

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

**by**

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## DECLARATION

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

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

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

Paul Andries Smit

Date:

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Signature

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## ABSTRACT

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

by

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

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

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

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

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

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

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

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

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

## LIST OF ABBREVIATIONS

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

## CHAPTER 1

### INTRODUCTION TO THE RESEARCH TOPIC AND DESIGN

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## 1.1 Introduction

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

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

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

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<sup>1</sup> Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) 46.

<sup>2</sup> 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.

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

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

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

In order to exercise their right to discipline employees, South African employers must comply with a number of legal principles that establish procedural requirements for disciplinary enquiries. The most important source of these requirements is Schedule 8 of the Labour Relations Act<sup>6</sup> (hereafter the LRA), which was published under the title "Code of Good Practice – Dismissal" (hereafter Schedule 8).

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

The trade union movement<sup>8</sup> in South Africa also plays a significant role in ensuring, either directly or indirectly, that disciplinary enquiries conducted by employers comply with the requirements of the LRA and other legislative instruments.<sup>9</sup> A major challenge for an employer who engages in a disciplinary enquiry is that the term "fairness" is not

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<sup>5</sup> The right to discipline is discussed in chapters 4 and 5 below.

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

<sup>7</sup> Grogan *Workplace Law* (2007) 129.

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

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



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

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

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

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

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

<sup>12</sup> The concept of procedural justice is discussed in chapter 2 below.

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

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

## 1.2 The quest for fairness in the workplace

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

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

Section 23(1) of the Constitution<sup>19</sup> of the Republic of South Africa states that:

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

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

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

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

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

<sup>17</sup> The ILO principles are discussed in chapter 3 below.

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

<sup>19</sup> 108 of 1996.

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

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

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

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

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

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

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

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

<sup>23</sup> S 1 of the LRA.

<sup>24</sup> Item 3(1) of Schedule 8.

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

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

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

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

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

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

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<sup>25</sup> Employee perceptions on fairness and procedural justice are discussed in chapter 2 below.

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

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

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

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

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

#### **1.4 Key focus of the study and background to the problem**

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

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

<sup>28</sup> The legislative requirements for a disciplinary enquiry are discussed in chapter 5 below.

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

Schedule 8.<sup>30</sup> In other words when will a dismissal be determined to be procedurally fair according to Schedule 8? For labour intensive companies “hiring and firing” comes with the territory and one of the most basic requirements for a fair dismissal is that a fair procedure must have been followed as provided for in Schedule 8.<sup>31</sup> How formalistic are these requirements and are they applied correctly in South Africa?

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

Item 1 of Schedule 8, states that:

“[i]t is intentionally general”.

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

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

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

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

<sup>32</sup> S 203(3) of the LRA.

<sup>33</sup> See s 194 of the LRA.

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

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

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

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

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

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

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

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

There is a widely held belief at present, albeit anecdotal, that procedural fairness is being interpreted and applied by the CCMA in a far more rigorous manner than is actually required by Schedule 8.<sup>36</sup> The former Industrial Court, the predecessor of the CCMA and the current Labour Court, laid down these strict rules under a broad definition of unfair labour practices. It was one of the main purposes of Schedule 8 to move away from the legalistic approach, and to provide legislative guidance on how the dismissal provisions in the LRA are to be interpreted and applied.<sup>37</sup> However, South Africa continues to be hamstrung by an unnecessary costly and largely irrelevant notion of procedural fairness, as most employers have not adapted their

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

<sup>36</sup> *Tokiso Review* (2005/6) 38.

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



disciplinary codes to reflect the more flexible and general approach of Schedule 8.<sup>38</sup>

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

## **1.5 The research aim, focus, scope and delimitations**

### **1.5.1 Aim of the study**

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

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

To accomplish these aims the following actions were followed:

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

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

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

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

### **1.5.2 Focus**

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

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

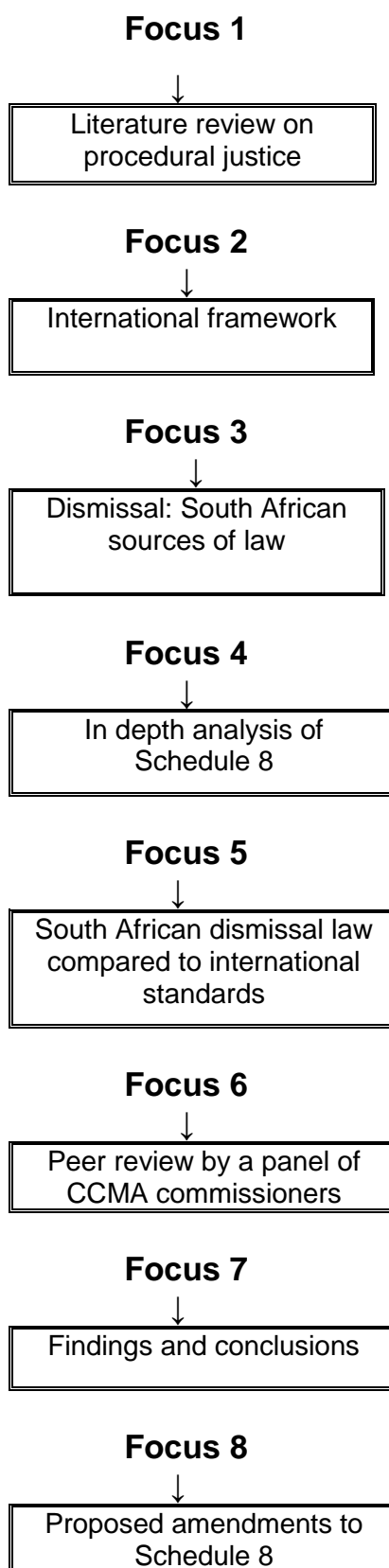
gather all this information but to evaluate the views expressed critically in terms of the current guidelines found in Schedule 8.

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

### **1.5.3 Scope and delimitations**

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

**Table 1: Scope of the research**



## 1.6 Literature review

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

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

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

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

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

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<sup>40</sup>Patton *Qualitative Evaluation and Research Methods* (1990) 285.

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

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

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

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

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

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

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<sup>42</sup> Patton *Qualitative Evaluation and Research Methods* (1990) 55.

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

possible nor appropriate to finalise research strategies before data collection has begun.<sup>44</sup>

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

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

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

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

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

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<sup>44</sup> Patton (1990) 65.



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

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

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

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

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

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

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

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

## 1.8 Ethical issues

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

## 1.9 Chapter outline

This thesis consists of eight chapters:

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

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<sup>45</sup> Patton (1990) 300.

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

## CHAPTER 2

### THE CONCEPT OF FAIRNESS AND ORGANISATIONAL JUSTICE

2.1	Introduction	25
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## 2.1 Introduction

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

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

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

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

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

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

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

## 2.2 Organisational justice

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

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

Organisational justice can be illustrated schematically as set out in Figure 1.<sup>7</sup>

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

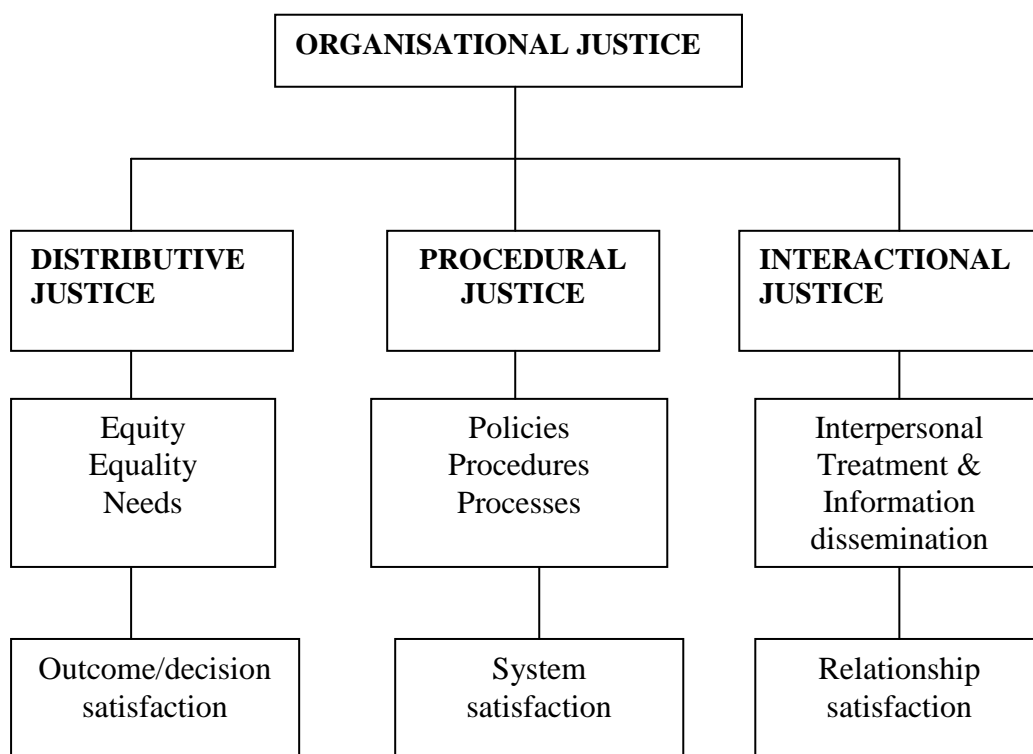
<sup>4</sup> Tyler and Belliveau “Tradeoffs in Justice Principles: Principles of Fairness” in Bunker and Deutsch *Essays in Conflict, Cooperation and Justice: Essays Inspired by the Work of Morton Deutsch* (1995) 297.

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

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

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

**Figure 1: Organisational Justice**



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

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

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



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

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

### 2.2.1 Distributive justice

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

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

- i. the contributions rule (equity rule);

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

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

<sup>11</sup> Tyler (1989) 341.

<sup>12</sup> Vermeulen and Coetzee (2006) 2.

<sup>13</sup> Tang *et al* (1996) 4.

- ii. the needs rule; and
- iii. the equality rule.<sup>14</sup>

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

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

"[d]istributive justice has been loosely equated with economic benefits."<sup>17</sup>

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

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

<sup>15</sup> Coetzee (2004) 4.6.

<sup>16</sup> 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.

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

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

## 2.2.2 Procedural justice

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

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

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

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

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<sup>19</sup> Vermeulen (2005) 4.

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

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

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

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

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

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

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

- i. organisational commitment;

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

<sup>23</sup> Coetzee (2004) 4.6.

<sup>24</sup> Coetzee (2004) 4.7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>29</sup> Vermeulen (2005) 6.

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

### 2.2.3 Interactional justice

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

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

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

- i. truthfulness;
- ii. respect;
- iii. propriety of questions; and
- iv. justification.<sup>31</sup>

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<sup>30</sup> Bies and Moag (1986) 44.

<sup>31</sup> Bies and Moag (1986) as stated by Coetzee (2004) 4.9.

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

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

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

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

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<sup>32</sup> Coetzee (2004) 4.9.

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

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

<sup>35</sup> Coetzee (2004) 4.10.



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

## 2.3 Conclusion

Links between procedural justice and disciplinary procedures, contained in item 4 of Schedule 8 of the LRA,<sup>36</sup> on the one hand the principles of fairness as stated by Vermeulen<sup>37</sup> on the other hand can be clearly seen:

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

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

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<sup>36</sup> Schedule 8 is analysed and discussed in detail in chapter 5 below.

<sup>37</sup> (2005) 6.

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

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

<sup>40</sup> Employee must have an opportunity to state his case against the allegations.

<sup>41</sup> Employer must provide employee with a written notification of decision taken after enquiry.

<sup>42</sup> Employee has an opportunity to respond against allegation.

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

<sup>44</sup> Employee must be reminded of right to refer the matter to the CCMA.

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

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

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

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<sup>45</sup> Schedule 8 is discussed in detail in chapter 5 below.

## CHAPTER 3

### THE RIGHT TO DISCIPLINE AND DISMISS: AN INTERNATIONAL FRAMEWORK

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### 3.1 Introduction

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

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

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

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

## 3.2 Supranational instruments

### 3.2.1 Introduction

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

### 3.2.2 The International Labour Organization

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

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

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

Member countries of the ILO are expected to subscribe to and adhere to the international labour standards set by the ILO. By 15 May 2009 no fewer than 183 countries worldwide were members of the ILO. The Netherlands and the UK became members of the ILO on 28 June 1919. The USA only became a member in 1934 and abandoned membership in 1977 and rejoined the ILO again on 18 February 1980.<sup>4</sup> South Africa was a founder member of the ILO in 1919 and remained a member until 1964, when the South African government withdrew from the ILO because the government's policy on apartheid became a major point of discussion at the International Labour Conference.<sup>5</sup> South Africa rejoined the ILO on 26 May 1994 after the first fully democratic elections in post-apartheid South Africa.<sup>6</sup>

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

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

<sup>4</sup> See [www.ilolex.org](http://www.ilolex.org) downloaded on 20 May 2009.

<sup>5</sup> Van Niekerk et al (2008) 20; Van Arkel (2007) 300.

<sup>6</sup> The [www.ilolex.org](http://www.ilolex.org) website contains a complete list of all member states of the ILO as well as all Conventions and recommendations and information on which Conventions have been ratified by which countries.

<sup>7</sup> S 1(b) of the LRA.

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

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

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

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

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<sup>9</sup> [2007] 12 *BLLR* 1097 (CC) at para 61.

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

<sup>11</sup> Van Niekerk *et al* (2008) 21; Wisskirchen (2005) 258.

<sup>12</sup> Van Niekerk *et al* (2008) 21.

<sup>13</sup> See Convention C158, downloaded from the ILO website at [www.ilo.org](http://www.ilo.org), on 17 May 2007.

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

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

Article 4 of Convention C158 states the following:

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

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

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

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

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



Article 5 of Convention C158 states the following:

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

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;

(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

(e) absence from work during maternity leave.”

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

Article 6 of Convention C158 stipulates the following:<sup>19</sup>

“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

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

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

<sup>19</sup> Article 6 is also reflected in South African legislation and is discussed in chapter 6 below.

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

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

Article 7 provides that:

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

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

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

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<sup>20</sup> See discussion of article 8 below.

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

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

Article 8 of C158 provides that:

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

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

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

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

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

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

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

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

### 3.2.3 The European Union

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

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

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

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

extent the EU countries have agreed on standards regarding pre-dismissal procedures.<sup>26</sup>

The primary institutions of the EU are:

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

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

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

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

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

<sup>27</sup> Coopers and Lybrand (1995) 2.

<sup>28</sup> Coopers and Lybrand (1995) 3.

The main function of the ECJ is to ensure that member states observe EU law in terms of the interpretation and application of the different treaties. The ECJ is seated in Luxembourg and consists of 13 judges appointed by agreement between the member states.<sup>29</sup> According to Blanpain<sup>30</sup> the ECJ has a threefold impact on labour law in the EU, namely:

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

It is clear that the EU has had an impact on the development of labour law principles in Europe. During 1975, the EU adopted a directive on collective redundancies. It adopted a directive on the transfer of enterprises in 1977, and one on insolvencies in 1980.<sup>31</sup> The role of the ECJ in enforcing these directives was clearly illustrated in two subsequent court cases:

- i. In the *Francovich* matter<sup>32</sup> the ECJ ruled that even though Italy had not implemented the Insolvency Directive an individual has to be compensated and protected against insolvency. The ECJ also stated that the full effectiveness of community law would be undermined and the rights of individuals will be diminished by any infringement of community law by individual member states.<sup>33</sup>

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<sup>29</sup> Coopers and Lybrand (1995) 3.

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

<sup>31</sup> Blanpain and Weiss (2003) 61.

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

<sup>33</sup> Blanpain and Weiss (2003) 61.

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

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

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

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

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

<sup>35</sup> Blanpain and Weiss (2003) 64.

<sup>36</sup> Biffle and Isaac (2005) 429-430.

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

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

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

### 3.2.4 The Southern African Development Community

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

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

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<sup>38</sup> Van Niekerk *et al* (2008) 29.

<sup>39</sup> Art 4.

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



health, safety and the environment,<sup>41</sup> employment and remuneration<sup>42</sup> and education and training.<sup>43</sup>

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

### 3.3 The Netherlands

#### 3.3.1 Introduction

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

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<sup>41</sup> Art 12.

<sup>42</sup> Art 13.

<sup>43</sup> Art 14.

<sup>44</sup> Van Niekerk *et al* (2008) 30.

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

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

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

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

### 3.3.2 Historical background

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

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

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

<sup>47</sup> A comparison between the Netherlands and South Africa is done in chapter 6.

<sup>48</sup> Van Arkel (2007) 150.

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

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

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

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

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<sup>50</sup> Burgerlijke Wetboek 1945 artikel 7: 655.

<sup>51</sup> Van Arkel (2007) 173.

<sup>52</sup> Van Arkel (2007) 175.

### 3.3.3 Legislative framework for dismissals

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

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

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

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

<sup>55</sup> Diebels (2007) 111.

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

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

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

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

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<sup>56</sup> Genderen *et al* (2006) 221.

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

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

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

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<sup>57</sup> Diebels (2007) 130–131.

<sup>58</sup> Burgerlijke Wetboek 1945 artikel 7: 678.

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

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

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

### **3.3.4 Compliance with Convention C158**

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

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<sup>59</sup> Diebels (2007) 111.

<sup>60</sup> Diebels (2007) 144–152.

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

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

## **3.4 The United Kingdom**

### **3.4.1 Introduction**

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

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



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

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

### 3.4.2 Historical Background

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

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

For many years, the subject of employment law was approached through collective bargaining. However, this situation changed when the Conservative government headed by Margaret Thatcher came to power in 1979.<sup>66</sup> In a series of legislative reforms, the freedom of trade unions to regulate their own conduct and organise industrial action was

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

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

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

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

<sup>66</sup> Bendix (2007) 708.

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

In 1972, the UK joined the then Common Market, which evolved into the EU. Numerous laws regulating aspects of anti-discrimination in the employment relationship were adopted. These included the Equal Pay Act,<sup>68</sup> the Race Relations Act<sup>69</sup> and the Sex Discrimination Act.<sup>70</sup> In 1996 the Employment Rights Act (hereafter the ERA) was introduced. It requires employers to recognise trade unions under certain circumstances and also contains sections on disciplinary enquiries and dispute settlement procedures.<sup>71</sup> In 2002 the Employment Act (hereafter the EA)<sup>72</sup> was introduced, which establishes a statutory dispute resolution procedure, that affects both the employer and the employee. It also expanded on the disciplinary procedures contained in the ERA.<sup>73</sup>

### 3.4.3 Legislative framework for dismissals

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

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<sup>67</sup> Bell *Employment Law* (2006) 2-3.

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

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

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

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

<sup>72</sup> Employment Act 2002.

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

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

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

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

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

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

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

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

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<sup>74</sup> S 98(2)(a-d) of the ERA of 1996.

<sup>75</sup> Bell (2006) 138-139.

<sup>76</sup> S 109 (1) ERA of 1996.

<sup>77</sup> S 110 ERA 1996; Bell (2006) 139.

<sup>78</sup> EA 2002 Schedule 2.

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

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

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

In the UK, the Employment Tribunal<sup>82</sup> and the Advisory Conciliation and Arbitration Service<sup>83</sup> (hereafter ACAS) deal with most disputes relating to claims related to allegedly unfair dismissals. ACAS is an impartial body that endeavours to resolve the dispute between employers and employees first through conciliation and then, if no settlement agreement is reached, by means of a full hearing.<sup>84</sup> Provision is also made for further appeal processes. The different levels of appeal are

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<sup>79</sup> Bell (2006) 157.

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

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

<sup>82</sup> Employment Tribunals Act 1996 (Tribunal Composition) Order 2009 No 789.

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

<sup>84</sup> Bell (2006) 7-8.

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

#### **3.4.4 Compliance with Convention C158**

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

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

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

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<sup>85</sup> Meeran (2007) 10.

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

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

### **3.5 The United States of America**

#### **3.5.1 Introduction**

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

#### **3.5.2 Historical background**

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

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<sup>86</sup> See footnotes 83 – 86.

<sup>87</sup> Klik *Onderzoek na de Amerikaanse Recht* (1994) 11.

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

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

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

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

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

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

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<sup>88</sup> Van Arkel (2007) 17.

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

<sup>90</sup> Wood *Master and Servant* (1877) 272-273.

<sup>91</sup> Standler (2000) 4.

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

<sup>93</sup> Busse *Your Rights at Work* (2005) 3.

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

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

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

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

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

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<sup>94</sup> Bendix (2007) 704.

<sup>95</sup> Wikipedia [http://en.wikipedia.org/wiki/National\\_Labour\\_Relations\\_Act](http://en.wikipedia.org/wiki/National_Labour_Relations_Act) downloaded on 7 August 2009.

<sup>96</sup> Standler (2000) 5 – 6.

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



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

In 1964, the USA Congress adopted the Civil Rights Act<sup>99</sup> and both Congress and many of the state legislatures enacted numerous anti-discrimination laws. Chapter VII of the Civil Rights Act, or Title VII, prohibits discrimination against any person in terms of conditions of employment, privileges of employment with respect to race, colour, national origin, sex and religion.

Other federal statutes that protect employees against discrimination include the Equal Pay Act,<sup>100</sup> which prohibits employers from paying different wages based on gender for the same work. Congress also passed the Americans with Disabilities Act,<sup>101</sup> the Family and Medical Leave Act<sup>102</sup> and the Age Discrimination in Employment Act.<sup>103</sup> In practice, it means that if an employee can prove that he or she was dismissed on any of these discriminatory grounds, the dismissal is deemed wrongful and the employee can claim damages.

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

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

<sup>99</sup> Civil Rights Act of 1964.

<sup>100</sup> Equal Pay Act of 1963.

<sup>101</sup> Americans with Disabilities Act of 1990.

<sup>102</sup> Family and Medical Leave Act of 1993.

<sup>103</sup> Age Discrimination in Employment Act of 1967.

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

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

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

### 3.5.3 Legislative framework for dismissals

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

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

<sup>107</sup> *Clearly v American Airlines Inc* 168 Cal Rptr722 (1980).

<sup>108</sup> Busse (2005) 31.

<sup>109</sup> *Nees v Hocks* 536 P 2d 512(Or1975).

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

<sup>111</sup> *Peterson v Browning* 832 P 2d 1280 (Utah 1992).

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

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

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

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

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

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

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

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

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

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

<sup>117</sup> Montana Wrongful Discharge from Employment Act of 1987.

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

<sup>119</sup> Van Arkel (2007) 140.

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

### 3.5.4 Compliance with Convention C158

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

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

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<sup>120</sup> Busse (2005) 143.

<sup>121</sup> Van Arkel (2007) 35.

<sup>122</sup> Busse (2005) 214.

<sup>123</sup> Bennet (1996) 11.

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

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

### **3.6 Conclusion**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



## CHAPTER 4

### DISMISSAL: SOUTH AFRICAN SOURCES OF LAW

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## 4.1 Introduction

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

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

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

## 4.2 The common-law contract of employment

### 4.2.1 General

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

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

<sup>2</sup> Bendix *Industrial Relations in South Africa* (2007) 100.

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

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

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

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

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

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

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<sup>5</sup> Grogan *Workplace Law* (2007) 1.

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

<sup>7</sup> S 37(6)(b) of the BCEA.

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

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

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

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

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

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

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<sup>10</sup> Grogan (2007) 30.

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

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

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

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

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

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

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

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

<sup>15</sup> Grogan (2007) 5.

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

#### 4.2.2 Common-law duties of the employer

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

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

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

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

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

<sup>17</sup> Also see Finmore (2006) 162.

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

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

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

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

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

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

<sup>20</sup> *Kinemas Ltd v Berman* 1932 AD 246.

<sup>21</sup> *Johannesburg Municipality v O’Sullivan* 1923 AD 201.

<sup>22</sup> *Brown v Hicks* 1902 19 (SC) 314.

<sup>23</sup> S 67(3) of the LRA.

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

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

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

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

### 4.2.3 Common-law duties of the employee

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

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

<sup>26</sup> Grogan (2007) 63.

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

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

<sup>29</sup> See s 188(1)(b) of the LRA.



The principal common-law duties of employees under a contract of employment are:<sup>30</sup>

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

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

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

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<sup>30</sup> Grogan (2007) 51.

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

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

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

<sup>34</sup> See ss 18, 21 and 22 of the BCEA.

that they will perform these tasks reasonably efficiently.<sup>35</sup> The standard of competence that employers can expect from their employees depends on the capacities in which the person have been employed and also their level of seniority. Where employees have warranted that they possess a particular degree of skill and have made representations in terms of their skills and qualifications, they must under common-law satisfy these representations. The common-law duty to remain reasonably efficient was prior to the 1956 LRA also regarded as grounds for summary dismissal in South Africa.<sup>36</sup> This right to summary dismissal for inefficiency by the employee has, however, been restricted in terms of the procedures laid down and jurisprudence established, not only by the LRA of 1956 but also by the LRA of 1995.<sup>37</sup>

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

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

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

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

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

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

<sup>39</sup> *Basson et al* (2005) 40.



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

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

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

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

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<sup>40</sup> (1996) 17 *ILJ* 18 (A) at 26D-E.

<sup>41</sup> Grogan (2007) 55.

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

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

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

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

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

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<sup>43</sup> Grogan (2007) 55-6.

<sup>44</sup> (1989) 10 *ILJ* 311 (IC).

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

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

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

### 4.3 The South African legislative framework

#### 4.3.1 Historical development

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

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

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

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<sup>47</sup> Basson *et al* (2007) 5.

<sup>48</sup> Basson *et al* (2007) 5.

<sup>49</sup> Ehlers *Labour Relations Systems, Procedures and Practice* (2007) 25.

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

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

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

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

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

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<sup>50</sup> Ehlers (2007) 25.

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

<sup>52</sup> (1986) 7 *ILJ* 341 (IC).

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

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

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

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

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

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

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

<sup>54</sup> (1985) 6 *ILJ* 369 (IC).

<sup>55</sup> (1986) 7 *ILJ* 346 (IC) 375.



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

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

### 4.3.2 Primary sources of current labour law

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

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

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<sup>56</sup> Van Niekerk and Linström *Unfair Dismissals* (2006) 58.

<sup>57</sup> See chapter 3 section 3.2.2 for a discussion on Convention C158.

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

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



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

**Table 2: Legislative Framework for Labour Relations**

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

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

<sup>60</sup> Employment Equity Act 55 of 1998.

<sup>61</sup> Unemployment Insurance Act 63 of 2001.

### 4.3.3 The South African Constitution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>68</sup> [2007] 8 BLLR 693 (SCA).

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

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

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

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

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

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

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<sup>70</sup> S 185 of the LRA.

<sup>71</sup> Bendix (2007) 93-4.

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

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

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

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

Section 2 of the Constitution adds that:

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

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

#### **4.3.4 The Basic Conditions of Employment Act**

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

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

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<sup>72</sup> Also see Van Niekerk *et al* (2008) 26-9.

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

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

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

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

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

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<sup>73</sup> Bendix (2007) 102-3.

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

<sup>75</sup> S 37(6) of the BCEA.

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

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

#### 4.3.5 The Labour Relations Act

Section 1 of the LRA contains the purpose of the Act, namely:<sup>77</sup>

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

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

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

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

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



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

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

Section 188(1) of the LRA provides that:

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

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

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

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

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<sup>78</sup> S 37(6)(a) of the BCEA.

The LRA itself does not provide any guidelines regarding the requirements of a fair procedure before dismissal. These principles have to some extent been given guidance to in the LRA by the issuing of “Codes of Good Practice”.<sup>79</sup> For the purposes of this study the most important Code of Good Practice is Schedule 8<sup>80</sup>, which is discussed and analysed in detail in chapter 5. In terms of the LRA labour tribunals, the CCMA and the Labour Courts, were established to deal with disputes and to handle dispute resolution related to, amongst other issues, unfair dismissals.<sup>81</sup>

Section 188(2) and section 203(3) of the LRA place an obligation on any person who must determine whether or not a dismissal was substantively and procedurally fair to take into account any relevant Code of Good Practice issued in terms of this Act.<sup>82</sup> These tribunals must ensure that the employer’s conduct meets the requirements of the applicable legislation and also Schedule 8.<sup>83</sup>

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

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<sup>79</sup> S 203 of the LRA.

<sup>80</sup> Schedule 8 is titled “Code of Good Practice: Dismissal”.

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

<sup>82</sup> S 188 (2) of the LRA.

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

## 4.4 Conclusion

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

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

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

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

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

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

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

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

## 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.<sup>1</sup>

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.<sup>2</sup> Every employee covered by the LRA also has the right not to be unfairly dismissed.<sup>3</sup> In a constitutional sense, the right to fair labour practices is wide enough to cover the right not to be unfairly dismissed.<sup>4</sup>

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.<sup>5</sup> 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

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<sup>1</sup> Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) 46.

<sup>2</sup> 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.

<sup>3</sup> S 185(a) of the LRA.

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

<sup>5</sup> S 188(1)(b) of the LRA.

Schedule 8 into consideration.<sup>6</sup> 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

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<sup>6</sup> 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.”<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

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<sup>7</sup> Item 1(1) of Schedule 8.

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

<sup>9</sup> 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.”<sup>10</sup>

The following stands out in item 1(2):

- i. Collective agreements have primacy over the Code.<sup>11</sup>
- 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.<sup>12</sup>

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

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<sup>10</sup> Item 1(2) of Schedule 8.

<sup>11</sup> See legislative framework table 2 in par. 4.3.2 above.

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

the guidelines given by Schedule 8.<sup>13</sup> 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.<sup>14</sup> In *Mckenzie v Multiple Admin CC*<sup>15</sup> 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.<sup>16</sup>

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

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<sup>13</sup> (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.

<sup>14</sup> 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.

<sup>15</sup> (2001) 22 ILJ 2753 (CCMA).

<sup>16</sup> 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.<sup>17</sup> Only registered trade unions can enter into collective agreements with employers.<sup>18</sup> By contrast workplace forums can only be established in workplaces where the trade union represents the majority of employees<sup>19</sup> and there are more than 100 employees.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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

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

<sup>18</sup> See definition of collective agreements in section 213 of LRA.

<sup>19</sup> S 78(b) of the LRA.

<sup>20</sup> S 80(1) of the LRA.

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

<sup>22</sup> S 31(a) of the LRA.

<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.”<sup>26</sup>

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

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

<sup>25</sup> S 23(5) of the Constitution of the Republic of South Africa 108 of 1996.

<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup>

## **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”.

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

<sup>28</sup> 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.<sup>29</sup>

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.”<sup>30</sup>

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.<sup>31</sup>

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.”<sup>32</sup>

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<sup>29</sup> Item 2(1) of Schedule 8.

<sup>30</sup> Item 2(4) of Schedule 8.

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

<sup>32</sup> 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*<sup>33</sup> when the court ruled that the right to be heard does not necessarily mean the right to a formal hearing.<sup>34</sup> However, in *MITUSA obo Clarke v National Ports Authority*,<sup>35</sup> 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.<sup>36</sup>

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

<sup>34</sup> 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.

<sup>35</sup> [2006] 9 BALR 861 (TOKISO).

<sup>36</sup> See the discussion on item 1(2) in chapter 5.3 above.



In *NUMSA obo Tshikana v Delta Motor Corporation*,<sup>37</sup> 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.”<sup>38</sup>

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.<sup>39</sup>

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.

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<sup>37</sup> [2003] 11 BALR 1302 (CCMA).

<sup>38</sup> As stated by Cheadle (2006) December SASLAW Newsletter,

<sup>39</sup> 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.<sup>40</sup> 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:

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<sup>40</sup> *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.”<sup>41</sup>

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.”<sup>42</sup>

“Enquiry” is defined as:

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

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.<sup>44</sup> After the necessary

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<sup>41</sup> Schedule item 4(1).

<sup>42</sup> *Collins English Dictionary* (1979) 768.

<sup>43</sup> *Collins English Dictionary* (1979) 487.

<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> The employee is not necessarily entitled to be heard or even represented during the investigation preceding the formal hearing.<sup>47</sup> This investigation relates to the investigation to be done by the employer prior to the disciplinary enquiry.<sup>48</sup>

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

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<sup>45</sup> Israelstam “Don’t underestimate the investigation process” (2008) *SA Labour Guide Newsletter* of 12 March downloaded from [www.labourguide.co.za](http://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.

<sup>46</sup> Grogan (2007) 189.

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

<sup>48</sup> 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.

<sup>49</sup> 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.”<sup>50</sup>

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.”<sup>51</sup>

### 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.”<sup>52</sup>

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<sup>50</sup> Item 3(1) of Schedule 8.

<sup>51</sup> Item 4(1) of Schedule 8.

<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> The employee should be told what conduct will be put in issue at the disciplinary enquiry. In *Num & another v Kloof Gold Mining Co*<sup>55</sup> 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.<sup>56</sup>

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*<sup>57</sup> 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.<sup>58</sup>

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<sup>53</sup> *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).

<sup>54</sup> *Cameron* (1986) *ILJ* (7) 2 at 201.

<sup>55</sup> (1986) 7 *ILJ* 375 (IC) at 384D.

<sup>56</sup> *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.

<sup>57</sup> (2004) 25 *ILJ* 1366 (BCA).

<sup>58</sup> 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*<sup>59</sup> 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.<sup>60</sup> In *ESKOM v NUMSA obo Galada and others*<sup>61</sup> 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

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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.

<sup>59</sup> Case number D242/03 (2003) at [5].

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

<sup>61</sup> [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.<sup>62</sup> 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.<sup>63</sup>

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.”<sup>64</sup>

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.<sup>65</sup> 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:

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

<sup>63</sup> Basson *et al* (2007) 127.

<sup>64</sup> Item 4(1) of Schedule 8.

<sup>65</sup> 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.”<sup>66</sup>

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*<sup>67</sup> matter should still to be followed to ensure procedural fairness.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> As was discussed earlier, employers are compelled to follow their own disciplinary codes as was

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<sup>66</sup> (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.

<sup>67</sup> (1986) 7 ILJ 346.

<sup>68</sup> Grogan (2005) 274–301; Grogan (2007) 191–208.

<sup>69</sup> Grogan (2007) 196.

<sup>70</sup> Basson (2007) 127.

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



clearly indicated by the Supreme Court of Appeal in *Denel v Vorster*.<sup>72</sup> 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.<sup>73</sup>

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*,<sup>74</sup> 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*,<sup>75</sup> the Labour Appeal Court held that the dismissal of the employee was procedurally unfair, as the

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<sup>72</sup> 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.

<sup>73</sup> Cheadle (2006) December SASLAW Newsletter 24.

<sup>74</sup> [2009] 5 BALR 431 (NBCCI).

<sup>75</sup> [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?’”<sup>76</sup>

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.”

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<sup>76</sup> 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.<sup>77</sup>

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.”<sup>78</sup>

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<sup>77</sup> See proposals and suggestions in chapter 8 below.

<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup>

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*<sup>81</sup> 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

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<sup>79</sup> Basson *et al* (2007) 127.

<sup>80</sup> Grogan (2005) 277.

<sup>81</sup> 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”.<sup>82</sup>

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.

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<sup>82</sup> <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.<sup>83</sup> 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.”<sup>84</sup>

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.<sup>85</sup> The employee has the right to choose his or her own representative within the boundaries of the employer’s disciplinary code.<sup>86</sup> In practice a trade union representative,<sup>87</sup> will act as a representative for employees who belong to a trade union. The LRA

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<sup>83</sup> 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).

<sup>84</sup> Item 4(1) of Schedule 8.

<sup>85</sup> 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.

<sup>86</sup> 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.

<sup>87</sup> 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.<sup>88</sup> Fellow employees normally represent non-union members from the same workplace.<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup> 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

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<sup>88</sup> S 14(4)(a) of the LRA.

<sup>89</sup> 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.

<sup>90</sup> Basson *et al* (2007) 127.

<sup>91</sup> *Lamprecht v McNeillie* (1994) 15 ILJ 998 (A).

administrative action.<sup>92</sup> 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.<sup>93</sup> However, the chairperson of a disciplinary enquiry retains the discretion to permit legal representation if it is requested by the employee<sup>94</sup> 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.<sup>95</sup>

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.”<sup>96</sup>

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<sup>92</sup> *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).

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

<sup>94</sup> 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.

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

<sup>96</sup> 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*,<sup>97</sup> 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.<sup>98</sup> 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

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<sup>97</sup> [2006] 7 BLLR 654 (LC).

<sup>98</sup> 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”.<sup>99</sup> 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,<sup>100</sup> 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.”<sup>101</sup>

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.<sup>102</sup>

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

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

<sup>100</sup> 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.

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

<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup>

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*

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<sup>103</sup> Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2007) 324.

<sup>104</sup> *IMATU v Rustenburg Transitional Council* (2000) 21 ILJ 377 (LC).

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

<sup>106</sup> Grogan (2007) 324 – 336.

*Consol Glass*,<sup>107</sup> 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*,<sup>108</sup> 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*,<sup>109</sup> 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*,<sup>110</sup> 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

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<sup>107</sup> [2009] 5 BALR 431 (NBCCI).

<sup>108</sup> [2000] 4 BALR 468 (IMSSA).

<sup>109</sup> [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).

<sup>110</sup> [2007] 3 BALR 256 (CCMA).



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

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.”<sup>112</sup>

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<sup>111</sup> [2007] 3 BALR 256 (CCMA) at 52.

<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup>

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<sup>113</sup> 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.

<sup>114</sup> 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.

<sup>115</sup> *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*,<sup>116</sup> 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*,<sup>117</sup> 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*,<sup>118</sup> 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.

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<sup>116</sup> (2004) *ILJ* 659 (SCA).

<sup>117</sup> [2002] 12 BLLR 158 (LAC).

<sup>118</sup> [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.<sup>119</sup> 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

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<sup>119</sup> 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.<sup>120</sup>

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*,<sup>121</sup> 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.<sup>122</sup>

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.<sup>123</sup>

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<sup>120</sup> Grogan (2007) 297.

<sup>121</sup> (1985) 6 *ILJ* 307 (IC).

<sup>122</sup> 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.

<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup>

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

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

<sup>125</sup> 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.<sup>126</sup> 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*.

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<sup>126</sup> 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;<sup>1</sup>
- ii. an employee must have the right to defend him– or herself against the allegations made by the employer;<sup>2</sup> and
- iii. there must be a right to appeal.<sup>3</sup>

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.”<sup>4</sup>

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<sup>1</sup> See article 4 of Convention C158 and the discussion in par 3.2.2 above.

<sup>2</sup> See article 7 of Convention C158 and the discussion in par 3.2.2 above.

<sup>3</sup> See article 8 of Convention C158 and the discussion in par 3.2.2 above.

<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

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

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

<sup>6</sup> 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.<sup>7</sup> As discussed in chapters 4 and 5, in 1986 the former Industrial Court of South Africa in *Mahlangu v CIM Deltak*<sup>8</sup> 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.<sup>9</sup>

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*<sup>10</sup> judgment, the right to state a case was summarised by Van Niekerk J to mean the following:

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<sup>7</sup> 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.

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

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

<sup>10</sup> (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:<sup>11</sup>

- 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

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<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup>

### 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

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<sup>12</sup> The complete Convention C158 is attached to this study as annexure 4.

<sup>13</sup> 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.

<sup>14</sup> 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.<sup>15</sup>

As is the case with ILO principles, there is no explicit statutory right to an internal appeal hearing in South African dismissal law.<sup>16</sup> 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.<sup>17</sup> 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* process<sup>18</sup> 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.

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<sup>15</sup> See the discussion in par 3.2.2 above.

<sup>16</sup> See the discussion in par 5.9 above.

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

<sup>18</sup> *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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup>

In terms of South African dismissal law, every employee has the right not to be unfairly dismissed,<sup>22</sup> 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.<sup>23</sup> 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

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<sup>19</sup> See the discussion in par 3.3.4 above.

<sup>20</sup> Coopers & Lybrandt (1995) 293.

<sup>21</sup> Coopers & Lybrandt (1995) 294.

<sup>22</sup> Ss 185(a) and 185(b) of the LRA.

<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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

<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> In South Africa, the appeal is directed to the

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<sup>26</sup> 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.

<sup>27</sup> See the discussion in par 3.4.4 above.

CCMA.<sup>28</sup> 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.<sup>29</sup>

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."<sup>30</sup> 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.

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<sup>28</sup> See the discussion in par 6.2.3 above.

<sup>29</sup> See the discussion in par 3.5.4 above.

<sup>30</sup> *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.<sup>31</sup> 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.<sup>31</sup> These pre-dismissal procedures that have to be followed are applicable to all employees in South Africa.<sup>32</sup>

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.<sup>33</sup>

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.

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<sup>31</sup> Busse *Your Rights at Work* (2005) 143.

<sup>31</sup> See the discussion in par 5.7 above.

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

<sup>33</sup> 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.<sup>34</sup> Convention C158 does not require the strict rules as spelled out in the *Mahlangu v CIM Deltak*<sup>35</sup> matter. The three core principles of Convention C158 are much closer to the *Avril Elizabeth Home for the Handicapped*<sup>36</sup> 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.<sup>37</sup> 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

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<sup>34</sup> S 233 of Constitution of South Africa Act 106 of 1996.

<sup>35</sup> (1986) 7 ILJ 346 (IC) 375.

<sup>36</sup> (2006) 27 ILJ 1466.

<sup>37</sup> 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.<sup>38</sup>

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.

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<sup>38</sup> 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.

## CHAPTER 7

### RESEARCH FINDINGS

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## 7.1 Introduction

Previous chapters have outlined the research problem, literature review, research approach, and the methods that were used to gather, interpret and analyse the data.

In the previous chapters, attention has been paid, to the concepts of fairness and organisational justice and an international framework of the right to discipline and dismiss was presented. The South Africa sources of law in respect of dismissal were discussed and Schedule 8 was analysed in depth. A comparative analysis of South African and international dismissal law was also done. A panel of CCMA commissioners did a peer review on the research in order to enhance the credibility, or truth-value of the qualitative study by providing an external check on the inquiry process.

The research process that was followed can thus be divided into four main phases, namely:

- i. discussing theoretical framework on fairness and organisational justice;
- ii. presenting an international overview on the right to discipline and dismiss;
- iii. analysing dismissal law in South Africa as founded in Schedule 8 of the LRA; and
- iv. requesting peer review on research results by a panel of CCMA commissioners.

The conclusions that were made at the end of each chapter have been summarised in this chapter, which also reflects the interpretation and results of the literature review.

## 7.2 Results of the literature review

### 7.2.1 Fairness and organisational justice

Employees' perceptions of fairness in the workplace are determined by the decisions taken by the employer and the procedures that were followed in order to reach that decision.<sup>1</sup>

Employees need to feel that the different levels of organisational justice are beneficial to them. In as far as distributive justice is concerned employees want to feel that they are treated equally in an unbiased manner.<sup>2</sup> Equal and unbiased treatment in the disciplinary process forms part of the value statements contained in Schedule 8, namely:

- i. a premium is placed on employment justice in the workplace and employees must be protected against arbitrary action;<sup>3</sup>
- ii. the disciplinary rules adopted by an employer should create certainty and consistency in the application of discipline;<sup>4</sup> and
- iii. the employer should apply the penalty of dismissal in a consistent manner.<sup>5</sup>

Procedural justice and fairness in the workplace can be achieved if the employer adheres to the following principles:

- i. providing advance notice of intent or decisions;
- ii. providing accurate information and adequate feedback;
- iii. supporting two-way communication;

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<sup>1</sup> Vermeulen "Perceptions of Procedural Justice in the Retrenchment of Managers" (2005) *South African Journal of Industrial Psychology* 31(2) 40 – 48.

<sup>2</sup> Tyler "The Psychology of Procedural Justice: A Test of the Group-value Model" (1989) *Journal of Personality and Social Psychology* (57) 338.

<sup>3</sup> Item 1(3) of Schedule 8.

<sup>4</sup> Item 3(1) of Schedule 8.

<sup>5</sup> Item 3(6) of Schedule 8.

- iv. explaining and justifying decisions;
- v. allowing employees to influence the decision process;
- vi. considering the interests, views and concerns of all recipients;
- vii. treating employees with dignity, respect and sensitivity; and
- viii. applying administrative procedures consistently.<sup>6</sup>

The above principles of procedural justice are automatically achieved if the employer follows the requirements of item 4(1) of Schedule 8, namely that:

- i. the employer must notify the employee of the allegations;<sup>7</sup>
- ii. the employee must be given an opportunity to state a case;<sup>8</sup>
- iii. the employee must be given reasonable time to prepare a response;<sup>9</sup>
- iv. the employee is entitled to be represented by a fellow employee or a trade union representative;<sup>10</sup> and
- v. employee should be informed of the decision and reminded of right to refer a dispute to the CCMA or bargaining council.<sup>11</sup>

The above requirements are not meant to be a formal checklist and deviations are permissible under certain circumstances.<sup>12</sup> It is clear that perceptions of procedural fairness are influenced by two important factors, namely:

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<sup>6</sup> Vermeulen (2005) 6.

<sup>7</sup> See *Ntshangane v Speciality Metals CC* (1998) ILJ 584 (LC); *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd* (1998) ILJ 635 (LC).

<sup>8</sup> *JDG Trading (Pty) Ltd v Brundson* 2000 ILJ 501 (LAC). See also *OTK Operating Co Ltd v Mahlangu* [1998] 6 BLLR 556 (LAC).

<sup>9</sup> Basson, Christianson, Garbers, Le Roux and Strydom *Essential Labour Law* (2007) 127.

<sup>10</sup> 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.

<sup>11</sup> 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 because the employee had not been informed of the reason for his dismissal.

<sup>12</sup> See the discussion in par 7.2.4 below.

- i. the interpersonal treatment people receive from decision-makers; and
- ii. the adequacy with which formal decision making procedures are explained.<sup>13</sup>

These factors are known as interactional justice. If employees feel that they have been treated with dignity and respect during the disciplinary process and an explanation has been given for the disciplinary action taken, they are more likely to accept the outcome, even though they may have been dismissed. This would mean that interactional justice has been achieved in the workplace.

### **7.2.2 International framework on the right to discipline and dismiss**

From the review that was done on the international framework on the right to discipline and dismiss the following is clear:

- i. There are various supranational institutions that can influence labour legislation. Not all of them have the same influence on their member states of the organisation concerned, and it would appear that some guidelines, set by these institutions, are viewed as more important than others.
- ii. The ILO through its Conventions provides minimum labour standards that should be adhered to by member states.
- iii. The ratification of a particular Convention means that the national legislation of a member state of the ILO must reflect the standards set by that Convention.

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<sup>13</sup> Bies and Moag “Interactional justice: Communication Criteria of Fairness” (1986) *Research on Negotiations in Organizations* (I) 44.



- iv. Ratification of a Convention also entails that a country will be subject to the supervisory bodies and institutions of the ILO.
- v. Convention C158 has not been ratified by South Africa, the Netherlands, the UK or the USA.
- vi. Three core principles in Convention C158 stand out namely: there must be a good reason before an employee can be dismissed; the employee must get an opportunity to state a case in response to the allegations made by the employer; and employee must have the right to appeal to an impartial body after the dismissal.
- vii. Article 4 of Convention C158 has been given effect to in the legislation in both the Netherlands and the UK, as employers must have a fair and valid reason before an employee can be dismissed.
- viii. Article 4 of Convention C158 is not reflected in the legislation of the USA as employees in the USA can be dismissed at any time without cause, except for a wrongful reason related to public policy concerns and the various anti-discrimination laws.
- ix. Legislation in the Netherlands does not give effect to Article 7 of Convention C158, as an employee has no opportunity to defend him-or herself against the allegations made by the employer before dismissal. The opposite is true in the UK, as the UK legislation makes provision for statutory disciplinary procedures.
- x. No pre-dismissal procedures are required in the USA and the principles contained in article 7 of Convention C158 are clearly absent from legislation in the USA, because the employment-at-will doctrine is still applicable in the USA.
- xi. In the Netherlands, employees have an opportunity to respond to the neutral CWI. It could be argued that this is in line with article 8 of Convention C158.
- xii. In the UK employees can appeal to the Employment Tribunal and provision is also made for further appeals to the Employment

Appeal Tribunal, the Court of Appeal, the House of Lords and ultimately the European Court of Justice. This is in line with article 8 of Convention C158.

- xiii. No provision is made in the USA for an employee who considers his or her dismissal to be unjustified to appeal to an impartial body. The principles contained in article 8 of Convention C158 are clearly absent from US legislation. Employees in the USA that believe their dismissal to have been unlawful, in terms of the anti-discrimination laws, can take civil action against their employers.

In both the Netherlands and the UK, a strong emphasis is placed on the reasons for dismissal, but the pre-dismissal procedures that need to be followed are vastly different.

In the UK, the onus is on the employer to ensure that a very specific pre-dismissal procedure is followed in the workplace before the decision to dismiss is taken. The employee is also given an opportunity to respond to the allegations made by the employer. If the employee believes his or her dismissal to be unfair he or she can then appeal to the Employment Tribunal.

In the Netherlands, no pre-dismissal procedures have to be followed in the workplace. However, the employer needs to obtain permission from the *CWI* to dismiss the employee. The right to respond to the allegations made by the employer, *audi alteram partem*, is not exercised in the workplace but at the *CWI*. If the employee believes his or her dismissal was unfair he or she can refer the matter to court.

The USA, also a member of the ILO, has a system, that is totally unique in the sense that most employees in the USA have no protection against arbitrary dismissals. The employment-at-will principle is still

applied. Employees are, however, protected against unlawful dismissal if the reason for dismissal is related to any of the anti-discrimination laws.

This comparison clearly indicates that national legislation, while reflecting certain principles contained in supranational instruments, is unique to each country, and illustrates the independence and unique national character of every country. It also shows, that protection against dismissal is not deemed of such importance that it has been made a core ILO convention which has to be applied by all ILO members.

### **7.2.3 Dismissal: South African sources of law**

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

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

When one analyses the different sources of law on dismissal in South Africa, the following is apparent:

- i. In terms of common-law principles, in a contract of employment an employer can demand satisfactory conduct and work performance from employees. The employer has the right to terminate a contract of employment where the employee is found guilty of misconduct. This means that an employer must have a reason to terminate.

- ii. The common-law contract of employment did not initially require a specific procedure to be followed in dismissing an employee, but developed to include the concept of fairness. Although this move is controversial, the Supreme Court of Appeal has developed the common-law contract of employment to include the right to procedural fairness.
- iii. As time went by, it became apparent that the common-law does not make provision for the changes and developments that have taken place in the workplace especially after the Industrial Revolution.
- iv. The Constitution of South Africa provides for certain fundamental rights, of which section 23 is of the utmost importance. It states that everybody has the right to fair labour practices.
- v. South African Labour legislation incorporates and takes into account the common-law contract of employment principles, ILO standards and the right to fair labour practices as enshrined in the Constitution.
- vi. The BCEA stipulates that an employer can terminate a contract of employment provided that the required notice is given.
- vii. The BCEA also stipulates that even when the employer has complied with the required notice, an employee can dispute the lawfulness or fairness of his or her dismissal in terms of the LRA.
- viii. The LRA stipulates that every worker has the right not to be unfairly dismissed.
- ix. For a dismissal to be fair, an employer must be able to prove that the dismissal was for a fair reason and in accordance with a fair procedure.
- x. The pre-dismissal procedures that must be followed by the employer have been codified to some extent in the Code of Good Practice: Dismissal, Schedule 8 of the LRA.

- xi. Any person determining whether or not a dismissal was effected for a fair reason and in accordance with a fair procedure must take the Schedule 8 into consideration.
- xii. Schedule 8 is a guideline; thus deviations are permissible under certain circumstances. Schedule 8 does not require a formal court-like procedure to be followed during disciplinary enquiries.

It is apparent that before dismissing an employee, employers must take cognisance not only of their own rules, regulations, codes and procedures, but also of the constitutional right to fair labour practices enjoyed by everybody. Attention must also be given by employers to the requirements of the LRA, the BCEA and Schedule 8.

Commissioners of the CCMA will ultimately, at least in the vast majority of dismissal disputes determine whether a dismissal was fair or not and this can only be done by taking note of the sources of South African dismissal law, paying specific attention to Schedule 8, as, required in section 188(2) of the LRA.

#### **7.2.4 Code of Good Practice: Dismissal (Schedule 8)**

In the analysis of Schedule 8, the following stands out with regard to the application and interpretation of Schedule 8:

- i. it must be regarded as a general guideline;
- ii. it is not a substitute for disciplinary codes and procedures;
- iii. it is not prescriptive on the contents of a disciplinary code and procedure;
- iv. it is not necessary to follow formal procedures every time a rule is broken, which clearly indicates the generality and informality of the requirements of Schedule 8; and

- v. it requires the following basic five steps in a disciplinary enquiry;
- a. the employee should be notified of the allegations against him or her;
  - b. the employee should be allowed a reasonable time to prepare;
  - c. the employee should be allowed an opportunity to state a case in response to the allegations;
  - d. the employee is entitled to be represented at the enquiry by a fellow employee or a shop steward; and
  - e. the employee should be informed of the outcome of the enquiry and reminded of the right to refer dispute to CCMA or bargaining council.

For a dismissal to be considered procedurally fair it must at least meet the minimum requirements set out in Schedule 8. This is also in essence what the judgment in *Avril Elizabeth Home for the Handicapped* says. Commissioners of the CCMA are compelled to take Schedule 8 into consideration when they arbitrate unfair dismissal disputes.<sup>14</sup>

The guidelines on procedural fairness in disciplinary enquiries as contained in items 4(1) – (4) of Schedule 8, do not require a formal court-like disciplinary enquiry.

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. Deviations from Schedule 8 can be justified under certain circumstances.

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<sup>14</sup> Section 138(6) of the LRA.

Where employers have formal disciplinary codes and procedures that form part of the conditions of service of the employees, employers are compelled to follow them as was held by the Supreme Court of Appeal in *Denel v Vorster*. The Labour Appeal Court in the *Highveld District Council* matter had a different view and preferred a more flexible approach. I agree with the approach adopted by the Labour Appeal Court.

South African dismissal law is not inflexible and rigid with formal court-like procedures in disciplinary enquiries, as is commonly believed. An overemphasis on procedures in disciplinary enquiries since the *Mahlangu v CIM Deltak* judgment by the former Industrial Court in 1986 has led employers to believe, wrongly, that such rigidity is required. Employers, employees, trade unions, labour consultants, human resources managers, attorneys and even some academics are to blame for the current situation.

With the implementation of the LRA and Schedule 8 the requirements set by the *Mahlangu v CIM Deltak* judgment was no longer required but most employers have not yet changed or adapted their disciplinary codes and procedures to be in line with the LRA and Schedule 8. Until they do, they will be bound by the rigidity and formality required by their own internal codes and procedures.

### **7.2.5 South African dismissal law compared to international perspectives**

South African dismissal law adheres to Convention C158, as the three core principles of Convention C158 are reflected in Schedule 8. It is apparent that the legislature in South Africa has taken cognisance of international law and principles in drafting the Constitution and the LRA.

The Constitution<sup>15</sup> requires any reasonable interpretation of legislation to be consistent with international law. The LRA<sup>16</sup> states that one of its aims is to give effect to South Africa's obligation as a member state of the ILO. This has clearly been done with the implementation of Schedule 8. The principles of flexibility, found in Convention C158 are also reflected in Schedule 8.

From the analysis and comparison of the three international jurisdictions with South African dismissal law, it is apparent that South Africa's dismissal law is not as rigid and inflexible as many employers wrongly believe.

In both the Netherlands and South Africa, there must be a fair and valid reason to justify the dismissal of an employee. In both these countries the employee has the right to an appeal against his or her dismissal to an impartial body. In the Netherlands the appeal is directed to the *CWI* and in South Africa it is directed to the *CCMA* or a bargaining council. The main difference between the dismissal law in the Netherlands and in South Africa, lies in the fact that the disciplinary process is absent from Dutch dismissal law. In contrast to the South African scenario, in the Netherlands an employee on probation has no protection against dismissal as the probation period is known as a *rechteloze priode*.<sup>17</sup>

The dismissal law in the UK and South Africa are very similar in structure and nature, as both fully adhere to the three core principles of Convention C158. The disciplinary enquiry process in the UK and in South Africa are very similar and the statutory dismissal and dispute procedures are very alike. The UK's dismissal law makes provision for a

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<sup>15</sup> S 233 of the Constitution. Also see Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2008) 26-29.

<sup>16</sup> S 1(b) of the LRA.

<sup>17</sup> Genderen *et al* (2006) 221.



compulsory internal appeal process, which is not the case in South Africa. The UK also has a much more extensive external appeal process that an employee can use if he or she believes that the dismissal was unfair, as the final court of appeal is the European Court of Justice. Just as in the Netherlands, an employee in the UK has no protection against dismissal during the probationary period of employment. In South Africa the protection against unfair dismissal is also extended to employees during their probationary period of employment.

There is almost no similarity of any kind between the dismissal law of the USA and South Africa and for that matter also not between the USA, the Netherlands and the UK. The employment-at-will doctrine in the USA is unique. The dismissal law in the USA does not adhere to any of the three core principles of Convention C158.

What is unique in South African dismissal law when compared to Convention C158,<sup>18</sup> the Dutch dismissal law and the dismissal law of the UK, is the fact that irrespective of the length of service of an employee and or whether an employee is employed on probation, the same disciplinary process has to be followed. This situation may be one of the reasons for employers' belief that South African dismissal law is inflexible and rigid.<sup>19</sup>

### **7.3 Results of peer review**

A panel of commissioners at the CCMA offices in Pretoria did a peer review on the study. They were requested to act as a panel of experts and express their own views on the contents of this study and also to

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<sup>18</sup> See article 2 of Convention C158 in annexure 4.

<sup>19</sup> The protection or non-protection of employees against dismissal during the probationary period of employment justifies further in-depth research at a postgraduate level.

make certain recommendations. The panel's report, as it was received by the researcher from the CCMA panel on 14 November 2009, is cited *verbatim*, and is printed in italics.

### **Peer review report from CCMA panel<sup>20</sup>**

*Procedural fairness had always been determined by way of the following:*

- 1. The employers' disciplinary code and procedure;*
- 2. If no such procedure existed, schedule 8 of the LRA;*

*Despite the fact however, that schedule 8 does not require a rigorous process to be followed, the tendency had developed over numerous years based on case law to treat the process in a formal manner with a checklist of requirements that had to be followed.*

*Failure to follow in any way any of these steps led to a finding of procedural unfairness.*

*This practice led to employers often assisted by employer's organisations and attorneys drafting lengthy codes detailing steps to be taken in order to ensure procedural fair disciplinary hearings.*

*In the event then that dismissals were challenged at the CCMA, a large part of the arbitration would focus on the procedural aspects and hours would be spent painstakingly analysing each and every step to be*

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<sup>20</sup> The CCMA panel consisted of commissioners Elsabé Maree (LLM), Ronel de Wet (LLB) and John Mello (LLB).

*taken. As said previously even a minor deviation from this led to a finding of procedural unfairness.*

*Strangely, enough one would have thought that rather than get embroiled in procedure as set out in one's own code and procedure, employer's would do away with it and rather do hearings by way of schedule 8.*

*This for the most part did not happen. Maybe money were being made by organisations scaring the living daylights out of employer's telling them that they had to 'follow procedure' and that this can only be done by way of their own codes and procedures.*

*This reasoning however, is fatally flawed as this approach led to the practice of having stringent processes developed for employers where non-compliance with the smallest detail led to findings of procedural unfairness.*

*Employers and the CCMA alike got entangled in a web of requirements set down to determine procedural fairness. Arguments would range from the 'charge sheet is so vague that it is embarrassing and does not constitute a charge to which the employee could enter a plea to and that the employee was not given 48 hours notice and everything in between!*

*As commissioners our hands were tied and still are if there exists such a procedure at the workplace to apply these requirements.*

*Schedule 8 had been in existence since 11 November 1995 [Today 14 years ago!!] but seems to have been ignored in the wake of the practice by employers to follow the 'criminal model'.*

*The employer – normally the smaller and less sophisticated one – who for various reasons had no code were then bound by the requirements of schedule 8. These employers would follow schedule 8 sometimes inadvertently, and would then have no trouble at arbitration in showing that a procedure had been followed.*

*However, despite this, some commissioners still tended to apply the strict ‘criminal law’ model even to these cases further creating the belief and enforcing the practice that procedure is the only leg on which a dismissal stands and that an employer had comply to a strict set of procedural rules.*

*Then along came Avril Elizabeth advocating that schedule 8 should be the basis for determining procedural fairness in the absence of disciplinary codes and procedures and even where they exist should comply to the less onerous guidelines set out in schedule 8 rather than the strict criminal law model followed so far.*

*2. The assertions made in the thesis regarding the requirements for procedural fairness to be followed are based on the decision in Avril Elizabeth which is applied by most of the CCMA commissioners.*

*3. It is our view that the thesis deals with every aspect of schedule 8 in sufficient detail and that a reading of this sufficiently explains the era ‘pre’ and ‘post’ Avril Elizabeth.*

*The opinions advocated in the thesis pronounce on the principles applied by commissioners in following the guidelines regarding a fair process as set out in Avril Elizabeth.*

*Regarding further research the esteemed researcher might want to venture into the following;<sup>21</sup>*

- 1. Workplace forums – do they exist, are they functioning and if not, why not?*
- 2. Unfair labour practices – is it really for the CCMA to act as an employment agency and to determine if the most suitable candidate was promoted?*
- 3. Can the CCMA arbitrate performance issues as ‘promotions’?*
- 4. Can the CCMA arbitrate bonus issues as ‘benefits’?*
- 5. Did the provision made in LRA regarding ‘occupational detriment’ led to cases being referred either as automatically unfair dismissals or unfair labour practices?*
- 6. The hotly contested issue of labour brokers;*
- 7. Is there really a need for probation? Why the detailed process? Why not rather appoint initially on a fixed term contract?*
- 8. The issue regarding the CCMA’s jurisdiction regarding a single retrenchment;*
- 9. At what stage must in limine issues be determined? At con or at arb?*
- 10. A comparative analysis of pre and post Sidumo.*

**Commissioner Elsabé Maree obo CCMA panel**

**14 November 2009.**

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<sup>21</sup> The CCMA panel also made proposal on further research and even though not completely in line with the research undertaken in this study, it has been included for completeness as, with a few exceptions most of the further research proposed is touch on in one way or another in this study.

## 7.4 Interpretation of results

Section 23(1) of the South African Constitution states that everybody has the right to fair labour practices and section 233 further requires that all courts in South Africa must interpret legislation in South Africa in so far as it is consistent with international law. One of the primary objectives of the LRA is to give effect to South Africa's obligations as a member state of the ILO.

On the basis of the analysis of Schedule 8, it is submitted that the right to fair labour practices as contained in section 23(1) of the Constitution has been given effect to in Schedule 8. By applying the guidelines reflected in Schedule 8 the employer can ensure that the employee's right to fair labour practices is entrenched and adhered to.

In the *Key Delta v Marriner*<sup>22</sup> judgment of 1998, the High Court suggested that the law might have developed to the point where a pre-dismissal hearing could be implied in a contract of employment. This principle in the *Key Delta v Mariner* judgment is also found in two Supreme Court of Appeal judgments ten years later.<sup>23</sup> In the *Gumbi* matter, Jafta JA held that pursuant to the enactment of the Constitution and the adoption of ILO Conventions into South African law, the right to a pre-dismissal hearing is "well recognised" in South African law.<sup>24</sup>

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<sup>22</sup> [1998] 6 BLLR 647 (E).

<sup>23</sup> In *Boxer Superstores Mthatha and Another v Mbenya* [2007] 8 BLLR 693 (SCA) and *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2008] 8 BLLR 699 (SCA) the court in essence stated that the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing.

<sup>24</sup> *Gumbi supra* 701 par 5-6. The court remarked that "[i]n recognising this right our law is consistent with international law relating to pre-dismissal hearings as set out in Article 7 of the International Labour Organisation (the ILO) Convention on Termination of Employment 158 of 1982".

In the *Avril Elizabeth Home for the Handicapped*<sup>25</sup> judgment, Van Niekerk J stated that:

“[t]he nature and extent of the fair procedure requirements established by the Labour Relations Act and the Code is supported by international labour standards. International Labour Organisation Convention 158 requires procedures to promote compliance with the obligation to ensure that dismissals are based on valid reasons. Although South Africa has not ratified Convention 158, and is therefore not obliged to implement its terms in domestic legislation, the Convention is an important and influential point of reference in the interpretation and application of the LRA.”

The Constitutional Court has confirmed these principles in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,<sup>26</sup> when the Court ruled that:

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

The above judgments clearly illustrate that the courts take cognisance of international principles and the requirements of the ILO, and by doing so adhere to article 233 of the Constitution and one of the primary objectives of the LRA.

Convention C158 is not a core convention of the ILO and has not been ratified by South Africa, the Netherlands, the UK or the USA. As a result of this non-ratification, none of the four countries' dismissal laws and pre-dismissal procedures are subject to the supervisory mechanisms and inspections of the ILO. This would also explain the large differences

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<sup>25</sup> [2006] 9 BLLR 833 (LC).

<sup>26</sup> [2007] 12 BLLR 1097 (CC) at para 61.

between the pre-dismissal procedures found in the USA and the Netherlands on the one hand and South Africa and the UK on the other.

The analysis that was done of Convention C158 in chapter 3 and Schedule 8 in chapter 5 makes it abundantly clear that the procedural fairness requirements for disciplinary enquiries in South Africa, as founded in Schedule 8, are in line with Convention C158 and even go beyond the requirements of Convention C158. However, contrary to popular belief that South Africa's pre-dismissal procedural requirements are among the most stringent in the world, there is almost no difference between the procedural requirements in South Africa and those found in the UK.

The former Industrial Court in South Africa has established an extensive library of jurisprudence that regulates procedural requirements for disciplinary hearings.

The most famous judgment in this regard was the *Mahlangu v CIM Deltak*<sup>27</sup> matter, where the court came close to equating a disciplinary enquiry to a court case. This led to an escalating spiral of proceduralism. Employers became fixated on procedural issues. Employers believed that if they spell out every step, gave no room for adapting the actions to the circumstances they would never have to worry that a dismissal might be deemed procedurally unfair. Human Resources managers wrote disciplinary procedures with huge numbers of forms and checklists to be completed at every stage and thereby complicated the process even further. Lawyers approached each case

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<sup>27</sup> (1986) 7 *ILJ* 346 (IC) 375.



as if it were a proceeding in the High Court, focusing on procedural technicalities.<sup>28</sup>

It was hoped that the new LRA of 1995 and Schedule 8 would change this, but so far it has failed to do so. Employers, employees, trade unions and CCMA commissioners continue to believe that we live in a country where proceduralism reigns. This has led to a system where the dismissal practices in South Africa have become a process bogged down by unnecessary formalities and court-like procedures.

It is interesting to note that to a fairly large extent, it is not so much the law of dismissal itself, but the practice and application of it that has led to the current situation where proceduralism is overemphasised.

It is clear that from the contents of the previous chapters in this study that the LRA, and especially Schedule 8, whilst seeking to provide protection and fairness for employees, does not go to extreme lengths to interpret this need for fairness as an inflexible set of procedural steps and actions. One of the aims of Schedule 8 was to allow employers to de-proceduralise and to move away from the formalistic approach established by the jurisprudence of the former Industrial Court.<sup>29</sup>

From the case law it seems that the courts and the CCMA will henceforth take a broader view of the overall fairness of the procedures followed as opposed to whether or not a particular procedure was followed to the letter. Under normal circumstances, employers are under bound to follow their own procedures, as was illustrated in the *Denel v Vorster* Supreme Court of Appeal judgment. It is clear that our labour courts have adopted a different approach in this regard; fairness

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<sup>28</sup> Levy "Rewriting your Dismissal Procedures" Masters Class Seminar presented in Johannesburg 13 October 2009.

<sup>29</sup> Schedule 8 is discussed in detail in chapter 4.

is more important than proceduralism, as was illustrated in the *Higvheld District Council* matter.<sup>30</sup>

It must also be borne in mind that Schedule 8 does not have the force of law and departures from its requirements or guidelines may be justified in particular circumstances.<sup>31</sup> This was clearly illustrated in the *Cornelius v Howden Africa Ltd t/a M&B Pumps*<sup>32</sup> decision, where the commissioner stated that:

“[p]rocedural fairness under the LRA demands less stringent and formalized compliance than was the case under the Unfair Labour Practice jurisdictions of the Industrial Courts. It did not matter whether each of the procedural requirements had been meticulously observed. What is required is for all the relevant facts to be looked at in the aggregate to determine whether the procedure adopted as fair. A holistic approach must be followed.”

The watershed case for procedural fairness was the *Avril Elizabeth Home for the Handicapped*<sup>33</sup> judgment in which the judge made a clear statement as to what the requirements for procedural fairness were and strongly emphasised that the procedures are meant to be simple and uncomplicated and that there is no requirement at all to follow the criminal justice model.<sup>34</sup> Employers are merely required to conduct an investigation, give the employee or representative an opportunity to respond to the allegations made after a reasonable period, take a decision and inform the employee of the decision.

Van Niekerk J sums it up as follows:

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<sup>30</sup> *S.A. Tourism Board v CCMA & others* (2004) 3 BLLR 272 (LC); *Khula Enterprise Finance Ltd v Madinane & others* (2004) 4 BLLR 366 (LC) and also *Higvheld District Council v CCMA & others* (2002) 12 BLLR 1158 (LAC).

<sup>31</sup> *Mosopane v Gilbeys Distiles & Vintners (Pty) Ltd* (1998) 19 ILJ 635 (LC).

<sup>32</sup> (1998) 19 ILJ 921 (CCMA).

<sup>33</sup> [2006] 9 BLLR 833 (LC).

<sup>34</sup> Also see *NUM obo Mathethe v Robbies Electrical* Case no. LP4837-08 (CCMA).

“On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex ‘charge sheets’ requests for particulars, the application of the rules of evidence, legal argument and the like.”<sup>35</sup>

Ultimately, the employer has the responsibility for acting fairly in the case of a dismissal. The rules of procedural fairness do not replicate the criminal justice model but should rather ensure that the basic elements of fairness are in place and followed as set out in item 4 of Schedule 8.

After evaluating and analysing all the information collected in the course of this research, it is submitted that disciplinary enquiries conducted in terms of Schedule 8 should be flexible and comply with the basic pre-dismissal procedure as found in item 4.

## 7.5 Conclusion

From the judgments of the Constitutional Court, the Supreme Court of Appeal and the Labour Appeal Court as well as Convention C158 and Schedule 8 of the LRA, it is apparent that the so-called “criminal justice model” is no longer applicable to workplace disciplinary enquiries. It is therefore untrue that South Africa’s dismissal law is rigid, inflexible and requires court-like procedures to be followed during disciplinary enquiries.

The form and nature of disciplinary enquiries will depend on the specific circumstances and should be flexible. Strict, formalistic disciplinary codes and procedures that are set in stone do not benefit either employer or the employee. The *Avril Elizabeth Home for the Handicapped* judgment of 2006 has confirmed what Schedule 8 has

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<sup>35</sup> [2006] 9 BLLR 833 (LC) at 839.

been saying since its inception. Van Niekerk J in the *National Bioinformatics*<sup>36</sup> matter again confirmed this when he stated:

“The applicant chose to ignore the *informal workplace procedures prescribed by the Code of Good Practise* and to conduct a disciplinary enquiry, at great expense to the tax payer no doubt, in a form that would make the criminal court proud.”

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<sup>36</sup> *Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson & others* [2009] 8 BLLR 833 (LC) at (1). Own emphasis added.

## CHAPTER 8

### CONCLUSIONS AND RECOMMENDATIONS

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## 8.1 Introduction

The main aim of this research was:

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

To accomplish these aims the following actions were followed:

- i. A review of international standards was undertaken regarding the right to discipline and dismiss was done. Special attention was paid to the ILO, two countries from the EU and the United States of America in order to get an international perspective.
- ii. A review was done of the sources of law in South Africa in respect of principles regulating disciplinary enquiries was done. A comparative analysis was then done between the international standards and the South African principles relating to the right to discipline and dismiss.
- iii. Schedule 8 was analysed.
- iv. Numerous CCMA awards and judgments in the Labour Court and Labour Appeal Court were analysed to identify and interpret the views of various arbitrators and Labour Court and Labour Appeal Court judges.
- v. A literature review of publications and articles on procedural requirements in terms of Schedule 8 of the LRA was done.
- vi. A peer review was done by a panel of commissioners of the CCMA based at the CMMA offices in Pretoria to test the validity of the research.

## 8.2 Overview of the research

**Chapter 1** gave an overview of the background to the research topic. The chapter outlined the research design and approach, the aim of the study as well as the most suitable research methodology. A qualitative research approach was followed. The research focus, scope and delimitations were outlined.

**Chapter 2** dealt with the concepts of fairness and organisational justice. The three pillars of organisational justice, namely distributive justice, procedural justice and interactional justice were discussed. These justice concepts were then linked to labour relations, particularly in relation to discipline and disciplinary enquiries.

**Chapter 3** provided an overview on the employer's right to discipline and dismiss against an international framework. Supranational instruments were analysed paying particular attention to the ILO, with a comprehensive analysis of Convention C158. An overview of the relevant EU and SADC policies were also given. Dismissal law in three countries, namely the Netherlands, the UK and the USA, was reviewed and was then evaluated in terms of compliance with the principles contained in Convention C158.

**Chapter 4** explained the different sources of law in South Africa that specifically deal with dismissal. The common-law contract of employment was analysed and an overview of the common-law duties of the employer and employee was given. Attention was paid to the South African Constitution, particularly section 23(1), which deals with labour relations. The sections in the BCEA and LRA that deal with discipline and dismissal were also discussed.

**Chapter 5** outlined the analysis of the Code of Good Practice: Dismissal (Schedule 8). A comprehensive analysis was done of item 4 as it relates directly to disciplinary procedures. The elements of procedural fairness contained in item 4 were analysed. The analysis went hand in hand with a review of numerous judgments of the Labour Courts and awards of the CCMA.

**Chapter 6** provided an overview of South African dismissal law, measured against the principles found in Convention C158. The dismissal law of the Netherlands, the UK and the USA were compared to the dismissal law in South Africa.

**Chapter 7** gave a description of the research findings. The conclusions made at the end of each chapter were drawn into chapter 7 to provide an overall picture of the research findings.

### **8.3 Challenges**

The greatest challenges that were faced during this study were the following:

- i. It was difficult to find a balance between labour relations and labour law. Labour relations are much more than a pure legal analysis of case law. Labour law deals with the judicial side of the employment relationship and the jurisprudence established through judgments of the courts and the CCMA. Labour relations also include the human element and the practical scenario of employer and employee facing each other in the workplace on a day-to-day to basis.
- ii. In a study of this nature, it is important not necessarily to evaluate every possible court case related to the subject matter under



investigation, but to form an overall picture of tendencies and principles by reviewing as many cases as possible.

These challenges were overcome by dividing the research into four specific phases, namely:

- i. reviewing a theoretical framework on fairness and organisational justice;
- ii. providing an international overview on the right to discipline and dismiss;
- iii. analysing dismissal law in South Africa as founded in Schedule 8 of the LRA; and
- iv. requesting a peer review of the research results by a panel of CCMA commissioners.

Two specific court cases that can be regarded as the cornerstones of this study, around which the main aims of the research were built are the *Mahlangu v CIM Deltak* and *Avril Elizabeth Home for the Handicapped* judgments. They are 20 years apart. *Mahlangu v CIM Deltak* has formed the cornerstone of disciplinary enquiries since 1986 and is still followed almost slavishly by many employers. The *Avril Elizabeth Home for the Handicapped* matter indicates a clear break from the jurisprudence established by the former Industrial Court and reminds all practitioners of the actual requirements of procedural fairness set out in Schedule 8.

The research was evaluated by a panel of commissioners from the CCMA who deal with procedural fairness disputes almost on a daily basis. The input and evaluation of the CCMA panel ensured that the research is in line with current practices.

## 8.4 Recommendations

### 8.4.1 Introduction

Organisational justice as a concept dealing with the perceptions of fairness can be a management tool that can be of great assistance in achieving fairness in the workplace. Almost every single course on labour relations that is offered by private training institutions including training at tertiary level, fails to include a module on the concept of organisational justice.

It is apparent that, for many years the training emphasis was placed on procedural issues. This included modules on grievance handling and grievance procedures, negotiation tactics and skills, retrenchment procedures, dismissal procedures, dispute resolution procedures, strike handling and the like. It was believed that employers would be able to handle almost every situation in the employment relationship if they had a clear-cut idea of the procedure that must be followed. This kind of training also contributed to the over-proceduralising of almost every aspect of labour relations, especially disciplinary procedures. The human element has been taken out of the equation by the strong emphasis on procedures.

More attention should be paid to organisational justice and the different justice perceptions contained in it, namely distributive justice, procedural justice and interactional justice, as this will contribute towards the achievement of fairness in the workplace. These different perceptions of justice and the application thereof in the workplace can lead towards greater equity, equality, outcome satisfaction, system satisfaction, sound interpersonal relationships and improved communication and overall employee satisfaction. The courses offered

at tertiary institutions in labour relations, employee relations, human resources management and/or people management should include a module on organisational justice.

Human Resources managers who understand the concept of organisational justice will be able to use their management styles and employment practices to assist employers and employees in achieving the value statement contained in the current item 1(3) of Schedule 8, namely:

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

#### **8.4.2 Proposed amendments or changes to Schedule 8**

With regard to Schedule 8, it is recommended that the following changes be made:<sup>1</sup>

- i. Items 1(1) and 1(3) should be combined into a single new item 1(1) to read as follows:

**“This Code of Good Practice deals with some of the key aspects of dismissals for reasons related to conduct or capacity. It is intentionally general. The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of the business. Although employees should be protected against arbitrary action, employers are entitled to**

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<sup>1</sup> The proposed amendments are printed in bold. The current Schedule 8 is attached as annexure 1.

**satisfactory conduct and work performance from their employees.”**

Combining the current items 1(1) and 1(3) into a new item 1(1) would make the importance of mutual respect and employment justice stand out much more clearly. If employers and employees adhere to these basic principles, procedural fairness may be achieved without falling into the trap of the so-called criminal justice model. This will greatly contribute towards the achievement of employment justice in the workplace. In essence, labour relations deal with the interpersonal relationship between an employee and an employer in the workplace. It is submitted that the number of dismissal dispute referrals to the CCMA or bargaining councils would be reduced if both parties adhere to these core value statements. I view it as of such importance that it is submitted that’s this point should be included in the first item of Schedule 8 and not item 3.

Items 1(2) and 2(1) to 2(4) can remain as they are and no amendments or changes to these items are proposed.

ii. It is recommended that item 3(1) be amended to read as follows:

**“All employers should adopt disciplinary rules and procedures that establish the standard of conduct required of their employees. These rules and procedures should be treated as a guideline for employers and employees on how to handle disciplinary issues. The form and content of disciplinary rules will obviously vary according to the size and nature of the employers business.”**

The rest of item 3(1) can remain as is. By including the part that stipulates that employers and employees must use disciplinary rules

and procedures as a guideline, flexibility will improve and the principles established in the *Highveld District Council* judgment will be adhered to. This will also prevent that employers are faced with a similar scenario as found in the *Denel v Vorster* judgment of 2004, where the employee had a disciplinary enquiry that complied with all the requirements of Schedule 8 but the employer failed to follow its own disciplinary code and procedure right down to the finest detail.

- iii. It is further recommended that the following be added to at the end of the current item 3(1):

**“Employers should note that where disciplinary rules and procedures form part of a collective agreement that was agreed to at a bargaining council, and the employer and his- or her employees fall under the jurisdiction of that bargaining council, they are compelled to follow them.”**

This will ensure that employers and employees that fall under the jurisdiction of a particular bargaining council adhere to the main agreement of that council. The fairness of a dismissal of an employee that falls under the jurisdiction of a bargaining council, will be measured against the disciplinary rules and procedures included in the main agreement of the bargaining council and not by those established by the employer.

The current item 3(2) can remain as is.

- iv. It is further recommended that the following be included at the end of the current item 3(3):

**“ Where any disciplinary action, other than a possible dismissal, is taken against an employee it is not necessary to follow the pre-dismissal procedures contained in item 4(1).”**

This will enhance the principles of flexibility and make it clear that it is not necessary to follow the pre-dismissal procedures contained in item 4(1) if the employer only wants to issue an employee with a verbal warning or even a written warning.

The current items 3(4) to 3(6) can remain as is and no amendments to these items are proposed.

v. It is recommended that item 4(1) be amended to read as follows:

“Normally the employer should conduct an investigation into the alleged misconduct of an employee to determine if there are grounds to **proceed with a disciplinary enquiry**. The employer should notify the employee of the allegations **that will be investigated during the disciplinary enquiry in a manner that the employee can reasonably understand**. The employee should be allowed an opportunity to state a case in response to the allegations made by the employer **at a disciplinary enquiry, which need not be a formal enquiry**. The employee should be allowed a reasonable time to prepare for the **disciplinary enquiry** and to the assistance of a trade union representative or fellow employee **at the disciplinary enquiry**. After the enquiry the employer should inform the employee of the decision taken and preferably do so in writing.”

At first glance it might seem that the proposed amendments are negligible, as the wording used is very similar to that in the current item 4(1). However, the proposed amendments to item 4(1) will prevent any

possible different interpretations as to what is meant by an “investigation” and by an “enquiry”.<sup>2</sup> The proposed amendments will also make it clear that the “enquiry” stage of the disciplinary process need not be formal and it is only at the “enquiry” stage and not during the “investigation” phase that an employee is entitled to the rights as stipulated in the remainder of item 4(1).

vi. It is further recommended that the current item 4(2) be amended to read as follows:

**“Pre-dismissal procedures, as stipulated in item 4(1), against a trade union representative or an employee who is an office-bearer or trade union official, should not be instituted without first informing the trade union of the allegations made and inviting the trade union to attend the disciplinary enquiry.”**

The proposed amendments to the current item 4(2) will prevent any confusion and different interpretations as to what is meant by “consulting the trade union”. It will also make it clear that it is not necessary for the employer to “inform and consult” with the trade union if it takes any disciplinary action against a trade union representative other than possible dismissal, for example when issuing a verbal or written warning or even a final written warning.<sup>3</sup>

Item 4(3) can remain as it is.

vii. It is further recommended that item 4(4) be amended and that following be included at the end of the current item 4(4):

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<sup>2</sup> See the discussion in chapter 5 above.

<sup>3</sup> See the discussion in par 5.8 above.

**“These exceptional circumstances can include the following, where the employee waives his or her right to a disciplinary enquiry and to protect life and property in instances of extreme violence.”**

The biggest challenge for employers, employees and trade union officials is to make a total paradigm shift in their mind set towards the procedural requirements in a disciplinary enquiry. The strict formalistic and almost court-like disciplinary codes and procedures that have been adopted under the jurisprudence of the former Industrial Court are so entrenched in society that it will take some time to change the situation. To complicate matters even further, many disciplinary codes and procedures that are in place have either been agreed to contractually or are part of a collective agreement. This can only be changed or amended through a process of consultations and mutual agreement. If an employer decides to adapt current disciplinary codes and procedures to reflect the principles contained in Schedule 8 and as interpreted in the *Avril Elizabeth Home for the Handicapped* judgment one-sidedly it can be regarded as a unilateral change in the conditions of employment.

Trade unions should take note of the latest developments with regard to procedural fairness and should implement a comprehensive training programme for all trade union officials, trade union representatives and their members. The same would apply to all Human Resources managers, personnel officers, Industrial Relations officers, managers, labour attorneys, labour consultants and CCMA commissioners.



## 8.5 Conclusions

Labour relations refer to the relationship between employers and employees in the workplace. Fairness is central to the employment relationship and both employers and employees would like to feel that they have been treated fairly. This is especially true when it comes to discipline and dismissals.

People's perceptions of fairness are vastly different and a single truth cannot be pinned down. Thus there is no recipe or procedure that can be followed to ensure fairness. The original intention of the disciplinary process was to ensure that dismissals were fair, in the sense of complying with the *audi alteram partem* rule. This principle has come to be associated imbued with an unnecessary and highly costly series of formalistic steps that parties go through, so as not to be found guilty of a procedurally unfair dismissal.

The procedures that are followed in the disciplinary process are important, but they are not the *alpha and omega*. It is more important to ask whether or not there was prejudice to the employee resulting in unfairness because a particular part of the procedure was not followed.

***“THE MORE WE PENETRATE THE SECRET CORNERS OF THE MIND, THE GREATER THE RICHES WE DISCOVER.”***

**HAROLD BROOMBERG**

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### 2. Netherlands Statutes

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### 3. United Kingdom Statutes

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### 4. United States of America Statutes

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## **5. Charters and Conventions**

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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 may be 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 *employees*, 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



### 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.

### COUNSELLING 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).

CCMA Info Sheet: DISCIPLINARY PROCEDURES - MAR 2002

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



## 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](#)