

**THE DOCTRINE OF DOUBLE JEOPARDY
IN THE SOUTH AFRICAN LABOUR LAWS**

BY

SIENTA BEKKER

STUDENT NO: 22048805

SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE

DEGREE : MAGISTER LEGUM / MASTER OF LAWS

IN THE FACULTY OF LAW

DEPARTMENT OF LABOUR LAW

AT THE UNIVERSITY OF PRETORIA

SUPERVISOR : Prof S R van Jaarsveld

15 February 2013

INDEX

Chapter 1	Introduction	1
Chapter 2	Employer's Function to Maintain Discipline in the Workplace	
A.	Introduction	6
B.	Maintaining Discipline in the Workplace	7
	1. Introduction	7
	2. The Labour Relations Act	8
	3. Disciplinary Codes	10
	4. Collective Agreements	11
C.	Disciplinary Fairness	12
	1. Introduction	13
	2. The Concept of Fairness	13
	3. Substantive Fairness	15
	4. Fair Procedure	15
D.	Conclusion	18
Chapter 3	Relevance of the Doctrine of Double Jeopardy in Labour Relations	
A.	Introduction	19
B.	The Nature and Principles of the Doctrine of Double Jeopardy	20
	1. Introduction	20
	2. The Origin of the Doctrine of Double Jeopardy	20
	3. Nature and Purpose of the Doctrine of Double Jeopardy	22
	4. Principles <i>re</i> Application of the Doctrine in Labour Relations	22
C.	The Role of a Disciplinary Chairperson	25
	1. Introduction	25
	2. Capacity of a Disciplinary Chairperson	26
	3. Function of a Chairperson in a Disciplinary Enquiry	26
	4. Finality of the Decision of a Disciplinary Chairperson	27
D.	Intervention with a Disciplinary Outcome	29
	1. Introduction	29
	2. Intervention by the Employer with a Disciplinary Decision	30
	3. Internal Appeal of the Disciplinary Decision by the Employer	33
	4. External Review in terms of Section 158(1)(h)	33
E.	Conclusion	35

Chapter 4 Deviations in respect of the Doctrine of Double Jeopardy and

Positive Law

A.	Introduction	38
B.	Exceptions to the Doctrine of Double Jeopardy	39
	1. Introduction	39
	2. Non-compliance with a Disciplinary Code	40
	3. New Evidence	42
	4. Inconsistency	42
	5. Unreasonable Decision	44
C.	<i>BMW v Van Der Walt</i>	45
	1. Summary of Facts	45
	2. Legal Issues	46
	3. Discussion of Judgment	46
D.	<i>SARS v CCMA</i>	48
	1. Summary of Facts	48
	2. Legal Issues	49
	3. Discussion of Judgment	49
E.	<i>Samson v CCMA</i>	52
	1. Summary of Facts	52
	2. Legal Issues	53
	3. Discussion of Judgment	54
F.	<i>SAMWU v SALGBC</i>	56
	1. Summary of Facts	56
	2. Legal Issues	57
	3. Discussion of Judgment	58
G.	Conclusion	60

Chapter 5 Comparative Survey

A.	Introduction	62
B.	United Kingdom	62
	1. Introduction	62
	2. Legislative Framework	63
	3. Disciplinary Fairness	64
	4. Positive Law in respect of the Doctrine of Double Jeopardy	65
C.	Canada	67
	1. Introduction	67
	2. Legislative Framework	68
	3. Disciplinary Fairness	68
	4. Positive Law in respect of the Doctrine of Double Jeopardy	69
D.	Conclusion	70

Chapter 6 Conclusion	71
Bibliography	
A. Books	73
B. Articles	73
C. Internet	74
D. Cases	75
E. Legislation	76
Summary	78

CHAPTER 1

INTRODUCTION

The doctrine of double jeopardy in the employment context provides that an employer may not subject an employee to second disciplinary action after a final decision was reached at an earlier disciplinary proceeding. Moreover, the rule prohibits multiple sanctions for the same misconduct. Generally it is unfair of an employer to subject an employee to a second disciplinary enquiry for the same alleged misconduct, anticipating a more "acceptable" result before a different chairperson than in the first enquiry. Similarly, a higher level of management is precluded from substituting a sanction imposed by a designated outside chairperson or lower-level management after a properly constituted disciplinary enquiry with a more severe sanction.

The function to maintain discipline in the workplace entails both rights and responsibilities. The employer's right to discipline employees may not be exercised unfettered. This right is confined by the standard of fairness. The principle of double jeopardy has an influence on the right to discipline an employee in that the employer has one opportunity to exercise this right fairly.

In the first segment of this study, maintaining of fair discipline is analysed. This analysis will demonstrate that fairness in the context of labour relations entails the balancing of both the employee and the employer's interests.¹ Disciplinary action that deviates in respect of the double jeopardy principle may be justified when measured with the test of fairness. The evaluation of second disciplinary proceedings against an employee in this work will reveal that courts and alternative dispute resolution forums are required to make a moral or value judgment to the established facts and circumstances of each

¹ *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) par 179 at 1152.

case when determining the fairness of disciplinary action taken by an employer.²

The fairness of disciplinary action involves three dimensions, namely substantive fairness, procedural fairness and consistency which is inherent to the concept of fairness. The Labour Relations Act³ [hereinafter "the LRA"] regulates dismissal law and provides that a dismissal is unfair if the employer fails to prove that the dismissal was for a fair reason and in accordance with a fair procedure.⁴ For purposes of this dissertation, it is important to assess what the different components of disciplinary fairness entail, in order to understand the working of the doctrine of double jeopardy in workplace law.

Substantive fairness relates to the reason for the disciplinary action against an employee and determining whether the employee is, on a balance of probability, guilty of an alleged transgression. It also relates to the appropriateness of the sanction meted out by the employer in the event that the employee was found guilty of an alleged offence. Substantive fairness in the context of the relevance and application of the doctrine of double jeopardy concerns the employer's authority to determine guilt and sanction where these disciplinary functions have been delegated to and executed by a designated chairperson.⁵

The second dimension of disciplinary fairness canvassed herein narrates the *audi alteram partem*-maxim. This maxim has been established by labour courts as one of the corner stones of procedural fairness in disciplinary action short of dismissal.⁶ The LRA and the Code of Good Practice⁷ compel an employer to afford an employee an opportunity to respond to allegations of misconduct before the decision to dismiss is taken. A pre-dismissal hearing is

² *Idem* par 180; *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* (1996) 4 SA 577 (A).

³ Labour Relations Act 66 of 1995.

⁴ S 188 of LRA.

⁵ *SA Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining council* (2011) 32 ILJ 2738 par 30 – 32 at 2746.

⁶ *Slagmont (Pty) Ltd v Building Construction and Allied Workers Union* (1995) 1 SA 742 at 755.

⁷ Schedule 8 Code of Good Practice: Dismissal, LRA.

a pre-requisite for fair dismissal. In double jeopardy cases procedural fairness relates to an opportunity to make representations to the actual decision-maker.

The issue under discussion in the third chapter is whether an employer has the power to revisit a disciplinary decision of a designated chairperson or does the double jeopardy rule bar such action? This requires an examination of the nature and principles of the doctrine of double jeopardy. Whether an employer may revisit a decision of a chairperson necessitates an investigation of the role of the chairperson in disciplinary proceedings. The chairperson tasked to render a disciplinary decision acts *qua* the employer.⁸ In view thereof it is important to consider the capacity and functions of a disciplinary chairperson as well as the finality of his or her decisions.

A relevant aspect is whether an employer may reserve the right to intervene with a final disciplinary outcome in its disciplinary procedure. An attempt is made in this work to ascertain whether an employer is entitled to interfere with a disciplinary decision, in the absence of an explicit right of internal appeal or review, or whether such interference will be *ultra vires* and substantively unfair.

The principles of natural justice require a chairperson to act *bona fide*, unbiased and to apply his or her mind to the facts and evidence before him or her.⁹ Every so often it happens that a disciplinary tribunal's decision may be inconsistent or otherwise inappropriate with the standards established in the workplace. Decisions that are contra any relevant disciplinary code may have an adverse impact on the trust relationship between an employer and an employee. An employer may suffer prejudice if it is forced to retain an employee as a result of an aberrant disciplinary decision. This requires exploring the circumstances in which an employer may substitute a decision of an appointed chairperson with a harsher decision in chapter four hereof.

⁸ *SARS v CCMA* [2010] 3 BLLR 332 (LC) par 34 – 35 at 338.

⁹ *Botha v Gengold Ltd* [1996] 4 BLLR 441 (IC) at 449.

Compelling circumstances should permit an employer to interfere with an inadequate disciplinary decision and to subject an employee to second disciplinary proceedings. These circumstances are evaluated and may differ from case to case provided always that the second disciplinary enquiry must satisfy the test of fairness.

Employees have statutory recourse against procedurally and substantively unfair disciplinary action in terms of the LRA in as far as an unfair labour practice or unfair dismissal dispute may be referred to the appropriate dispute resolution forum for conciliation and arbitration.¹⁰ An internal appeal, depending on the employer's policy, practice or disciplinary code, may also be an option to a dissatisfied employee. Employers are in a less certain position when they contend that the disciplinary procedure followed by the appointed chairperson conflicts with their standard procedures. The LRA does not provide recourse to the private sector employer when the sanction imposed by a chairperson, executing the employer's function to discipline, is too lenient, unreasonable or inconsistent with the workplace policy or practice.

The recourse available to employers in these instances is to some extent vague. The reasons for that are due to a rather inconsistent approach in positive law concerning double jeopardy cases; the test of fairness should be applied to determine the propriety of second disciplinary action and there is no complete test to ascertain what is fair.

The Supreme Court of Appeal has come to the aid of the State, acting in its capacity as employer, by declaring that section 158(1)(h) of the LRA provides a remedy for the external review of an egregious decision of a disciplinary chairperson.¹¹ Statutory intervention with disciplinary decisions by the courts appears to be legalised by this remedy. Although employees in private and public employment are treated equally under the LRA concerning workplace discipline, this section causes divide between employers in private and public employment. Intervention with a chairperson's decision appears to be

¹⁰ S 191(1)(a) LRA.

¹¹ *Ntshangase v MEC for Finance: KwaZulu-Natal* (2009) 30 ILJ 2653 (SCA).

otherwise prohibited unless the employer's disciplinary code provides for the same or provides proof that a standard practice for intervention with disciplinary outcomes exists.¹²

Various disputes have been adjudicated by the labour courts in the Republic of South Africa on subject-matter pertaining to the rule of double jeopardy. The positive law on this topic is examined and the principles that have crystallised therefrom are evaluated.

The last phase of this study concerns an overview of literature and positive law pertaining to disciplinary fairness and the principles in respect of the application of double jeopardy in the United Kingdom and Canada. The labour law dispensation in the United Kingdom compares well with the law in South Africa and is therefore ideal for the comparative survey in this work.

¹² *SARS v CCMA* [2010] 3 BLLR 332 (LC); *SAMSON v CCMA* (2010) 31 ILJ 170 (LC); *County Fair Foods v CCMA* (2003) 24 ILJ 355 (LAC).

CHAPTER 2

EMPLOYER'S FUNCTION TO MAINTAIN DISCIPLINE IN THE WORKPLACE

A. Introduction

The employment relationship is inherently unequal. The employer holds a position of authority whereas the employee's position is subordinate in nature.¹ The relationship between an employer and an employee and the main object of labour law is set out in the dictum of Otto Kahn-Freund:

*"[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment.' The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."*²

Grogan states that an employee has the duty to be obedient and to refrain from misconduct.³ Obedience of an employee towards an employer suggests that the employer has control over the employee's conduct in the workplace. In order for the employer to exercise effective control it needs to maintain discipline. The maintenance of discipline includes making disciplinary rules, taking action in the event of a misdemeanour and imposing a suitable sanction against a disciplinary transgression. The general rule is that an employer should not repeat the application of discipline against an employee in respect of the exact same transgression.

¹ Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2012) par 113 at 3 – 16.

² Davies Freedland & Khan-Freund *Labour and the Law* (1983) quoted in *Sidumo v Rustenburg Platinum Mines* supra fn 82 at 1121.

³ John Grogan *Workplace Law* (2009) at 51 – 52.

The unequal nature of the employment relationship may result in an abuse of power by the employer. The LRA, ancillary legislation, regulations as well as common law principles, aspire to balance the inequality in employment relations through stipulations concerning fair discipline in the workplace.

Disciplinary rules and procedures, together with appropriate penalties for misconduct, are generally set out in disciplinary codes. Collective agreements frequently incorporate disciplinary rules and procedures that have been agreed to by the employer and trade unions on behalf of employees. The employer will be held to the standards established by its own disciplinary code. Compliance with these standards does not always guarantee a fair outcome. The standards must not only be fair themselves, but they also have to be applied fairly with due consideration of the employee's rights.⁴

Fairness occupies centre stage in labour relations. Fairness, *vis-à-vis* the doctrine of double jeopardy, dictates that employers should refrain from subjecting employees to further disciplinary action in circumstances where it is unfair to do so.

B. Maintaining Discipline in the Workplace

1. Introduction

The employment relationship is a reciprocal one. Employers and employees have various rights and obligations towards each other. The employer is entitled to satisfactory conduct and work performance from an employee. According to Van Jaarsveld *et al*, the common law recognises an employer's right to obedience as well as its derivative, the employer's right to exercise discipline.⁵ The employer therefore has a right to maintain discipline in the workplace.⁶ The employee on the other hand has, *inter alia*, the right to fair

⁴ Rycroft, Jordaan *A Guide to South African Labour Law* (1992) 188 – 189.

⁵ Van Jaarsveld, Fourie and Olivier (2012) par 800 at 14 – 14.

⁶ Schedule 8 Code of Good Practice: Dismissal, LRA.

labour practices⁷, job and subsistence security⁸ (which includes a safe working environment) and to be protected from arbitrary conduct by his or her employer or fellow employees. The employer is obliged to provide and apply fair labour practices⁹ and to create a working environment where employees feel safe and secure. This obligation involves the employer's responsibility to maintain discipline in the workplace.

When employers fulfil their function of maintaining discipline in the workplace, their actions must be in conformity with the Constitution, the LRA, BCEA,¹⁰ applicable common law principles, natural justice, any relevant contract of employment, disciplinary codes as well as any collective agreement concluded between an employer and a trade union on behalf of their members.¹¹

2. The Labour Relations Act¹²

The LRA provides a framework for the regulation of discipline in the workplace and the resolution of employment disputes. One of the primary objectives of the LRA is to give effect to and regulate the right to fair labour practices as conferred by the Constitution.¹³ The LRA partially achieves this object by the incorporation of the Code of Good Practice: Dismissal therein.¹⁴ This Code provides guidelines that assist employers with the execution of fair discipline. The LRA also recognises international labour law obligations and compels any person applying the Act to comply with international labour standards.¹⁵ It is noteworthy that the Code of Good Practice is on par with the ILO's convention on the termination of employment.¹⁶

⁷ S 23(1). Constitution of the Republic of South Africa Act 108 of 1996.

⁸ Van Jaarsveld Fourie Olivier (2012) par 149 at 4 – 5.

⁹ *Booyesen v SAPS* (2008) 10 BLLR 928 (LC).

¹⁰ Basic Conditions of Employment Act, 75 of 1997 (BCEA).

¹¹ Item 1(2) Sch 8.

¹² Labour Relations Act 66 of 1995.

¹³ S 1(a).

¹⁴ Schedule 8 annexed to the LRA.

¹⁵ S 1(c) and 3(c).

¹⁶ International Labour Organisation Convention 158 of 1982.

Section 185(a) of the LRA tersely provides that:

"Every employee has the right not to be unfairly dismissed and subjected to unfair labour practice."

This right forms the foundation upon which the ensuing sections in the LRA are erected.¹⁷ Employers accordingly have to exercise their right to discipline fairly.

The right to discipline (or conversely the right not to be unfairly disciplined) has two components; procedural fairness and substantive fairness.¹⁸ The LRA recognises the employer's right to discipline its employees, provided that the reason and procedure concerning the discipline is fair. It should be noted that the LRA contains no formal prescribed procedure that an employer should follow when disciplining an employee. Only guidelines in respect of fair procedure are set out in the Code of Good Practice¹⁹.

When an employer fails to conduct fair disciplinary action, the affected employee may institute a claim for unfair treatment on the grounds as contained in the dispute resolution procedures of the LRA.²⁰ The outcome of these dispute resolution procedures may have considerable financial consequences for the employer in that the remedies for unfair conduct by the employer entail, *inter alia*, re-instatement with retrospective back-payment or compensation.²¹

It often occurs that employers are dissatisfied with disciplinary decisions of presiding chairpersons on the basis that the sanction imposed by the latter is too lenient or otherwise not acceptable. In these circumstances, the LRA entitles the state in its capacity as employer to apply to the Labour Court for the review of internal disciplinary decisions.²² There is no similar provision for

¹⁷ *NEHAWU v University of Cape Town* (2003) 3 SA 1 CC.

¹⁸ S 188(1)(a) and (b).

¹⁹ *Supra*.

²⁰ S 191.

²¹ S 193 and 194.

²² S 158(1)(h).

parties in the private employment sector. The Labour Court in *SARS v CCMA*²³ commented that this section privileges parties in public employment over private employment.²⁴

3. Disciplinary Codes

Every employer may set the rules and standards in the workplace according to the needs and size of the business. Regulating discipline in respect of misconduct entails setting standards, the implementation of disciplinary measures and appropriate disciplinary penalties.²⁵ Disciplinary fairness requires disciplinary rules to be certain and consistent.²⁶

The Code of Good Practice²⁷ presses upon employers to adopt disciplinary rules that establish the standard of conduct required from its employees and to make the consequences known to them in the event of a contravention.²⁸ Certainty and consistency may be achieved by communicating the rules and standards to employees and making it available to them in the form of a disciplinary code.

The disciplinary process that the employer chooses to adopt in its disciplinary code is binding on its employees. Employers are equally bound to apply the standards that they have established.²⁹ Van Jaarsveld asserts that internal disciplinary codes and procedures are merely guidelines and when they are interpreted, the approach should not be legalistic or technical.³⁰

Even though a disciplinary code is intended as a set of guidelines, an employer is not permitted to disregard its provisions when it suits the

²³ *Supra*.

²⁴ *Idem* par 50 at 340.

²⁵ Items 2,3,4,7,9 Sch 8.

²⁶ Item 3(1).

²⁷ *Supra*.

²⁸ Item 1.

²⁹ *Avril Elizabeth Home v CCMA* (2006) ILJ 1644 (LC) A – H at 1654.

³⁰ *Ibid*.

employer's purpose.³¹ Generally employers are not allowed to employ different disciplinary procedures than those provided for in its disciplinary code. When the courts judge the fairness of the decision of an employer to recharge an employee for the same alleged misconduct, the disciplinary code of that employer is one of the determining factors.³²

In *County Fair Foods v CCMA*³³ the employer interfered with the decision of a properly constituted disciplinary tribunal. There was no express provision for interference contained in the disciplinary code. The Court found that the employer acted without recourse to the express provision of its disciplinary code and on the basis of no precedent for interference in the particular workplace.³⁴ In *BMW v Van der Walt*³⁵ the Court cautioned that disciplinary action, such as conducting a second disciplinary enquiry, may be construed as *ultra vires* the employer's disciplinary code in the absence of an explicit provision to that effect.³⁶

When an employer deviates from the predetermined disciplinary procedures, it does not render the decision to dismiss an employee axiomatically unfair. Basson *et al* states that the courts permit the employer some leeway in this regard.³⁷ If, however, a disciplinary code and procedure forms part of an employee's terms and conditions of employment, the situation may be different.³⁸ Departure from the set guidelines in a disciplinary code may be warranted in certain circumstances provided that fairness is administered to both the employer and the employee.³⁹

³¹ *Solidarity on behalf of Van Rensburg v Base Metal Refineries (Pty) Ltd* (2007) 28 ILJ 2888 (ARB) par 19 at 2896.

³² *Theewaterskloof Municipality v Independant Municipal & Allied Trade Union on behalf of Visagie* (2012) 33 ILJ 1031 (BCA); *SAMWU on behalf of Mahlangu v SA Local Government Bargaining council supra*.

³³ (2003) 24 ILJ 355 (LAC).

³⁴ *County Fair Foods (Pty) Ltd v CCMA* para19 – 23 at 360 - 361.

³⁵ *BMW v Van der Walt* (2000) 21 ILJ 113 (LAC).

³⁶ *Idem* par 12 at 117.

³⁷ Basson *et al Essential Labour Law* (2009) par 6.4 at 129.

³⁸ *Idem* at 130.

³⁹ Van Jaarsveld, Fourie and Olivier (2012) par 800 at 14 – 14.

4. Collective Agreements

A collective agreement is defined in the LRA⁴⁰ as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand and, on the other, by one or more employers, registered employers' organisations or one or more employers and one or more registered employers' organisations.⁴¹

The LRA emphasises the primacy of collective agreements.⁴² Disciplinary procedures are frequently incorporated into collective agreements as a result of collective bargaining. The Court held in *SAMWU v SALGBC*⁴³ that a disciplinary code included in a collective agreement and that forms part of an employee's terms and conditions of employment, is peremptory, and may not be unilaterally altered.⁴⁴ Such a code is equally binding on employers and employees.

Deviating from disciplinary procedures as set out in a collective agreement may amount to both substantive and procedural unfairness.⁴⁵ In *SARS v CCMA*⁴⁶ the Court reiterated the sanctity of a collective agreement.⁴⁷ The employer [SARS] assumed the power of substitution, which was not particularly provided for in the collective agreement, by substituting the decision of the chairperson with its own decision. The Court found that an inference that the collective agreement provided for the power of substitution, would be the antithesis of freedom to contract and to bargain collectively.⁴⁸ The courts take a stringent approach when judging deviation from disciplinary codes contained in collective agreements.⁴⁹

⁴⁰ *Supra.*

⁴¹ S 213.

⁴² Item 1(2) Sch 8, section 23(1) and (3) of LRA.

⁴³ *Op cit.*

⁴⁴ *SAMWU on behalf of Mahlangu v SALGBC supra* par 32 at 2746.

⁴⁵ *Idem* par 34 at 2747.

⁴⁶ *SARS v CCMA and others* (2010) 3 BLLR 332 (LC).

⁴⁷ *Idem* par 7 at 334.

⁴⁸ *Idem* par 26 at 336.

⁴⁹ *SAMWU on behalf of Mahlangu v SALGBC* discussed *infra*.

C. Disciplinary Fairness

1. Introduction

When judging the fairness of disciplinary action the assessment is objective and proper regard must be had to the purpose sought to be achieved by the LRA.⁵⁰ One of the primary objects of the LRA is to give effect to the fundamental rights conferred by Section 23 of the Constitution that confirms that every employer and employee has the right to fair labour practices.⁵¹ Fairness applies to both the employer and the employee.⁵²

Disciplinary fairness comprises of two main elements, namely substantive and procedural fairness. Another constituent is that the employer is required to apply discipline consistently.⁵³ It has been held by the Labour Appeal Court that:

*"Reasonable consistency of punishment is an indispensable element of disciplinary fairness."*⁵⁴

The consistency component is particularly important in this discussion in respect of the double jeopardy rule. Inconsistency is often the predominant reason why employers choose to interfere with disciplinary penalties imposed by designated chairpersons.

The importance of the evaluation of the conception of fairness hereunder is expressed in the abstract of the issues by the Arbitrator in the recent matter decided on the doctrine of double jeopardy, *Theewaterskloof Municipality v IMATU*.⁵⁵ The Arbitrator stated that fairness is the guiding principle when

⁵⁰ *CWIU v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).

⁵¹ S 1 LRA.

⁵² *Branford v Metrorail Services* (2003) 24 ILJ 2269 (LAC) par 16 at 2278.

⁵³ Item 3(6) Code of Good Practice: Dismissal.

⁵⁴ *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC).

⁵⁵ *Theewaterskloof Municipality v Independant Municipal & Allied Trade Union* on behalf of Visagie (2012) 33 ILJ 1031 (BCA).

deciding whether an employer is permitted to recharge an employee for the same offence.⁵⁶

2. The Concept of Fairness

Fairness entails the balancing of competing and sometimes conflicting interests of the employer on the one hand and of the employee on the other.⁵⁷ Care must be taken to accommodate, wherever possible, these conflicting interests so as to arrive at the balance required by the constitutional conception of fair labour practices.⁵⁸

In the matter of *Branford v Metrorail Services*,⁵⁹ the Court assessed the fairness of the decision of the employer to dismiss the employee after he had received a warning for the same offence. The Court emphasised that fairness is the decisive factor in determining whether or not a second enquiry is justified.⁶⁰ In this regard, the Court held that the concept of fairness applies to both the employer and the employee and stated that there is no universally applicable test for deciding what is fair.⁶¹ The weight to be attached to these respective rights depends on the circumstances of each case.⁶²

Disciplinary fairness is an elastic and flexible concept.⁶³ When deciding the fairness of a dismissal, these dimensions should not be considered in isolation.⁶⁴ A mere deviation from a preset disciplinary procedure is not *per se* fatal to the employer's decision to dismiss an employee.⁶⁵ The substance of the dismissal may be comparatively so compelling as to justify deviation from the predetermined disciplinary proceedings.⁶⁶

⁵⁶ *Idem* par 20 at 1036.

⁵⁷ *Branford v Metrorail Services supra* par 16 at 2278.

⁵⁸ *Avril Elizabeth Home v CCMA supra* A – C at 1653.

⁵⁹ *Supra*.

⁶⁰ *Ibid* par 15 at 2278.

⁶¹ *Idem* par 16 at 2278.

⁶² *Ibid*.

⁶³ *Greater Letaba Local Municipality v Mankgabe NO* (2008) 29 ILJ 1167 (LC) par 28 at 1175.

⁶⁴ *Ibid*.

⁶⁵ *Idem* par 26.

⁶⁶ *Ibid*.

Fairness generally requires that like cases should be treated alike. Consistency is a basic tenet of fairness whereby every employee is measured by the same standards.⁶⁷

In deciding fairness, the courts apply a moral or value judgment to the established facts and circumstances.⁶⁸ The circumstances of each case will determine what is just and equitable.

3. Substantive Fairness

Van Jaarsveld *et al* confirm that substantive fairness is one of the basic requirements for a fair dismissal and involves the reason(s) or ground(s) for dismissal (*causa dismissalis*) of an employee.⁶⁹ The LRA recognises three grounds that may justify the dismissal of an employee, namely the employee's conduct, capacity or the employer's operational requirements.⁷⁰ The dismissal of an employee will be substantively fair if the employer can prove, on a balance of probabilities, that a fair reason to dismiss existed.⁷¹

Substantive fairness pertaining to dismissal based on misconduct involves the seriousness of the misdemeanours and whether such conduct has lead to the breach of the duty of good faith or the breach of the trust relationship between employer and employee.⁷²

Substantive fairness also relates to the authority of the employer to determine an appropriate sanction. In the matters of *SAMWU v SALGBC*⁷³ and *SARS v CCMA*⁷⁴ the Labour Court found that the dismissals of the employees were substantively unfair because the decision to dismiss was not one that the employer could validly make.⁷⁵

⁶⁷ *Cape Town City Council v Masitho* (2000) 21 ILJ 1957 (LAC) par 11 at 1960.

⁶⁸ *Branford v Metrorail* *supra* par 16 at 2278.

⁶⁹ Van Jaarsveld Fourie Olivier (2012) par 801 at 14-15.

⁷⁰ S 188(a) of the LRA.

⁷¹ *Avril Elizabeth Home v CCMA* *supra* D – E at 1655.

⁷² *Edcon Ltd v Pillemer NO & others* (2009) 30 ILJ 2642 (SCA) par 23 at 2652.

⁷³ *Supra*.

⁷⁴ *Supra*.

⁷⁵ *SARS v CCMA* par 52 at 340; *SAMWU v SALGBC* par 25 at 2745.

4. Fair Procedure

Edwin Cameron (as he then was) wrote about fair procedure before dismissal:

*"The most fundamental rule relating to pre-dismissal procedure is that the employee must be accorded a hearing."*⁷⁶

The LRA requires that a dismissal should be effected in accordance with a fair procedure.⁷⁷ The Act itself is silent on the content of the right to procedural fairness. Item 4 of the Code of Good Practice⁷⁸ contains guidelines to pre-dismissal procedure and provides in essence that:

*"The employee should be allowed the opportunity to state a case in response to the allegations."*⁷⁹

These pre-dismissal guidelines are supported by the international labour standard as set by Convention 158 of the International Labour Organisation (ILO).⁸⁰ The ILO's Committee of Experts had interpreted the right to fair procedure as providing an opportunity for 'dialogue and reflection' before dismissal.⁸¹ The Labour Court of South Africa endorsed this conception of procedural fairness in the matter of *Avril Elizabeth Home for the Handicapped v CCMA*.⁸²

According to Smit, the main purpose of a disciplinary enquiry is to determine the real reason for a dismissal and if the real reason can be determined in an

⁷⁶ Edwin Cameron "The Right to a Hearing before Dismissal" Part 1 (1986) 7 *ILJ* par 183 at 193.

⁷⁷ S 188 LRA.

⁷⁸ *Op cit.*

⁷⁹ *Ibid.*

⁸⁰ International Labour Organisation, Convention 158, 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.*"

⁸¹ *Avril Elizabeth Home v CCMA supra* E – I at 1653.

⁸² *Idem* 1653 D – J.

informal disciplinary process, it is sufficient.⁸³ The approach to fair procedure in the Code of Good Practice is significantly different than the 'criminal justice' model under the previous Labour Relations Act.⁸⁴ A greater degree of flexibility is allowed for under the current LRA.

The procedure adopted by an employer and the nature of a disciplinary enquiry may be fairly simple and extremely informal, but an employee cannot be fobbed off with a sham hearing.⁸⁵ In circumstances where an employee has admitted guilt on charges of misconduct, an enquiry should nevertheless be held to determine an appropriate sanction and to afford the employee an opportunity to make representations.⁸⁶

In certain circumstances it may also be acceptable to afford an employee the right to be heard after the decision to dismiss was taken.⁸⁷ In *Samson v CCMA*⁸⁸ the Court held that a proper appeal hearing was enough to satisfy the requirement of procedural fairness.⁸⁹ It has been held that where the employer had failed to hold a hearing, a proper appeal could never be an adequate substitute.⁹⁰ Van Jaarsveld *et al* wrote that an appeal cannot in general rectify earlier procedural irregularities. It may, however, do so in exceptional circumstances.⁹¹ Grogan noted that the test in these circumstances is whether the employee has suffered prejudice.⁹²

In *Botha v Gengold*⁹³ the Industrial Court held that a second enquiry on the same facts exposed an employee to double jeopardy, which is unfair.⁹⁴ There

⁸³ Smit "Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act" (2010) PhD Thesis University of Pretoria par 6.2.2 at 146.

⁸⁴ Act 28 of 1956. *Mahlangu v CIM Deltak* (1986) 7 ILJ 346 (IC) at 365.

⁸⁵ *Botha v Gengold* (1996) 4 BLLR 441 (IC) at 448.

⁸⁶ *Ibid.*

⁸⁷ *Semenya & others v Commission for Conciliation, Mediation and Arbitration* (2006) 27 ILJ 1627 (LAC) A – C at 1628; *Samson v CCMA supra* A – C at 178.

⁸⁸ *Op cit.*

⁸⁹ *Idem* par 14 at 179.

⁹⁰ Grogan *Workplace Law* (2010) 251.

⁹¹ Van Jaarsveld *et al* (2012) par 808A at 14-28(1).

⁹² Grogan (2010) 251.

⁹³ *Supra.*

⁹⁴ *Botha v Gengold* at 441.

are, however, circumstances that may justify a second enquiry based on the same or similar allegations against an employee.⁹⁵

Certain circumstances require that a second enquiry be held for a dismissal to be procedurally fair.⁹⁶ In *SAMWU v SALGBC*⁹⁷ the Court held that in the circumstances where the employer interfered with a decision of a designated chairperson, the employee should at least have been given an opportunity to make further representations to the employer before it imposed a harsher sanction.⁹⁸

D. Conclusion

Employers are entitled to set their own standards regarding discipline and penalties either in a disciplinary code or by incorporation thereof in a collective agreement. Once the employer established the workplace rules and procedures, both parties to the employment relationship are obligated to act in compliance therewith. Fairness may justify deviation from these rules and procedures.

Whether an employer has fulfilled the function to maintain discipline in a fair manner depends on the circumstances surrounding each instance. In labour relations the test is fairness.

*"Fairness and fairness alone is the yardstick."*⁹⁹

⁹⁵ *BMW v Van der Walt* par 12 at 117.

⁹⁶ *Greater Letaba Local Municipality v Mankgaba NO* para 15 – 16 at 1172 to 1173 and par 43 at 1179 *"The failure of the employer to afford an employee a proper second hearing undoubtedly rendered the dismissal procedurally unfair."*

⁹⁷ *Supra.*

⁹⁸ *Idem* par 26 at 2745.

⁹⁹ *BMW v Van der Walt supra* par 12 at 117.

CHAPTER 3

THE RELEVANCE OF THE DOCTRINE OF DOUBLE JEOPARDY IN LABOUR RELATIONS

A. Introduction

The double jeopardy rule endorses the principle that it is unfair to "jeopardise" a person twice for the same alleged offence. The rule prohibits exposure to subjecting an employee to multiple disciplinary actions. The double jeopardy principle mainly applies to the domain of criminal procedure law. In labour relations, by analogy to criminal procedure law, the rule provides that it is unfair to expose an employee to numerous disciplinary procedures arising from the same complaint.

It has been established in the previous chapter that the employer determines the disciplinary procedures in the workplace and has the prerogative to appoint a chairperson to preside over a disciplinary enquiry. The functions of the disciplinary chairperson and the finality of his or her decisions are also determined by the employer. Evaluating the role of the chairperson in disciplinary proceedings is important for the reason that the final decision of the chairperson becomes that of the employer. Reconsideration by the employer of the chairperson's decision constitutes breach of the double jeopardy rule.

There are circumstances that require intervention by the employer with the outcome of a disciplinary decision. These circumstances justify a further enquiry on the same alleged complaint. The Labour Appeal Court has stated in this respect:

"...[T]here may be exceptional circumstances in which every reasonable person would agree that senior authorities in an organisation, particularly a government department, must be able to intervene to reverse a decision on sanction reached by a chairman of a disciplinary enquiry who has been appointed by them. A good example in this regard is whether the

*decision reached by the chairman of the enquiry has been induced by corruption."*¹

In this chapter the application of the doctrine of double jeopardy in the disciplinary context is evaluated. The question is asked whether an employer may fairly deviate from the doctrine and, if so, in terms of what process.

B. The Nature and Principles of the Doctrine of Double Jeopardy

1. Introduction

The double jeopardy rule applies in labour relations where the employer intervenes with the decision of the disciplinary chairperson by substituting the sanction with a more severe sanction. Double jeopardy is a defence that an employee may raise at a second disciplinary enquiry where the employee is anew charged with the same alleged offence. The second disciplinary enquiry is usually conducted by an employer who is dissatisfied with the initial sanction and has the objective to obtain a different, more severe result. This defence has also been raised at internal appeal proceedings after the employer has unilaterally changed the initial sanction or at a pre-dismissal arbitration in terms of Section 188 of the LRA.² The reconsideration of a disciplinary penalty by senior management, without the disciplinary code sanctioning revision, is viewed as a breach of the double jeopardy principle.

2. The Origin of the Doctrine of Double Jeopardy

In criminal proceedings an accused person may raise the plea that he or she has previously been convicted or acquitted of essentially the same offence that he or she is charged with.³ In criminal law this defence is known as

¹ *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin NO* (2008) 29 ILJ 1707 (LAC) par 13 at 1717.

² *Samson v CCMA supra; Theewaterskloof Municipality v Independant Municipal & Allied Trade Union obo Visagie* (2012) 33 ILJ 1031 (BCA) par 6 at 1033.

³ Section 106 of the Criminal Procedure Act 51 of 1977.

autrefois convict or *autrefois acquit*.⁴ Further prosecution for the alleged offence is precluded once the accused person's defence is successful.

The Constitution of the Republic of South Africa specifically protects every accused person from being tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.⁵ This right forms part of the comprehensive right to a fair trial and provides a guarantee against being "twice put in jeopardy". Cachalia *et al* stated that this rule has come to be known as the doctrine of double jeopardy.⁶

The doctrine originates from the Latin maxim '*nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*' (full version).⁷ The maxim literally means that no one ought to be twice punished for the same offence.⁸

The counterpart of the double jeopardy rule in civil proceedings is the defence known as *exceptio rei iudicatae*.⁹ Harms asserts that this plea is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct.¹⁰ This presumption prevents endless litigation and precludes bad faith that allows demanding the same thing more than once.¹¹

⁴ Schmidt *Bewysreg* (2000) 594.

⁵ Section 35(3)(m) of Act 108 of 1996.

⁶ Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus *Fundamental Rights in the New Constitution* (1994) 88.

⁷ *Regina (Redgrave) v Commissioner of Police of the Metropolis* (2003) 1 W.L.R. 1136 par 34 at 1144.

⁸ *Ibid.* The alternative form of the maxim is set out in Hiemstra & Gonin *Trilingual Legal Dictionary* (2008) 234 – 235 '*nemo debet bis vexari pro una et eadem causa*'- no one ought to be harassed a second time for the same crime.

⁹ Hiemstra & Gonin (2008) at 187; Harms *Amler's Precedents of Pleadings* (2009) 341 (*res iudicata*).

¹⁰ *Ibid.*

¹¹ *Ibid.*

3. Nature and Purpose of the Doctrine of Double Jeopardy

The doctrine of double jeopardy is a universal concept. The doctrine of double jeopardy is absolute and inherently inflexible within the context of criminal procedure and civil law.¹² The principles of *res iudicata* and *autrefois acquit* are founded on public policy.¹³ The public policy considerations underlying these defences include reaching finality in disputes, achieving certainty in respect of the parties' respective legal positions and avoiding undue burdens on the justice system.¹⁴

The purpose of the double jeopardy rule is to prevent repeated attempts to convict an individual, thereby exposing him or her to continued embarrassment and anxiety.¹⁵

4. Principles re Application of the Doctrine in Labour Relations

The double jeopardy rule applies to three types of situations in the employment context. Firstly, the rule bars recharging an employee for the same disciplinary offence after a finding of not-guilty (acquittal). Secondly, an employee may not be recharged on the same grounds after a finding of guilty (conviction) and thirdly, the rule prohibits multiple sanctions for the same transgression.¹⁶

Schmidt affirms that a requirement of the double jeopardy rule is that the allegation against an employee in the second hearing must be essentially the same as in the first hearing.¹⁷ Grogan states that the test for double jeopardy is whether the allegation relates to the same alleged misconduct.¹⁸

¹² *Regina (Redgrave) v Commissioner of Police of the Metropolis* supra par 39 at 1146.

¹³ Harms (2009) 341.

¹⁴ Frikkie Ponelis "Double Jeopardy: When can an employee be recharged for the same offence?" *Contemporary Labour Law* (2011) 22.

¹⁵ Cachalia *et al* (1994) 88.

¹⁶ *Ibid.*

¹⁷ Schmidt (2000) 594.

¹⁸ Grogan *Workplace Law* (2010) 248.

The application of the double jeopardy doctrine in labour relations is described by Van Jaarsveld, Fourie and Olivier:

*"It is unfair for an employer (management) to set aside a first disciplinary hearing and then to subject the employee to a rehearing when no justification exists for doing so."*¹⁹

The following facts in the matter of *Theewaterskloof Municipality v IMATU obo Visagie*²⁰ illustrate the application of double jeopardy in labour relations. The employee was charged with and found guilty of, *inter alia*, sexual harassment. After a properly constituted disciplinary enquiry, the appointed chairperson imposed a final written warning. The employer was dissatisfied with the outcome and re-charged the employee with the same allegations of misconduct with the view of eventually dismissing the employee. At the second hearing, in the form of a pre-dismissal arbitration, the employee raised a preliminary plea of *double jeopardy*. The defence was successful on the basis that the employee had already been subjected to a proper disciplinary hearing in compliance with the employer's disciplinary code.²¹ No exceptional circumstances were present that could justify a re-hearing.²²

Labour law promotes the principles of equity and fairness.²³ Rigidity in workplace discipline is an unfair approach. The labour courts have considered the application of the doctrine in labour relations and have relaxed the strict application by the industrial court to some extent.

A strict approach against employer intervention was taken in *Bhengu v Union Co-operative Ltd*,²⁴ where the industrial court confirmed that an employer is not entitled to hold a second enquiry if it is not satisfied with the outcome of a first properly constituted enquiry.

¹⁹ Van Jaarsveld, Fourie and Olivier (2012) 14 – 23.

²⁰ *Op cit.*

²¹ *Idem* par 25 at 1038.

²² *Idem* par 27 at 1038.

²³ *Cox v CCMA* (2011) 22 ILJ 137 (LC) par 22 at 143.

²⁴ *Bhengu v Union Co-operative Ltd* (1990) 11 ILJ 117 (LC) A – B at 121.

"The fact that higher management may feel that the finding in regard to guilt is incorrect or that the sentence is too lenient does not entitle it to retry the matter. Such a second enquiry would be an unfair labour practice."²⁵

The Labour Appeal Court in *BMW v Van der Walt*²⁶ came to the rescue of employers that are disgruntled with a disciplinary outcome:

"Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so"²⁷ (my emphasis).

The Labour Appeal Court also confirmed the dictum of *Amalgamated Engineering Union v Carlton Paper*²⁸ in *BMW v Van der Walt*²⁹ and held that it is unnecessary to import public policy principles into labour law. The Court held:

"The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule."³⁰

The principles that can be extracted from the dictum of *BMW v Van der Walt*³¹ are that by conducting a second disciplinary enquiry, a dismissal is not *per se* unfair.³² The doctrine of double jeopardy does not apply categorically in employment law. Fairness may justify a second enquiry. The same principles apply where the employer reconsiders a disciplinary penalty and substitutes it with a more severe penalty. The Court accepted in *Branford v Metrorail Services*³³ that the principles established in *BMW v Van der Walt*³⁴ is applicable to the situation where successive punishments were imposed even if, strictly speaking, two hearings were not held.³⁵

²⁵ *Ibid.*

²⁶ *Supra.*

²⁷ *BMW v Van der Walt supra* par 12 at 117.

²⁸ *Amalgamated Engineering Union of SA v Carlton Paper of SA (Pty) Ltd* (1988) 9 ILJ 588.

²⁹ *Op cit.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Branford v Metrorail Services supra* par 21 at 2280.

³³ *Ibid.*

³⁴ *Op cit.*

³⁵ *Idem* par 19 at 2280.

C. The Role of a Disciplinary Chairperson

1. Introduction

There are no formal provisions in the LRA or Code of Good Practice³⁶ pertaining to disciplinary chairpersons. In order to establish the role of an appointed chairperson in disciplinary proceedings, it is important to evaluate the capacity and function of disciplinary chairpersons. The duty to preside over a disciplinary enquiry is generally performed by a managerial employee in the workplace. The informal procedural requirements envisaged in the LRA recognise that managers are not experienced judicial officers.³⁷ The person taking the disciplinary decision should be unbiased and should enter the proceedings with an open mind.³⁸ Natural justice requires a chairperson to act impartial and *bona fide*.

Grogan affirms that the right to appoint a disciplinary chairperson resides with the employer and it may appoint an outside person like an independent attorney or advocate to chair the enquiry.³⁹ Employers and trade unions may agree on the selection of the chairperson as well as the disciplinary functions that the chairperson will have.⁴⁰ When an employer relinquished certain functions to a disciplinary chairperson in terms of a binding collective agreement, it is not entitled to simply reclaim those powers.⁴¹

A disciplinary chairperson clearly fulfils an important role in a disciplinary procedure. The purpose for evaluating the finality of the decision of an appointed chairperson is to assess whether the employer breaches the double jeopardy rule when interfering with that decision. The finality of the decision of the chairperson is one of the determining factors when the courts

³⁶ *Supra*.

³⁷ *Avril Elizabeth Home v CCMA supra* A – J at 1652.

³⁸ *Rossouw v SA Mediese Navorsingsraad* (2) (1987) 8 ILJ 660 (IC).

³⁹ Grogan (2010) 243.

⁴⁰ *SARS v CCMA supra*; *SAMWU v SALGBC supra*; *Greater Letaba Local Municipality v Mankgaba supra*.

⁴¹ *SAMWU v SALGBC* par 30 at 2746.

consider the fairness of interference with that decision.⁴² Once a final decision is made by an appointed chairperson, interference with that decision by a higher level of management may be unfair.⁴³

2. Capacity of a Disciplinary Chairperson

The employer has the right to take disciplinary action and the responsibility to determine its own disciplinary procedure.⁴⁴ The power to make findings of fact, determine guilt and the appropriate sanction are entrusted to a chairperson that is appointed to preside over a disciplinary enquiry. The Court held in *SARS v CCMA*.⁴⁵

*"Irrespective of whether the chairperson of the enquiry was an independent panellist or one of SARS managers, she executed SARS's responsibility for discipline. ...[T]he chairperson acted qua SARS as the employer"*⁴⁶

The presiding chairperson of a disciplinary enquiry therefore acts in the capacity of the employer and not as an independent arbitrator.⁴⁷ The chairperson assumes the task to discipline by determining an appropriate sanction. On this premise, it is recognised that an employee has to be satisfied with a degree of institutional bias.⁴⁸

The prerogative to select the chairperson who will preside at the enquiry resides with the employer.⁴⁹

3. Function of a Chairperson in a Disciplinary Enquiry

It is an essential function of a disciplinary chairperson to make findings of fact, determine guilt and to pronounce on an appropriate sanction. The duties of a

⁴² *Ibid.*

⁴³ Van Jaarsveld, Fourie and Olivier (2012) par 807 at 14 – 23.

⁴⁴ *Solidarity on behalf of Van Rensburg v Rustenburg Base Metal Refineries (Pty) Ltd* par 13 at 2895.

⁴⁵ *Op cit.*

⁴⁶ *SARS v CCMA* par 35 at 338.

⁴⁷ *Ntshangase v MEC for Finance: KwaZulu-Natal supra* par 17 at 2661.

⁴⁸ *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries (Pty) Ltd* par 14 at 2895.

⁴⁹ *Ibid.*

chairperson appointed to preside over a disciplinary enquiry are to apply the disciplinary code and procedure to the best of his or her ability, to give effect to the employer's standard of conduct and to properly and diligently apply his or her mind to the facts and issues before him or her.⁵⁰

Grogan emphasises that a presiding officer is duty-bound to weigh the evidence for and against the employee, to make an informed and considered decision and to act impartial when performing these duties.⁵¹

In *Theewaterskloof Municipality v IMATU on behalf of Visagie*⁵² it was held that the chairperson may exercise a discretion concerning the sanction to be meted out to the employee.⁵³ The conclusion of the disciplinary chairperson, in *MEC for Finance v Dorkin NO*,⁵⁴ that dismissal was not an appropriate sanction but that a final written warning was appropriate, was held to be a conclusion reached by someone that did not exercise a discretion at all and was held to be unreasonable.⁵⁵

4. Finality of a Disciplinary Chairperson's Decision

The finality of the decision of the chairperson depends on the powers awarded to him or him by the employer in terms of a disciplinary code, collective agreement or otherwise. In many instances the disciplinary procedures incorporated into collective agreements are framed in mandatory language, for example: "...the determination of the disciplinary chairperson shall be final and binding; ...the chair must pronounce sanction"⁵⁶ (my emphasis). These stipulations further oblige an employer to implement the decision imposed by the chairperson.⁵⁷ The courts take a stringent approach in these circumstances and have held that the wording of the disciplinary

⁵⁰ *Idem* par 19 at 2896.

⁵¹ Grogan (2010) 242.

⁵² *Op cit.*

⁵³ *Idem* par 25 at 1038.

⁵⁴ *MEC for Finance, KwaZulu-Natal v Dorkin NO* (2008) 29 ILJ 1707 (LAC).

⁵⁵ *Idem* par 18 at 1718.

⁵⁶ *Ibid* par 18 at 1718; *SARS v Kruger supra* at 336; *SAMWU v SALGBC supra* at 2743; *Greater Letaba v Mankgaba supra* at 1173;

⁵⁷ *Ibid.*

procedure is peremptory.⁵⁸ This indicates that the decision of the chairperson is final.

The decision of a chairperson is often referred to in disciplinary codes as a recommendation that results in senior management choosing to accept or reject the decision.⁵⁹ The courts frequently distinguish between the chairperson's supposed power to recommend and the power to impose a sanction. In *MEC for Finance: KwaZulu-Natal v Dorkin NO*⁶⁰ the Labour Appeal Court referred to a recommendation on sanction as a limitation on the chairperson's powers.⁶¹ In *SAMWU v SALGBC*⁶² the Labour Court emphasised the distinction between "only recommending" and imposing a sanction.⁶³ The distinction made by the courts between recommending and imposing a sanction creates the impression that the sanction decided on by the chairperson may be deviated from, provided that it was made in the form of a recommendation.

The view in *Telkom SA v CCMA*⁶⁴ is that once the chairperson has made a finding and decided on a sanction that he or she deemed appropriate, the hearing is complete and the chairperson becomes *functus officio*. After that it is not competent for the employer to change a lesser sanction to dismissal.

The approach in *Telkom SA v CCMA*⁶⁵ appears to be correct. Grogan contends that there is little point in entrusting a chairperson with the function to decide (impose or recommend) a sanction if senior management are allowed merely to overrule the sanction of the chairperson.⁶⁶ Perhaps the distinction between recommending and imposing a sanction is contrived to escape the restraint of double jeopardy.

⁵⁸ *SAMWU v SALGBC supra* at 2743; *SARS v Kruger supra* at 336.

⁵⁹ *Wium v Zondi* [2002] 11 BLLR 1117 (LC).

⁶⁰ *Supra*.

⁶¹ *Ibid* par 15 at 1717.

⁶² *Supra*.

⁶³ *Idem* par 29 at 2746.

⁶⁴ (2002) 23 ILJ 536 (LC).

⁶⁵ *Ibid*.

⁶⁶ Grogan (2010) 248.

The current position seems to be that if the employer's disciplinary code provides that the person chairing a disciplinary enquiry are authorised to make a recommendation only, it is not double jeopardy if the recommended penalty is substituted with a more severe penalty by senior management.⁶⁷

D. Intervention with a Disciplinary Outcome

1. Introduction

Employees often raise the defence of double jeopardy when senior management unilaterally reviews or reconsiders the decision of the designated chairperson, in the absence of any provision for such procedure in the disciplinary code, and with the view of imposing a more onerous sanction than the one of the elected chairperson.⁶⁸ Grogan states that an employer breaches the double jeopardy rule when management ignores the decision of the chairperson of a properly constituted disciplinary enquiry and substitutes it with its own decision.⁶⁹

It often happens that an appointed chairperson imposes, for instance, a final written warning as a sanction against an employee guilty of gross misconduct, which senior management considers to be too lenient or a breach of employer policy undermining fair disciplinary measures. In these circumstances employers have the need to interfere with the inappropriate sanction in support of consistency and fairness. The obstacle many employers face in these situations is the absence of specific measures in its disciplinary code that may authorise interference with a decision of a chairperson that is final and binding.

An appeal procedure in terms whereof the employer may appeal against the decision of the presiding chairperson is rare or non-existent in disciplinary

⁶⁷ Van Niekerk *et al* (2008) 253; *UASA obo Davidtz v Kloof Gold Mining Company Ltd* [2005] 7 BALR 787 (CCMA).

⁶⁸ *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries (Pty) Ltd* par 11 at 2894; *Samson v CCMA infra*; *SARS v CCMA infra*.

⁶⁹ Grogan (2010) 245.

codes. The general perception is that an employer may not appeal against the decision of the disciplinary chairperson. It is indeed a controversial issue, purportedly for the reason that an employer will then in effect appeal its own decision. In principle an employer is at liberty to regulate its own disciplinary procedure and may reserve the right of appeal in its disciplinary code.⁷⁰ Similarly, an employer may incorporate into its own disciplinary procedure a right to review the decision of the chairperson. Without these mechanisms, interference with the sanction imposed by the chairperson is theoretically unfair.

The Labour Appeal Court in *MEC for Finance v Dorkin NO*⁷¹ recognised the need of every employer to intervene with an aberrant decision reached by a disciplinary chairperson. In this section the right of an employer to intervene with a disciplinary decision reached by an appointed chairperson, is discussed. The recourse available to employers in the public and private sector, in the event that intervention is not authorised by internal disciplinary procedures, is considered next.

2. Intervention by the Employer with a Disciplinary Decision

When an employer intervenes with the decision of a duly appointed chairperson after a properly constituted disciplinary enquiry, it is generally regarded as unfair towards the employee.

Van Niekerk *et al* describe the application of the doctrine of double jeopardy in the employment context by stating that once an employer has imposed a disciplinary penalty, the matter may not be re-opened to allow the employer the opportunity to revise the penalty, and in particular, to impose a more severe penalty.⁷²

⁷⁰ *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries supra* par 13 at 2895.

⁷¹ *Op cit.*

⁷² Van Niekerk *et al Law@Work* (2008) 253.

In *Amalgamated Engineering Union v Carlton Paper*⁷³, the view of the industrial court was that intervention by senior management will be unfair once a decision is reached by a properly constituted tribunal that was set up in terms of the employer's own disciplinary procedure and where the facts were adequately canvassed.⁷⁴ The fact that an employer is discontented with the chairperson's decision, or that the decision may disturb labour peace, will not justify intervention.⁷⁵ The unfairness of employer intervention is aggravated by a prolonged period after the decision.⁷⁶

It was stated in *Telkom v Frost*⁷⁷ that, unless the disciplinary code explicitly provides for managerial review, any further enquiry under the subterfuge of a review (on the same allegations or facts) will be unfair since it exposes the employee to double jeopardy.⁷⁸ In *BMW v Van der Walt*,⁷⁹ senior management conducted a second enquiry and presented further evidence to obtain a different outcome. The Court cautioned that an employer's disciplinary code may be a stumbling block if a second enquiry is *ultra vires* that code.⁸⁰

The judgment in *County Fair Foods v CCMA*⁸¹ supports the proposition that an employer is precluded from intervening with the disciplinary outcome in the absence of a standing practice or a provision in the disciplinary code for intervention. It was proposed in *Solidarity obo Van Rensburg v Base Metal Refineries*⁸² that the dictum in *County Fair Foods v CCMA*⁸³ does not constitute clear authority for the viewpoint that, in the absence of an express provision in an employer's disciplinary code and in the absence of appropriate

⁷³ *Op cit.*

⁷⁴ *Amalgamated Engineering Union of SA v Carlton Paper of SA (Pty) Ltd supra* C – D at 596.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Supra.*

⁷⁸ *Telkom v Frost* (2001) 22 ILJ 1253 (CCMA) C – D at 1260.

⁷⁹ *Op cit.*

⁸⁰ *Idem* par 12 at 117.

⁸¹ *Supra.*

⁸² *Op cit.*

⁸³ *Supra.*

precedent, the employer is in all circumstances precluded from imposing a different decision than that of the duly appointed disciplinary chairperson.⁸⁴

Unfortunately, the courts and dispute resolution forums are often reluctant to endorse employer intervention in the absence of a specific provision in the employer's disciplinary code authorising interference.⁸⁵ Ponelis asserts that, in principle, an employer should be allowed to intervene with the disciplinary outcome if fairness requires intervention.⁸⁶ In *County Fair Foods v CCMA*,⁸⁷ the Court upheld the finding of the CCMA to the effect that the evidence put up by the employer did not justify interference with the chairperson's decision.⁸⁸ This indicates that the Court had regard to more than just the disciplinary code or workplace policy.

There are exceptional circumstances where an employer is justified, and must be able, to intervene with a decision of its own chairperson even where a disciplinary code provides for the finality of a chairperson's decision or where the code is silent on the right to internal review or where no standard practice for review exists in the workplace. Even though the disciplinary procedure, in *MEC for Finance v Dorkin NO*,⁸⁹ provided that the findings of the chairperson shall be final and binding and contained no procedure for internal review or appeal, the Court permitted interference. The Court identified the multiplicity of the disciplinary charges, their seriousness and the amount of the financial loss caused by the employee's misconduct as exceptional circumstances that justified the employer's intervention to change the sanction imposed by the chairperson.

⁸⁴ *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries supra* par 52 at 2901.

⁸⁵ *SARS v CCMA supra*; *County Fair Foods v CCMA supra*; *CEPPWAWU obo Kopi v Chep SA* [2010] 7 BALR 711 (CCMA).

⁸⁶ Ponelis *Contemporary Labour Law* (2011) 23; *BMW v Van der Walt supra*; *Branford v Van der Walt supra*.

⁸⁷ *Op cit.*

⁸⁸ *County Fair Foods v CCMA supra* E – F at 361.

⁸⁹ *Supra*.

3. Internal Appeal against the Disciplinary Decision by the Employer

An employer is entitled to determine its own disciplinary procedure, provided that it conforms to the basic requirements of fairness.⁹⁰ In *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries*⁹¹ the arbitrator remarked that an employer is not precluded from building into the disciplinary code an appeal procedure which allowed for both the disgruntled employee and employer to appeal against the findings of the disciplinary chairperson.⁹²

Ponelis states that double jeopardy relates to instances where new hearings are instituted on the same facts and not to internal appeal hearings since the latter are extensions of disciplinary proceedings already launched.⁹³ The same applies to an internal review of a disciplinary decision, provided that the right to internal review is reserved in a disciplinary code or established by means of a long-standing company practice.⁹⁴ This position was confirmed in *Samson v CCMA*,⁹⁵ where the Court confirmed the fairness of internal review where the evidence established the existence of a practice to review disciplinary decisions by senior management.⁹⁶

4. External Review in terms of Section 158(1)(h)

In the circumstances where the State acts in its capacity as employer, and a collective agreement stipulates that the employer is bound by the decision of a chairperson appointed in terms of that agreement, is intervention with that decision permitted? If the disciplinary procedure contained in the collective agreement is silent about employer intervention, either in the form of an internal appeal or review process, is the employer then to be burdened with an unreasonable decision?

⁹⁰ *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries supra* par 13 at 2895.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Ponelis (2011) *Contemporary Labour Law* 23.

⁹⁴ *Ibid.*

⁹⁵ (2012) 31 ILJ 170 (LC).

⁹⁶ *Idem* par 11 at 177.

Section 158(1)(h) of the LRA offers a remedy to the State in its capacity as employer in terms whereof the employer may apply to the Labour Court to review and set aside an egregious decision of a chairperson of a disciplinary enquiry on any grounds permissible in law.⁹⁷ Section 158(1)(h) of the LRA provides:

*"The Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law."*⁹⁸

The Supreme Court of Appeal validated this review process in *Ntshangase v MEC for Finance*⁹⁹ by answering the vexed legal question of whether a chairperson's decision is reviewable at the instance of the employer.¹⁰⁰

The facts in this matter concern a public service employee who was charged with serious misconduct involving allegations of wilful mismanagement of the employer's finances and abusing his authority.¹⁰¹ The presiding chairperson of the disciplinary enquiry, Dorkin NO, was appointed in terms of PSCBC¹⁰² resolution 2 that embodies the disciplinary procedure negotiated and agreed upon by the employer and trade unions representing the employees. The chairperson found the employee guilty and imposed a final written warning. In terms of the resolution, the employer was required to implement this sanction in the absence of any internal appeal.¹⁰³

The employer disagreed with the chairperson's sanction on the basis that it was inappropriate and too lenient in the circumstances and filed a review application under Section 158(1)(h) of the LRA. The review eventually succeeded in the Labour Appeal Court on the basis of gross

⁹⁷ *Ntshangase v MEC for Finance: KwaZulu-Natal* (2009) 30 ILJ 2653 (SCA) par 15 at 2661.

⁹⁸ Section 158(1)(h) of Act 66 of 1995.

⁹⁹ *Op cit.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Idem* par 1 at 2656.

¹⁰² *MEC for Finance: KwaZulu-Natal v Dorkin NO* par 15 at 1717: Public Service Co-ordinating Bargaining Council Resolution 2 of 1999 clause 7.4(a) "*If the chair finds an employee has committed misconduct, the chair must pronounce a sanction, depending on the nature of the case and the seriousness of the misconduct...*" (my emphasis).

¹⁰³ *Ibid.*

unreasonableness.¹⁰⁴ The employee appealed against the decision in favour of the employer and the Supreme Court of Appeal found that the chairperson's decision has failed to pass the test of rationality and reasonableness.¹⁰⁵

The Court concluded that the decision of a chairperson, acting *qua* the employer, amounts to administrative action. On that premise, the disciplinary action must be lawful, reasonable and procedurally fair.¹⁰⁶ Even though the Constitutional Court finally decided in *Gcaba v Minister of Safety and Security*¹⁰⁷ that employment and labour relationships do not give rise to administrative action, the remedy in terms of Section 158(1)(h) of the LRA is nevertheless available for public employers.¹⁰⁸

The decision of *Ntshangase v MEC for Finance: KwaZulu-Natal*¹⁰⁹ is particularly important on the topic of employer intervention. The following extract from the dictum in this matter is the focal point which highlights the need for employer intervention:

*"All actions and / or decisions taken pursuant to the employment relationship... must be fair and must account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all relevant facts and is manifestly unfair to the employer, it is entitled to take such decision on review."*¹¹⁰

E. Conclusion

The view that employer intervention, by conducting a second disciplinary enquiry or revisiting a disciplinary decision and substituting same with a more severe sanction, is *per se* unfair, misconceives the true legal position as enunciated in *BMW v Van der Walt*.¹¹¹ The application of the doctrine of

¹⁰⁴ *Ntshangase v MEC for Finance: KwaZulu-Natal* *supra* par 21 at 2663.

¹⁰⁵ *Idem* par 14 at 2660.

¹⁰⁶ *Idem* par 16 and 17 at 2661.

¹⁰⁷ (2009) 12 BLLR 1145 (CC).

¹⁰⁸ See *SARS v CCMA* and *SAMWU v SALGB* *infra*.

¹⁰⁹ *Op cit*.

¹¹⁰ *Ntshangase v MEC for Finance: KwaZulu-Natal* C – D at 2662.

¹¹¹ *Branford v Metrorail* *supra* par 21 at 2280.

double jeopardy in the labour environment is not absolute and intervention with a disciplinary decision by an employer may be justified if it is in the interest of fairness.

The courts are more likely to find employer intervention acceptable when explicit provision for internal appeal or review is contained in the employer's in-house disciplinary procedure. The responsibility remains with the employer to properly train its senior employees tasked to initiate disciplinary hearings and to appoint competent chairpersons to preside over disciplinary enquiries. An employer should endeavour to do thorough investigation in the first instance rather than to conduct a second hearing, subjecting an employee to double jeopardy, in order to obtain a different result.

The Court recognised in *MEC for Finance: KwaZulu-Natal v Ntshangase*¹¹² that even though the decision of the chairperson was final and binding, it would be prejudicial to oblige the employer to retain an employee in employment despite a breach of the trust relationship. The Court acknowledged that there are exceptional circumstances where an employer is, and must be able, to review a disciplinary decision.¹¹³

If the exceptional circumstances referred to in *MEC for Finance v Dorkin NO*¹¹⁴ arise in public employment, why can they not arise in the private employment? No apparent reason is forthcoming. If an employer in the public sector may approach a court of law to have its own decisions reviewed and set aside, that right should equally be afforded to private sector employers.

It is, however, suggested that neither public nor private sector employers should have to bear the burden of litigation in the pursuit of fairness. Disciplinary decisions, which are the prerogative of the employer, may be

¹¹² *Op cit.*

¹¹³ *Idem* par 16 at 1718.

¹¹⁴ *Supra.*

revisited by the employer when it is fair to do so.¹¹⁵ The latter approach is in the interest of informal and flexible disciplinary procedure as envisaged by the LRA, Code of Good Practice and international standards.

¹¹⁵ *BMW v Van der Walt supra.*

CHAPTER 4

DEVIATIONS IN RESPECT OF THE DOCTRINE OF DOUBLE JEOPARDY AND POSITIVE LAW

A. Introduction

In the previous chapter it was assessed that interfering with a disciplinary decision and recharging an employee with the same misconduct to obtain a different, and harsher result, breaches the double jeopardy rule. It became apparent that interference by the employer may be warranted in certain circumstances where fairness requires interference.

The circumstances that may justify deviations in respect of the doctrine of double jeopardy are exceptional. These circumstances include, *inter alia*, situations in which the presiding officer has acted in bad faith, failed to apply the provisions of the disciplinary code of the employer or has come to an aberrant decision. In this chapter situations that may constitute exceptional circumstances in the context of intervention with disciplinary decisions are examined.

A few decided cases are discussed in an attempt to ascertain what the current position in South Africa is relating to the propriety of holding a second disciplinary enquiry. In the previous chapter it was established that the application of the doctrine of double jeopardy in labour relations, since the era of the industrial court, has evolved to a more relaxed approach to some extent.

The *locus classicus*, *BMW v Van der Walt*¹ (that constitutes authority for fair deviation in respect of the double jeopardy rule), is reflected on and three other contemporary cases are deliberated. The facts of these cases are crisply described and only where it relates to the subject-matter of this

¹ (2000) 21 ILJ 113 (LAC).

dissertation. *SARS v CCMA*² and *SAMWU v SALGBC*³ relate to the intervention with the disciplinary penalty by the State in its capacity as employer in circumstances where a collective agreement regulates disciplinary procedures in the workplace. *Samson v CCMA*⁴ involves a private sector employer that substitutes an imposed sanction with its own sanction on authority of management's longstanding practice to review disciplinary sanctions.

B. Exceptions to the Doctrine of Double Jeopardy

1. Introduction

The norm of assessing the fairness of a disciplinary offence is a single disciplinary enquiry conducted in compliance with the employer's disciplinary code.⁵ The requirement of a single enquiry may be deviated from in exceptional circumstances. There is no *numerus clausus* as to what constitutes exceptional circumstances and thus will depend on the circumstances of each case. The Labour Appeal Court in *BMW v Van der Walt*⁶ articulated a *caveat* that it would probably not be considered to be fair to hold more than one disciplinary enquiry, save in rather exceptional circumstances.⁷

It has been argued in many cases that the deviation from the doctrine is only justified in exceptional circumstances. The Court in *Branford v Metrorail*⁸ has expressed that exceptional circumstances is a measure of fairness and not the test itself.⁹ In *Theewaterskloof Municipality v IMATU obo Visagie*¹⁰ it was

² *Infra.*

³ *Infra.*

⁴ *Infra.*

⁵ *Telkom v Frost* (2001) 22 ILJ 1253 (CCMA) A – B at 1260.

⁶ *Infra.*

⁷ *BMW v Van der Walt* *infra* par 12 at 117.

⁸ *Op cit.*

⁹ *Branford v Metrorail* *supra* C – E at 2278.

¹⁰ *Supra.*

ascertained that the test set out by case law required something more than distaste for the sanction imposed to warrant recharging an employee.¹¹

Hutchinson argues that the unfair inconsistent treatment of two or more employees by one or more chairperson(s) should in its own right constitute an exceptional circumstance paving the way for an employer to hold a second disciplinary enquiry.¹² An exceptional circumstance warranting deviation from the doctrine may include, for instance, a disciplinary decision induced by corruption.¹³

The courts have assessed in a number of decided cases, the fairness of the practise by employers to reconsider imposed sanctions by re-charging employees. The circumstances, as discussed hereunder, have been identified as exceptions in respect of the doctrine of double jeopardy.

2. Non-Compliance with a Disciplinary Code

A second enquiry will be valid if the initial hearing was not in compliance with the employer's disciplinary code and the facts involved were not properly canvassed. Even in criminal law the double jeopardy rule will not prevent a re-hearing if the initial trial was vitiated by a material irregularity.¹⁴

In *NUMSA obo Walsh v Delta Motors Corporation*¹⁵ the supervisor took informal disciplinary action against an employee who allegedly perpetrated serious misconduct. The employer was dissatisfied with the supervisor's informal approach and took further disciplinary action based on the same allegations by conducting a formal enquiry. The Commissioner found that the supervisor's disciplinary action amounted to obvious non-compliance with the

¹¹ *Theewaterskloof Municipality v IMATU obo Visagie supra* par 27 at 1038.

¹² Hutchinson (2006) ILJ 2038.

¹³ *MEC for Finance v Dorkin* par 13 at 1717.

¹⁴ *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries (Pty) Ltd* (2007) 28 ILJ 2888 (ARB), the arbitrator quoted at footnote 4: *S v Singh* (1990) 1 SA 123 (A) G – J at 126.

¹⁵ *NUMSA on behalf of M Walsh v Delta Motors Corporation (Pty) Ltd* (1998) 3 LLD 152 (CCMA).

employer's policies to the extent that the disciplinary code had not been applied to the employee at all. The formal enquiry did not amount to double jeopardy but to compliance (for the first time) with the employer's policies.

The parity principle motivated the decision of the Commissioner. The need for ensuring a common approach to particular offences, especially dismissible offences, remains of cardinal importance.¹⁶

It was suggested by Le Roux that a second enquiry will probably only be permitted if the non-compliance is a relatively blatant departure from the accepted standards and norms with regard to the sanction.¹⁷ The dictum in *Telkom v Frost*¹⁸ underlines that substantial non-compliance with the disciplinary code by senior management responsible for disciplinary action renders further disciplinary action in compliance with the code justifiable.¹⁹

The Arbitrator asserted that this justification is a clear distinction from the unfair situation where an employee had been subjected to two proper enquiries in respect of the same offence, receiving a warning pursuant to the first enquiry and being dismissed pursuant to the second.²⁰

In *Branford v Metrorail Services*²¹ the Labour Appeal Court held that it would be manifestly unfair for an employer to be saddled with an inappropriate decision of one of its employees who misconceived the seriousness of the matter and that disregarded the employer's disciplinary procedures.²²

¹⁶ *Ibid.*

¹⁷ Le Roux "Reconvening Disciplinary Inquiries: When can a second inquiry impose a heavier penalty?" (2001) *Contemporary Labour Law* 19.

¹⁸ (2001) 22 ILJ 1253 (CCMA).

¹⁹ *Telkom v Frost supra* A – B at 1261.

²⁰ *Ibid.*

²¹ *Op cit.*

²² *Branford v Metrorail Services supra* par 17 at 2279.

3. New Evidence

Fairness permits an employer to re-open a disciplinary enquiry against an employee where new evidence comes to the employer's attention after the initial enquiry.²³ Le Roux has formulated the legal position in respect of the fairness of a second enquiry based on new evidence as follows:

*"Where new and material information comes to light which was not in the employer's possession at the time of the first enquiry and which, if true, would materially have altered the outcome of the disciplinary enquiry."*²⁴

The Court in *BMW v Van der Walt*²⁵ held that the second enquiry was fair even though the 'new and further evidence' probably should have been realised at the initial enquiry had the employer done a better investigation.²⁶

4. Inconsistency

Is the decision of an employer to overrule an inconsistent penalty, imposed by an outside chairperson, justified? If a disciplinary chairperson has reached an inconsistent or unjustifiable decision by failing to consider the very principle of consistency, the decision to alter the sanction may be acceptable.

In *Greater Letaba Local Municipality v Mankgabe NO*²⁷ the employee was charged with serious misconduct in that he was in unauthorised possession of the employer's motor vehicle. The misconduct was aggravated by the employee's negligence in crashing the vehicle, causing the employer financial loss.²⁸

Subsequent to a proper disciplinary enquiry, the chairperson found the employee guilty and recommended a penalty of suspended dismissal. Senior

²³ *Rakgolela v Trade Centre* (2005) 3 BALR 353 (CCMA).

²⁴ Le Roux (2001) *Contemporary Labour Law* 20.

²⁵ *Infra*.

²⁶ *BMW v Van der Walt supra* par 13 at 118 "It may be that the appellant should have seen through the respondent's scheme sooner that it did...but that did not make it fair that the employee should have come away scot free."

²⁷ *Greater Letaba Local Municipality v Mankgabe NO* (2008) 29 ILJ 1167 (LC).

²⁸ *Idem* par 31 at 1176.

management found that the suspended dismissal was too lenient and unfair in circumstances where the transgression was serious and the disciplinary code prescribed dismissal as the appropriate penalty.²⁹ The employer *mero motu* decided to summarily dismiss the employee.

It must be emphasised that the collective agreement between the employer and the trade union on behalf of the employees, encompassed the employer's disciplinary procedures. The collective agreement determined that the decision of the disciplinary tribunal shall be final and binding.³⁰ On this premise the Court found the employer's intervention unfair for two reasons. Firstly, the employee was not afforded the right to a second hearing before the second penalty was meted out. Secondly, the employer acted *contra* the collective agreement by altering the sanction of the chairperson.³¹ The disciplinary procedure obliged the employer to implement the final decision of the chairperson and did not permit the employer to appeal against the sanction.

Unlike the analogous judgment of *SAMWU v SALGB*,³² the chapter on fairness was not prematurely closed. The Court had regard to the negative effect that the employee's remorseless conduct had on the employment relationship.³³ It would be unfair for the employer to retain the employee in employment where there is a breach in the trust relationship.

In this context the judgment is significant. The Court observed that at times the substance of the dismissal may be comparatively so compelling as to justify the cause of deviation from the agreed disciplinary proceedings.³⁴

²⁹ *Idem* par 30 at 1176.

³⁰ *Idem* par 17 at 1173.

³¹ *Ibid.*

³² *Infra.*

³³ *Idem* par 34 at 1177.

³⁴ *Idem* para 26 – 28 at 1174 to 1175 "...deviation from or breach of a specific provision of the collective agreement, which governs disciplinary proceedings, is not per se fatal to the employer's decision whereby an employee was dismissed."

It is not a requirement to prove that the chairperson had ulterior motives or acted with bias before a disciplinary penalty, based on inconsistency, may be interfered with.³⁵ The Court confirmed in *Greater Letaba Municipality v Mankgabe NO*³⁶ that a wrong decision should not be allowed to stand on the grounds of the disciplinary chairperson's innocent motives.³⁷

Hutchinson contends that a disciplinary decision that is tainted with inconsistency may be cured, in the interest of fairness, by conducting a second disciplinary enquiry.³⁸

Employer intervention in these circumstances must always comply with rules of natural justice. Failure to afford an employee a second hearing before altering the inconsistent sanction imposed by the chairperson, constitutes procedural unfairness.³⁹

5. Unreasonable Decision

An inappropriate decision of a disciplinary tribunal constitutes a material irregularity that may warrant a second hearing. Grogan asserts that a fundamentally flawed decision or a penalty that induces a sense of shock are factors that could impact on the fairness of employer intervention and that may substantiate interference with the disciplinary penalty.⁴⁰

It was suggested in *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries (Pty) Ltd*⁴¹ that the majority decision in *BMW v Van der Walt*⁴² also rescues employers from the untenable situation of having to retain in

³⁵ *SRV Mill Services (Pty) Ltd v CCMA* (2004) 25 ILJ 135 (LAC) par 26 at 144; *Cape Town City Council v Masitho* (2000) 21 ILJ 1957 (LAC).

³⁶ *Op cit.*

³⁷ *Supra* par 42 at 1178.

³⁸ Wayne Hutchinson "Remedying Inconsistency by Conducting a Second Disciplinary Hearing" (2006) *Industrial Law Journal* 2036.

³⁹ *Idem* par 16 at 1173.

⁴⁰ Grogan "Double Jeopardy: Fairness is the test" *Employment Law* (2004) 4.

⁴¹ *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries (Pty) Ltd* (2007) 28 ILJ 2888 (ARB).

⁴² *Op cit.*

employment a person whose conduct is such that the trust relationship has broken down entirely, following an unjustifiably lenient decision.⁴³

A lenient decision may be as a result of the disciplinary chairperson failing to apply his mind to the task at hand, failure to apply the disciplinary code or his or her *mala fides*.⁴⁴ The employee should not be entitled to snatch at the bargain of an aberrant decision delivered by a chairperson who has failed to properly execute the task entrusted to it.⁴⁵

The following extract of the judgment of *Ntshangase v MEC for Finance: KwaZulu-Natal*⁴⁶ encapsulates the fairness of deviation in respect of the doctrine of double jeopardy based on an unreasonable decision:

*"The chairperson's decision, measured against the charges on which he convicted the employee, appear[s] [sic] to be grossly unreasonable. Given the yawning chasm in the sanction imposed by the chairperson and that which the court would have imposed, the conclusion is inescapable that the chairperson did not apply his mind properly or at all to the issue of an appropriate sanction. The chairperson's decision is patently unfair to the employer...In the circumstances, the second respondent was entitled to take such a decision on review..."*⁴⁷

It is submitted that this dictum may equally apply to unreasonable decisions of disciplinary chairpersons in the private sector.

C. BMW (SA) (Pty) Ltd v Van der Walt⁴⁸

1. Summary of Facts

A senior road testing manager of BMW (SA) removed, under false pretence, redundant wheel alignment equipment from the employer's premises for repairs at Garaquip CC. The employee sold the repaired equipment that he

⁴³ *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries (Pty) Ltd* par 16 at 2895.

⁴⁴ *Idem* par 19 at 2896.

⁴⁵ *Ibid.*

⁴⁶ *Op cit.*

⁴⁷ *Ntshangase v MEC for Finance supra* par 20 at 2663.

⁴⁸ (2000) 21 ILJ 113 (LAC).

dishonestly acquired and made a profit at his employer's expense. The employee's conduct led to an investigation and a disciplinary enquiry ensued. With the facts and evidence presented at the enquiry, the employee was found at fault for merely making a misrepresentation by removing the equipment for repairs. The employee was not found guilty of any disciplinary transgression and no sanction was imposed on the employee.

Only after the employer became aware of further and new information, namely a quotation with false information drafted by the employee, did the employer realise the enormity of the employee's deception. The employee's conduct demonstrated fraudulent intent far beyond making a mere false representation. The employer opened a second disciplinary enquiry against the employee approximately one month after the initial enquiry. It is noteworthy that at the second disciplinary hearing the charges were in substance the same alleged misconduct that the employee faced in the first disciplinary enquiry and of which he was found not guilty.⁴⁹ Subsequent to the second enquiry, the employee was found guilty of the alleged misconduct and dismissed.

2. Legal Issues

The main legal issue that required the Labour Appeal Court's attention was whether or not a second disciplinary enquiry may be opened against an employee that is instituted on the same factual basis as the first enquiry.⁵⁰ The Court also had to consider whether the principles of *autrefois acquit* and *res judicata* ought to be imported into labour law.

3. Discussion of Judgment

The dictum in this case provides that an employer is entitled to subject an employee to more than one disciplinary enquiry where it is in all the

⁴⁹ *Idem* par 17.

⁵⁰ *Idem* par 12.

circumstances fair to do so.⁵¹ On this basis the Court found that the principles of *autrefois acquit* and *res judicata* (also known as the *double jeopardy rule*⁵²) are public policy rules and should not be imported into labour law. These public policy rules are founded on public interest and the finality in criminal and civil cases is thought to outweigh the harm which may in individual cases be caused by the application of the rule.⁵³ Finality to a dispute is not the determining factor in labour relations as to whether or not a second enquiry may be opened against an employee. The breakdown of the trust relationship⁵⁴, *bona fide* actions of employer⁵⁵ and fairness to both the employer and employee are decisive factors when considering the propriety of second disciplinary enquiries.

The Court remarked that a second hearing would probably not be considered to be fair, save in rather exceptional circumstances.⁵⁶ The Court did not elaborate on the circumstances that are deemed exceptional. It is suggested that "exceptional circumstances" in this context require that an employer needs to show something more than merely relying on dissatisfaction with the outcome of the first disciplinary enquiry when proving the fairness of deviating from the rule of one enquiry.

The Court further commented that a second hearing may be *ultra vires* the employer's disciplinary code which may be a stumbling block for the employer.⁵⁷ The Court did not state that a provision in the employer's disciplinary code, authorising the employer to conduct a second hearing, is a prerequisite for deviating from the norm of one enquiry. An employer may surmount the stumbling block if fairness necessitated the second enquiry.

The ultimate test to determine the propriety of a second disciplinary hearing is fairness. The Court enunciated this true test as follows:

⁵¹ *Idem* par 12 at 117.

⁵² *Vide* paragraph B.2 in Chapter 3 *supra*.

⁵³ *BMW v Van der Walt supra* par 12 at 117.

⁵⁴ *Idem* par 13 at 118.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

*In labour law fairness and fairness alone is the yardstick.*⁵⁸

D. SARS v Commission for Conciliation, Mediation and Arbitration⁵⁹

1. Summary of Facts

An employee of the South African Revenue Service ("SARS") perpetrated misconduct in that he allegedly uttered abusive and derogatory language towards his team leader. The dispute resolution procedures of SARS are regulated in terms of a disciplinary code that is embodied in a collective agreement. The employee was invited to a disciplinary enquiry that was chaired by an independent panellist who was authorised, in terms of the collective agreement, to make a finding on guilt and to impose a disciplinary penalty. In accordance with the collective agreement SARS had to implement the sanction imposed by the designated chairperson.

The chairperson found the employee guilty of the alleged misconduct after a properly constituted disciplinary enquiry and sanctioned that the employee be given a final written warning valid for six months, be suspended without pay for a period of ten days and receive counselling. Initially the employer and the employee accepted the finding and outcome of the disciplinary enquiry, but the SARS Commissioner, after reviewing the imposed penalty, was dissatisfied therewith on the basis that SARS is an organ of State and should not be seen employing persons guilty of such serious misconduct.⁶⁰ The employer substituted the initial penalty with summary dismissal without a further enquiry. The disciplinary procedure in the collective agreement is silent about whether the employer may substitute the chairperson's decision.

⁵⁸ *Ibid.*

⁵⁹ (2010) 3 BLLR 332 (LC).

⁶⁰ *Idem* par 54 at 341.

The CCMA commissioner who arbitrated the unfair dismissal dispute solely relied on the decision of *County Fair Foods v CCMA*⁶¹ and held that the employer was prohibited from overruling the chairperson's decision in the absence of an express provision in the employer's code permitting such substitution. The Commissioner ordered reinstatement on the same conditions imposed by the disciplinary chairperson. SARS unsuccessfully applied to the Labour Court for the review of the arbitration award. SARS has subsequently filed an appeal at the Labour Appeal Court and the matter is currently *sub iudice*.⁶²

2. Legal Issues

The Labour Court recorded four issues that it needed to decide.⁶³ For purposes of this dissertation a combined description of the relevant legal issues is furnished. Does the law permit an employer to interfere with a sanction, imposed by a properly constituted disciplinary tribunal, by substituting the sanction with a more severe sanction in the absence of express power of substitution in the disciplinary procedure incorporated in a collective agreement?

3. Discussion of Judgment

The employer relied on *Ntshangase v MEC: KwaZulu-Natal*⁶⁴ in support of its argument that the chairperson's decision was not final and binding, but reviewable.⁶⁵ The employer acknowledged the sanctity of the collective agreement but contended that it does not alter the law.⁶⁶ The alleged breach of the trust relationship between the parties was raised to justify deviation from the outcome of the chairperson's decision. The employer suggested that

⁶¹ *Op cit.*

⁶² The appeal is filed under Labour Appeal Court case number JA06/11.

⁶³ *Idem* par 22 at 336.

⁶⁴ *Supra.*

⁶⁵ *SARS v CCMA supra* par 12 at 334.

⁶⁶ *Idem* par 8 at 334.

the decision of the arbitrator, relying solely on *County Fair Foods v CCMA*,⁶⁷ was reviewable.

It was submitted on behalf of the employee that the initial disciplinary decision was peremptory, not advisory, and the employer had no discretion to deviate from the collective agreement which is silent on the employer's power of substitution or internal reviewing powers. The employee's argument was framed along the lines of the decision in *County Fair Foods v CCMA*.⁶⁸

The Court found that this matter was comparable with *County Fair Foods v CCMA*.⁶⁹ Both the Court and the CCMA Commissioner *in casu* interpreted the dictum of *County Fair Foods v CCMA*⁷⁰ as follow:

*...[A]n employer cannot overturn a sanction imposed by a chairperson of a disciplinary inquiry unless the Disciplinary Code and Procedure permits it.*⁷¹

The Court favoured the argument of the employee and followed a narrow approach in judging the employer's intervention in the circumstances where the collective agreement is silent about the employer's power to substitute the disciplinary penalty with its own. The reasoning in this matter was confined to the terms of the collective agreement. The Court reasoned that the most reasonable inference, concerning the silence in the collective agreement about whether the employer can substitute the decision of the chairperson with its own decision, is that the parties to the collective agreement did not intend to grant management the power of substitution.⁷² The Court stated:

*"To infer otherwise would be to interfere with the bargain and to make an agreement which the parties either never intended or could not make for themselves."*⁷³

⁶⁷ *Supra.*

⁶⁸ *Supra.*

⁶⁹ *Supra.*

⁷⁰ *Supra.*

⁷¹ *SARS v CCMA supra* par 21 at 336.

⁷² *Idem* par 26 at 336.

⁷³ *Ibid.*

This inference, respectfully, places form over substance. The inference relates to prediction, or lack thereof, at the time of negotiating the agreement.⁷⁴ Surely, the parties to the collective agreement did not intend for the employer or other employees to be saddled with an inappropriate decision? An egregious disciplinary decision in respect of one employee almost invariably is equally unfavourable to other employees.

The inference of the Court went so far as to conclude that the collective agreement barred the employer from intervention.⁷⁵ It should be emphasised that the collective agreement was silent on this aspect. The agreement did not permit employer intervention, but it was not explicitly forbidden either.

According to the Court the decision of the employer to interfere and substitute the sanction imposed by the chairperson related to the substantive unfairness of the dismissal. The interference with a disciplinary decision is unjustified in the absence of a provision in a disciplinary code permitting same.⁷⁶ The absence of a pre-dismissal hearing when the initial sanction was substituted with dismissal, rendered the dismissal procedurally unfair.⁷⁷

The present matter was distinguished from *BMW v Van der Walt*⁷⁸ but the Court did not elaborate on the reasons for this distinction.⁷⁹ In both instances the employers deviated from the double jeopardy principle.

Neither the Commissioner, nor the Court endeavoured to establish whether the intervention by the employer was fair. Both ended the enquiry after referring to the silence in the disciplinary code about employer intervention. At the arbitration and the review proceedings unfairness was presumed solely on the absence of an explicit provision in the disciplinary code authorising intervention.

⁷⁴ *Idem* par 25 at 336.

⁷⁵ *Idem* par 52 at 340.

⁷⁶ *Idem* par 27 at 337.

⁷⁷ *Idem* 52 at 340.

⁷⁸ *Supra*.

⁷⁹ *SARS v CCMA supra* par 28 at 337.

After the Court found that the decision of the disciplinary chairperson was not internally reviewable by the employer, it confirmed that the decision is in fact externally reviewable by the Labour Court. Here the Court touches the correct chord by describing the issue as follows:

"If, therefore, in principle or as a matter of fairness and justice, it should be possible to reject the decision of the chairperson of disciplinary enquiry, does the law permit it? [sic]"⁸⁰ (my emphasis)

The alleged breach of the trust relationship was considered for the first time when the Court accepted the invitation from the employer not to place form over substance. Only when the Court reviewed the disciplinary chairperson's decision, in terms of Section 158(1)(h) of the LRA, did the Court assess whether the employer's decision to substitute the disciplinary decision with its own decision was fair.

It is submitted that the dictum in *BMW v Van der Walt*⁸¹ is applicable to the facts of this matter. Had the Court applied the test of fairness in the first instance, it would probably have reached the same result without the necessity of invoking a remedy that breaches the parity principle in dispute resolution systems for private and public sector employment.

E. *Samson v Commission for Conciliation, Mediation and Arbitration & others*⁸²

1. Summary of Facts

The employee perpetrated gross misconduct in that he distributed pornography on the employer's intranet. The chairperson found the employee guilty of the alleged transgression and imposed a final written warning valid for three years subsequent to a properly constituted disciplinary hearing, at which the employee pleaded guilty, expressed remorse and apologised for his

⁸⁰ *Idem* par 29 at 337.

⁸¹ *Supra*.

⁸² (2010) 31 ILJ 170 (LC).

conduct. The employer's executive vice-president for corporate affairs reviewed the merits of the matter and reconsidered the sanction imposed by the disciplinary chairperson.⁸³ The employer substituted the sanction of the chairperson with its own sanction and dismissed the employee. The reason for the employer's interference with the initial disciplinary penalty appears to be that the chairperson did not apply the disciplinary code and standards set by the employer.⁸⁴

The employer did not afford the employee an opportunity to make representations before it altered the sanction to a more severe sanction. The employer did, however, grant the employee a right to appeal against the altered sanction.⁸⁵ On appeal the employee unsuccessfully raised the defence of *double jeopardy*. The employee was also unsuccessful at the arbitration in the CCMA and applied to the Labour Court to review and set aside the commissioner's arbitration award.

2. Legal Issues

The employee challenged the substantive and procedural fairness of the dismissal. The legal issue relating to substantive unfairness was whether the employer was entitled to revisit a penalty already imposed by an appointed chairperson and substitute it with a more severe penalty. In addition, whether exceptional circumstances existed that could justify the substitution of the penalty of the disciplinary chairperson.

The issue on procedural unfairness pertained to the failure of the employer to afford the employee a hearing before the decision was taken to alter the penalty imposed by the disciplinary chairperson.

⁸³ *Idem* par 2 at 173.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

3. Discussion of Judgment

The importance of this judgment is that the Court confirmed the well-established principle that an employer may revisit a disciplinary penalty previously imposed by an appointed chairperson if it is fair to do so.⁸⁶

There are three main factors which the Court took into account when confirming the substantive fairness of the dismissal. Firstly, the existence of a long-standing practice in the workplace that senior management (the executive vice-president) may review decisions of appointed chairpersons in disciplinary enquiries.⁸⁷ The second factor concerned the disciplinary code of the employer that did not prohibit the employer from reviewing or revisiting the disciplinary penalty of the appointed chairperson.⁸⁸ Thirdly, exceptional circumstances were present that justified the interference of the employer. The exceptional circumstances were found in the seriousness of the employee's misconduct and the fact that the disciplinary code prescribed dismissal as the appropriate penalty for employees guilty of distributing pornography.⁸⁹

In essence, the Court found that it was fair for the employer to revisit the disciplinary penalty where the appointed disciplinary chairperson did not apply the disciplinary code and imposed a penalty that did not conform to the set standards of the employer.

In the judgment there is, however, no apparent enquiry into the breach of the trust relationship between the parties that could indicate whether dismissal was indeed the appropriate sanction in the circumstances.⁹⁰ The position and interests of the employee should also be considered when deciding on the fairness of the interference of the employer.⁹¹ Disciplinary chairpersons

⁸⁶ *Idem* par 12 at 177.

⁸⁷ *Idem* par 11 at 177.

⁸⁸ *Ibid.*

⁸⁹ *Idem* par 14 at 179.

⁹⁰ *Edcon Ltd v Pillemer NO supra* par 23 at 2652.

⁹¹ *Branford v Metrorail supra* par 16 at 2278.

generally have a discretion with regard to sanction.⁹² It is mentioned in the judgment that the employee pleaded guilty, was remorseful and apologised to his fellow employee for his conduct.⁹³ These circumstances could have swayed the disciplinary chairperson from imposing the drastic sanction of dismissal.

The executive vice-president was not present at the initial enquiry and reconsidered the sanction imposed by the disciplinary chairperson without affording the employee a hearing before he made the decision to alter the penalty to a more severe one.

The Court accepted that the right to appeal afforded to the employee, after the decision to alter the penalty, met the requirement of procedural fairness.⁹⁴ The Court referred to the decision of *Semenya v CCMA*⁹⁵ and declared that it does not axiomatically follow that a failure to afford a hearing before a decision is taken is unfair.⁹⁶

It must be stressed that the Court in *Semenya v CCMA*⁹⁷ concluded that the opportunity to be heard after the decision was made must be as fair as, or even fairer than, the opportunity that the employee was entitled to before the decision.⁹⁸ In that matter the Court based procedural fairness on the fact that the employee was afforded a hearing which was presided over by an independent chairperson of her choice.⁹⁹ *In casu* the decision to dismiss was a foregone conclusion.

What will the outcome on procedural fairness be if the employee decided not to make use of his right to appeal? Can it then be said that the employee

⁹² *Theewaterskloof Municipality v IMATU on behalf of Visagie supra* par 25 at 1038.

⁹³ *Samson v CCMA supra* par 2 at 173.

⁹⁴ *Idem* par 14 at 179.

⁹⁵ (2006) 27 ILJ 1627 (LAC).

⁹⁶ *Samson v CCMA supra* par 14 at 179.

⁹⁷ *Op cit.*

⁹⁸ *Idem* par 30 at 1638.

⁹⁹ *Ibid.*

waived his right to a fair hearing by declining to file an appeal against the second disciplinary decision?

F. *SA Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council*¹⁰⁰

1. Summary of Facts

This matter concerns a public service employee that was disciplined for serious misconduct in that he behaved grossly insolent and caused disruption at the municipality where he was employed.¹⁰¹ The presiding chairperson of the properly constituted disciplinary enquiry found the employee guilty of the alleged misconduct and recommended a sanction of dismissal, conditionally suspended for a period of 12 months.

The parties were bound by a collective agreement concluded under the auspices of SALGBC¹⁰², which incorporated the disciplinary procedure that was deemed to be a condition of service. In terms of the collective agreement the chairperson had to make findings of fact and determine a sanction that was final and binding. The employer was, however, informed by the chairperson that the decision was merely a recommendation and that the employer has a right to deviate from the recommended sanction. The employer then altered the initial sanction to one of summary dismissal without affording the employee a further opportunity to be heard.

The rationale behind the employer choosing a harsher sanction than that of the chairperson is unclear and the Court merely mentioned that *the recommendation was not to the employer's liking*.¹⁰³ One can speculate that the employer found the recommendation too lenient, especially taking into

¹⁰⁰ (2011) 32 ILJ 2738 (LC).

¹⁰¹ *Idem* par 5 at 2741.

¹⁰² *Ibid* (South African Local Government Bargaining Council "SALGBC").

¹⁰³ *Idem* par 2 at 2740.

account the seriousness of the employee's misconduct as described in the judgment.¹⁰⁴

The employee alleged that the dismissal was substantively and procedurally unfair at the unfair dismissal arbitration under the auspices of SALGBC. The challenge on substantive unfairness related to the deviation from disciplinary procedure contained in the collective agreement. In this respect the employee contended that the chairperson's decision was final and binding in terms of the collective agreement and that the employer was precluded from substituting the recommended sanction with its own sanction.

Procedural unfairness was based on the fact that the employee was not afforded another opportunity to make representations prior to the employer substituting the recommended sanction with a more severe sanction.

The arbitrator found that the dismissal was substantively fair and referred to the well-established principle that failure to follow an agreed procedure does not necessarily render a dismissal unfair.¹⁰⁵ The dismissal was found to be procedurally fair based on the fact that both parties had ample opportunity to present mitigating and aggravating circumstances at the initial enquiry. The Labour Court found the arbitrator's conclusions unreasonable and the award was reviewed and set aside.

2. Legal Issues

Was it substantively unfair for the employer to impose a more severe sanction than the recommended sanction of the appointed chairperson in circumstances where the collective agreement, regulating disciplinary procedure, specifically assigned the power to decide on a sanction to the chairperson?

¹⁰⁴ *Idem* par 5 at 2741.

¹⁰⁵ *Idem* par 12 at 2742 In support of the commissioner's finding he referred to *Highveld District Council v CCMA (2003) 24 ILJ 517 (LAC)*.

Did the employer act procedurally unfair by not affording the employee an opportunity to make representations to the employer on whether or not a different sanction could, or should, be imposed?

3. Discussion of Judgment

Having regard to the judgment as a whole, the Court placed the emphasis throughout the assessment of the matter squarely on the collective agreement and the wording of specific clauses. The Court found that the disciplinary code incorporated in the collective agreement was not intended to be a guideline but that its provisions were mandatory.¹⁰⁶ This was the starting point of the Court's reasoning, which was based on the express provision that the disciplinary code was a product of collective bargaining, deemed to be a condition of service and the application thereof was thus peremptory.¹⁰⁷

The Court made a clear distinction between merely recommending and imposing a sanction.¹⁰⁸ This matter was identified as one in which the chairperson had been given specific powers to impose a sanction in terms of a disciplinary code that is binding on the employer and the employee.¹⁰⁹

The following wording of the disciplinary procedure was emphasised by the Court:

"The determination of the disciplinary tribunal shall be final and binding on the employer save that the employee may lodge an appeal thereto" (emphasis of the court).

No provision was made in the collective agreement for the employer to appeal against the decision of the appointed disciplinary chairperson. The Court recognised this and expressed that the employer has no recourse in terms of the disciplinary procedure if it is dissatisfied with the disciplinary outcome.¹¹⁰

¹⁰⁶ *Idem* par 24 at 2744.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Idem* par 25 at 2745.

¹⁰⁹ *Idem* par 24 at 2744.

¹¹⁰ *Idem* par 28 at 2745.

It is noteworthy that the Court did not convey that an employer may not in general appeal against a disciplinary outcome. *In casu*, express provision was made for the employee to appeal against the disciplinary outcome, however, no similar provision was made for the employer.¹¹¹ On this basis the decision to dismiss was unfair. The employer failed to design a measure that could authorise it to reconsider or revise an egregious disciplinary decision. In the circumstances it was substantively unfair for the employer to reclaim disciplinary powers which it has previously relinquished in terms of a binding collective agreement.

The Court distinguished this matter from *Samson v CCMA*¹¹² on the grounds that in that matter no collective agreement existed and there was a well-established practice of reviewing disciplinary sanctions internally.¹¹³

Presumably, the court had a perception of some unreasonableness concerning the sanction recommended by the chairperson. The Court asserted that the employer was not entirely without recourse and referred to the external review procedure contemplated by Section 158(1)(h) of the LRA.¹¹⁴ The Court nevertheless persisted with a legalistic approach.

The finding of procedural unfairness was founded on the absence of an opportunity to make representations to the employer before it determined another sanction.¹¹⁵ The Court held that it would be procedurally fair to allow the employee an opportunity to make representations to the actual decision-maker, which in this instance is someone other than the initial chairperson. Further, the employee should have been given an opportunity to make representations on whether any different or harsher sanction could validly be made by the employer.¹¹⁶

¹¹¹ *Ibid.*

¹¹² *Op cit.*

¹¹³ *SAMWU v SALGBC supra* par 30 at 2746.

¹¹⁴ *Idem* par 33 at 2747.

¹¹⁵ *Idem* par 26 at 2745.

¹¹⁶ *Ibid.*

The Court referred to the dictum of *Telkom SA v CCMA*¹¹⁷ which confirms that it is procedurally unfair not to grant an employee an opportunity to make further representations before a more serious sanction is imposed than the initial sanction.¹¹⁸

The judgment in its entirety was silent about the test of fairness as enunciated in *BMW v Van der Walt*.¹¹⁹ Although the Court in *BMW v Van der Walt*¹²⁰ warned that an employer's interference may be *ultra vires* the employer's disciplinary code, and that it may be a stumbling block, that was however not the ultimate test. The true test is whether it is fair for an employer to substitute the penalty of a chairperson with its own decision. From the reading of the judgment it seems that the enquiry ended at the inflexible interpretation of the disciplinary procedure, albeit contained in a collective agreement. No enquiry into the rationale for the employer's interference is evident. No reference is made to any possible prejudice that the employer could suffer in having to retain an employee in employment despite a breach of the trust relationship between the parties.

G. Conclusion

A formalistic and inflexible approach to disciplinary fairness has no place in South African labour law. Smit asserted that the legislature, by implementing the LRA and Schedule 8, made an attempt to move away from over-proceduralism in disciplinary enquiries.¹²¹ The stringent functioning of the doctrine of double jeopardy should not be imported into labour law. Although it is an important and valuable principle that contributes to fairness in labour relations, deviation in respect thereof need not be adjudicated with legalism.

Having regard to the right of freedom to contract, the primacy of collective agreements, economic prosperity, the trust relationship inherent in

¹¹⁷ *Telkom SA v CCMA* (2002) 23 ILJ (LC).

¹¹⁸ *Idem* par 14 at 539; *SAMWU v SALGB* *supra* par 26 at 2745.

¹¹⁹ *Supra*.

¹²⁰ *Supra*.

¹²¹ Smit (2010) par 6.2.3 at 147.

employment relations, flexibility, and consistency of workplace discipline, it is strongly contended that fairness must be the determining factor when evaluating a decision of an employer to intervene with a disciplinary outcome.

CHAPTER 5

COMPARATIVE SURVEY

A. Introduction

The double jeopardy principle is a universal concept. Many countries recognise the double jeopardy rule in their constitutions.¹ The constitutional conception of double jeopardy generally pertains to criminal law. Although the doctrine of double jeopardy is not specifically imported into labour law in the RSA and UK, the underlying principle is taken into account in assessing the fairness of dismissal following second disciplinary proceedings based on the same facts.

Comparative research was deemed necessary for this dissertation for the following reasons: an international perspective is relevant as it serves as an important point of reference when interpreting legislation and legal issues in the RSA.² An international perspective on labour dispute resolution may assist in finding solutions for difficulties experienced in the South African labour law system. In this chapter the perception of the doctrine of double jeopardy in labour relations in the UK and Canada is compared to the perspective in South Africa.

B. United Kingdom

1. Introduction

In the UK the commonly known doubly jeopardy rule is referred to in legal terms as the doctrine of *res judicata*. The principles concerning the application of this common law principle in the UK are much the same as in South Africa. The ground-breaking decision in *Christou v London Borough of*

¹ Section 11H of the Canadian Charter of Rights.

² *Avril Elizabeth Home of the Handicapped v CCMA* (2006) ILJ 1644 (LC).

*Haringey*³ expressed that the strict principles of *res judicata* are not applicable to internal disciplinary proceedings and confirmed that exceptional circumstances may warrant second disciplinary action against an employee. In this part of the work the legislative framework in employment relations is explored, as well as the measures which are implemented to determine disciplinary fairness in English employment law.

2. Legislative Framework

Labour law in Britain is derived from multiple sources, *inter alia*, legislation, common law, collective agreements and disciplinary codes.⁴ Unfair dismissal is a statutory concept consolidated almost entirely within the Employment Rights Act⁵ [hereafter the ERA]. Section 94(1) of the ERA provides that an employee has the right not to be unfairly dismissed by the employer. For a dismissal to be fair in the United Kingdom, it must comply with the requirements of substantive and procedural fairness.⁶

The correct approach to determine fairness of a dismissal is set out in Section 98(4) of the ERA which provides as follows:

"In any other case where the employer has fulfilled the requirements of subsection 1, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) ...

(b) *Shall be determined in accordance with equity and the substantial merits of the case.*"⁷

The Employment Act⁸ [hereafter the EA] expands on the disciplinary procedures contained in the ERA.⁹ Schedule 2 of the EA provides

³ *Infra*.

⁴ Deakin & Morris *Labour Law* (2012) 57.

⁵ Employment Rights Act 1996.

⁶ Smit (2010) par 3.4.3 at 63.

⁷ ERA 1996, Chapter 18, Part X. The ERA was amended by Employment Rights Dispute Resolution Act 1998 "ERDRA".

⁸ Employment Act 2002 as amended by Regulation 2004 (Dispute Resolution).

⁹ Smit (2010) par 3.4.2 at 61.

requirements on procedural fairness.¹⁰ Schedule 2 of the EA can be compared with Schedule 8 annexed to the LRA of the RSA.

Unfair dismissal disputes are dealt with in the United Kingdom [UK] by the Employment Tribunal¹¹ and Advisory Conciliation and Arbitration Service¹² [hereafter ACAS]. Dismissal law in South Africa and in the United Kingdom is very similar in nature.¹³

3. Disciplinary Fairness

Internal disciplinary proceedings are not viewed as litigation in the UK.¹⁴ It was established in *Sarkar v West London*¹⁵ that the principles of *res judicata* or abuse of process are, therefore, not applied to internal proceedings. However, the fairness of subjecting an employee to a second disciplinary proceeding will be considered under ERA Section 98(4)."

Whether an employer acted reasonably or unreasonably in dismissing an employee must be determined in accordance with equity and the substantial merits of the case.¹⁶ The key consideration is, therefore, the reasonableness of the employer's conduct and not the injustice to the employee.

Lord Mackay of Clashfern states that in considering whether an employer acted reasonably or unreasonably, a broad approach of common sense and common fairness must prevail, eschewing all legal or other technicalities.¹⁷

In *Iceland Frozen Foods Ltd v Jones*¹⁸ the "range of reasonable responses test" is described as:

"...to determine whether in the particular circumstances of each case

¹⁰ *Idem* par 3.4.3 at 63.

¹¹ Employment Tribunals Act 1996.

¹² Statutory Instrument 1998 No 14 *The Employment Protection Code of Practice (Disciplinary Practice and Procedure)* Order 1998.

¹³ Smit (2010) par 6.4 at 153.

¹⁴ *Sarkar v West London health NHS Trust* [2010] IRLR 508.

¹⁵ *Ibid.*

¹⁶ Lord Mackay of Clashfern *Halsbury's Laws of England* (2009) par 724 at 180.

¹⁷ *Ibid.*

¹⁸ [1983] ICR 17.

*the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair, but, if the dismissal falls outside the band, it is unfair.*¹⁹

In the UK the concept of fairness in all the circumstances means that the employment tribunal ought to look at both sides in any situation with sympathetic understanding.²⁰

4. Positive Law in respect of the Doctrine of Double Jeopardy

Before the decision in the very recent matter of *Christou v London Borough of Haringey*,²¹ decided by the Employment Appeal Tribunal, English Law pertaining to the doctrine of double jeopardy appeared to have placed an absolute bar on an employee being tried twice on substantively the same issues.²²

In *Coke-Wallis v ICAEW*²³ the issue concerned the relevance and application of the principles of *autrefois acquit*, *res judicata* and abuse of process in the context of successive proceedings before a regulatory or disciplinary tribunal. It was held that the principle of *res judicata* is applicable to disciplinary proceedings, which are civil in nature.²⁴ The basis of this decision was that the substance of the underlying conduct on which the employee was charged, was the same in both complaints, and the decision of the first disciplinary tribunal was final and made on the merits of the case.²⁵ Lord Collins (Minority judgment) remarked that the effect of the decision is that a person who has shown by discreditable conduct that he is not fit to practice as a chartered accountant may, nevertheless, continue to do so.²⁶

¹⁹ *Idem* at 24 – 25.

²⁰ Lord Mackay of Clashfern (2009) par 724 at 181.

²¹ *Christou v London Borough of Haringey* UKEAT/0298/11/DM, the judgment was handed down on 25 May 2012.

²² *Coke-Wallis v Institute of Chartered Accountants in England and Wales* 2011 UKSC 1.

²³ *Ibid.*

²⁴ Canning "Res judicata Principle Applies to Disciplinary Proceedings" (2011) *Mayer & Brown Legal Update* 2.

²⁵ *Coke-Wallis v Institute of Chartered Accountants in England and Wales* par 51 at 17.

²⁶ *Idem* par 60 at 20.

The judgment of *Coke-Wallis v ICAEW*²⁷ illustrates that the rigid *res judicata* principles have no place in labour relations and may lead to absurd consequences.

The reasoning in *Christou v London Borough of Haringey*²⁸ provides a more flexible approach and the facts are succinctly as follows: Two employees were charged with misconduct in that they failed to comply with the employer's policies and procedures that resulted in the death of a baby, for whose care they were responsible. In terms of a "Simplified Disciplinary Procedure", both employees received written warnings.

New senior management was appointed who undertook a re-investigation of the incident after comprehensive negative media coverage of the matter. The employees were subjected to second disciplinary procedures and dismissed eighteen months after the initial sanction was imposed. The employer considered the initial sanctions inadequate.²⁹

The following principles pertaining to the application of the doctrine of double jeopardy in the disciplinary context were extracted from this judgment by the Employment Appeal Tribunal:

- i. Internal disciplinary proceedings and decisions by managers fall outside the scope of litigation;³⁰
- ii. The fact that two sets of disciplinary proceedings have been used was simply a factor to be considered when assessing the fairness of the dismissal, but it was not fatal to the ultimate decision to dismiss;³¹
- iii. The question in this situation was whether the dismissal of the employees fell within the range of reasonable responses by the

²⁷ *Supra.*

²⁸ *Supra.*

²⁹ Baines "Double Jeopardy in Employment?" *LLP* (2012) 1.

³⁰ *Ibid.*

³¹ *Christou v London Borough of Haringey supra* par 106 at 32.

employer and whether it was appropriate to undertake a second set of disciplinary proceedings against the Appellants;³²

- iv. An employer may be justified in revisiting the disciplinary action if the sanction that was imposed seems to be inadequate, especially where the misconduct complained of gave rise to a risk to the public;³³
- v. The fairness of taking an employee through a second disciplinary procedure was to be assessed in the light of the employer's reason for doing so;³⁴
- vi. The time period of eighteen months between the first and second disciplinary procedures is a relevant factor to consider, but did not prejudice the employees;³⁵
- vii. The circumstances under which a decision to discipline twice on the same facts would be fair only in extremely rare circumstances;³⁶
- viii. New information provides justification for second disciplinary proceedings.³⁷

C. Canada

1. Introduction

Although Canada does not have a labour law system comparable with South Africa, the principle of double jeopardy finds application in their internal disciplinary regime. A summary of the principles *re* the application of the doctrine of double jeopardy in internal disciplinary proceedings in Canada is provided hereunder.

³² *Idem* par 143 at 48.

³³ *Idem* par 57 at 16.

³⁴ *Idem* par 107 at 33.

³⁵ *Idem* par 159 at 53.

³⁶ Baines LLP (2012) 2.

³⁷ *Ibid.*

2. Legislative Framework

Canada has a federal government with 10 provinces and three territories.³⁸ Canada's labour law framework can, therefore, not be compared with the national labour legislation of the RSA that applies to employees all over the country. The termination of employment is regulated for instance, in the province of Ontario, in terms of the Employment Standards Act³⁹ [hereafter ESA]. In terms of the ESA, an employer is not obliged, like in the RSA, to provide reasons for a dismissal or to follow a disciplinary procedure before dismissing an employee for misconduct.⁴⁰ Termination of employment in Canada is generally effected *without cause*, by providing employees with reasonable notice of termination of employment or pay *in lieu* of notice.⁴¹ On the other hand, *just cause* termination typically involves serious, wilful misconduct on the part of the employee and may be compared with summary dismissal in South Africa. The exception in South Africa is that proper procedure needs to be followed before a dismissal may be effected regardless the cause.

The courts and arbitrators in Canada overall (except the province of Quebec) are obliged to have regard to common law principles when adjudicating employment grievances.⁴²

3. Disciplinary Fairness

Employers in all the provinces of Canada are generally not required by any legislation to conduct a disciplinary enquiry before summarily dismissing an employee for serious wilful misconduct. There are, however, measures in terms whereof an employee may challenge unfair disciplinary action, for

³⁸ http://www.nationsonline.org/oneworld/countries_canada.htm.

³⁹ Employment Standards Act, 2000.

⁴⁰ *Ibid.*

⁴¹ <http://www.blakes.com/DBIC/html/canada-27.htm>.

⁴² *Ibid.*

instance, where an employee had been disciplined twice for the same incident.⁴³

4. Positive Law in respect of the Doctrine of Double Jeopardy

Labour arbitral jurisprudence in Canada demonstrates that the double jeopardy rule finds application in their labour relations. In the matter of *Attorney General of Canada v Valmont Babineau*,⁴⁴ decided by the Federal Court, it was confirmed that an employee has been treated unfairly as he had been subject to "double jeopardy." It was held that this matter was a classic example of the unfairness of two levels of management that impose separate penalties for the same disciplinary transgression. The facts of the matter are concisely described as follow:

A correctional officer working at Dorchester Penitentiary, was sent home "without pay" by a supervisor of Correctional Service Canada, for refusal to perform assigned duties. The following day a higher level unit manager imposed a written reprimand for the same misconduct. Subsequently, another unit manager notified the employee in writing that eight hours' pay is also being deducted from his remuneration as a result of his absence from work, when he was sent home for failure to perform assigned duties. The Court found that the latter notice constituted second disciplinary action ("double jeopardy") and quashed the second penalty. The employer was directed to reimburse the employee his regular wages.

The main principles that are derived from this judgment are:

- The double jeopardy rule finds application to second disciplinary action once the employer has previously made a final disciplinary decision.⁴⁵

⁴³ <http://www.blakes.com/DBIC/html/canada-27.htm>.

⁴⁴ *Attorney General of Canada v Valmont Babineau* 2005 FC 1288 L.A.C.

⁴⁵ *Idem* par 8 – 11; *United Steelworkers v Torngait Services Inc.* at 12;
http://www.gov.nl.ca/lra/arbitration_awards/pdf/Torngait_Services_Inc_and_USWA.pdf

- It would defeat the purpose of the double jeopardy rule if the application thereof is limited so as to apply only once the employee is clearly informed that the matter is closed.⁴⁶

D. Conclusion

The evaluation of the positive law in the UK indicates that employers may discipline an employee twice for the same offence, imposing a harsher sanction the second time around. However, this type of disciplinary action should be treated with extreme caution and will only be justified in exceptional circumstances. The approach in *Christou v London Borough of Haringey*⁴⁷ compares well with the *locus classicus* in South Africa, *BMW v Van der Walt*,⁴⁸ on the subject of the propriety of second disciplinary enquiries. In the UK as in South Africa, the yardstick remains equity and fairness in unfair dismissal disputes.

In Canada, the principles of the doctrine of double jeopardy are applied strictly to employment disputes. The prohibition against second disciplinary action is unqualified in Canadian employment.

⁴⁶ *Attorney General of Canada v Valmont Babineau supra* at par 13.

⁴⁷ *Op cit.*

⁴⁸ *Op cit.*

CHAPTER 6

CONCLUSION

Does the doctrine of double jeopardy preclude employer intervention or the proverbial 'second bite at the cherry'? The rigid principles of double jeopardy does not form part of our labour law dispensation. The double jeopardy principle, however, is a necessary factor that is taken into account when deciding on the fairness of subjecting an employee to further disciplinary action.

Even though the employer has the primary responsibility to discipline an employee, the employer may not deviate from disciplinary procedure and standards set by itself, without justification. The employer's powers must be curtailed to some extent in order to countervail the inequality inherent in the employment relationship as expressed by Otto Khan-Freund.¹

A wide approach in labour disputes should be adopted when deliberating the fairness of deviating in respect of the double jeopardy rule. A disciplinary code, which is a guideline, should not be a stumbling block for fairness to prevail. Deciding against employer intervention, solely based on the absence of a provision in an employer's disciplinary code expressly providing for the right to intervene, is an unwarranted narrow approach that leads to absurd results.

The wider approach necessitates consideration of all the relevant facts and circumstances, not only the employer's disciplinary procedure, but including the effect of the employee's conduct on the trust relationship, public interest, the parity principle, reasonableness of the first sanction, appropriateness of the second sanction, reasonableness of the employer's decision to recharge the employee or reconsider the imposed sanction, prejudice to the parties, the time that has lapsed between the first and second disciplinary action and, essentially, the fairness to both the employee and employer.

¹ *Supra*.

It is evident that an employer may only reconsider a decision of a properly constituted disciplinary tribunal when it is fair to do so. It will be fair to do so in exceptional circumstances. These circumstances will be extremely rare. Even where an employer reserved the right in its disciplinary procedure to intervene with the decision of a disciplinary chairperson, the intervention must nevertheless, be justified. A second bite at the cherry is, therefore, possible. Identifying *exceptional* circumstances is not an easy task, in view of the test of fairness. Employers should therefore be conscientious in executing the important task to discipline.

*"No model or argument can ever supply the answers to be given by the industrial court in all cases. The reality of labour relations is far too complex, diverse, and rich for this."*²

² Rautenbach "Remedying Procedural Unfairness: An Employer's Dilemma" (1990) *Industrial Law Journal* 466.

BIBLIOGRAPHY

A. Books

- Basson AC, Christianson MA, Dekker A, Garbers C, Le Roux PAK, Mischke C
Strydom EML *Essential Labour Law* 5 ed (Labour Law Publications
Cape Town, 2009)
- Cachalia, Cheadle, Davis, Haysom, Maduna, Marcus *Fundamental Rights in
the New Constitution* (Juta & Co Ltd, 1994)
- Deakin S & Morris G S *Labour Law* 6 ed (Hart Publishing Ltd, 2012)
- Davies Freedland & Khan-Freund *Labour and the Law* 3 ed (Stevens & Sons
London, 1983)
- Grogan J *Workplace Law* 10 ed (Cape Town Juta & Co Ltd, 2010)
- Harms *Amler's Precedents of Pleadings* 7 ed (LexisNexis Durban, 2009)
- Hiemstra VG & Gonin HL *Drietalige Regswoordeboek* 3 ed (Juta en Kie Bpk,
Kaapstad, 2008)
- Lord Mackay of Clashfern *Halsbury's Laws of England* 5 ed (LexisNexis UK,
2009)
- Rycroft A & Jordaan B *A Guide to South African Labour Law* 2 ed (Juta & Co
Ltd Cape Town, 1993)
- Schmidt *Bewysreg* 4 ed (Juta & Co Ltd Durban, 2000)
- Van Niekerk A, Christianson MA, McGregor M, Smit N & van Eck BPS
Law@Work (LexisNexis Durban, 2008)
- Van Jaarsveld SR, Fourie JD & Olivier MP *Principles and Practice of Labour
Law* (LexisNexis Durban, 2012)

B. Articles

- Baines W "Double Jeopardy in Employment" (2012) *LLP*
[http://www.baineswilson.co.uk/articles/double jeopardy](http://www.baineswilson.co.uk/articles/double%20jeopardy)
- Cameron E "The Right to a Hearing before Dismissal" Part 1 (1986) 7 *ILJ* 183
- Canning C "Res Judicata Principle applies to Disciplinary Proceedings" (2011)
Mayer & Brown Legal Update (February)

- Green G "No Double Jeopardy in Internal Disciplinary Proceedings: Christou & Ward v London Borough of Haringey" (June 2012) *Employment Law Bulletin*
- Grogan J "Double Jeopardy" (2004) Vol 20 *Employment Law Journal* 4
- Hutchinson W "Remedying Inconsistency by Conducting a Second Disciplinary Hearing" (2006) *Industrial Law Journal* 2036
- Le Roux PAK "Reconvening Disciplinary Inquiries" (2001) *Contemporary Labour Law* 19
- Le Roux PAK "Double Jeopardy in Disciplinary Inquiries" (2003) *Contemporary Labour Law* 48
- Ponelis F "Double Jeopardy: When can an employee be recharged for the same offence?" (2011) *Contemporary Labour Law* 22
- Rautenbach NF "Remedying Procedural Unfairness: An Employer's Dilemma (1990) 11 *Industrial Law Journal* 466
- Smit PA "Disciplinary Inquiries in terms of Schedule 8 of the LRA of 1995: The Right to Discipline and Dismiss: An International Framework" (2010) *Unpublished PhD Thesis*, University of Pretoria
- Smit P & Van Eck BPS "International Perspectives on South Africa's Unfair Dismissal Law" (2010) XLIII *CILSA* 46

C. Internet

- <http://www.georgegreen.co.uk/news/214>
- <http://www.butterworths.up.ac.za/nxt/gateway.dll/bc/ke/rjxa/tp75a>
- <http://www.butterworths.up.ac.za/nxt/gateway.dll/bc/ke/95pgb/6srmb>
- <http://www.butterworths.up.ac.za/nxt/gateway.dll/bc/ke/xp28/ldaba/dc5pa>
- http://www.gov.nl.ca/lra/arbitration_awards/pdf/Torngait_Services_Inc_and_U_SWA.pdf
- http://www.nationsonline.org/oneworld/countries_canada.htm.
- <http://www.blakes.com/DBIC/html/canada-27.htm>.

D. Cases

Amalgamated Engineering Union of SA v Carlton Paper of SA (Pty) Ltd (1988)
9 ILJ 588

Attorney General of Canada v Valmont Babineau 2005 FC 1288 L.A.C.

Avril Elizabeth Home v CCMA (2006) ILJ 1644 (LC)

Bhengu v Union Co-operative Ltd (1990) 11 ILJ 117 (LC)

BMW v Van der Walt (2000) 21 ILJ 113 (LAC)

Booyesen v SAPS [2008] 10 BLLR 928 (LC)

Botha v Gengold Ltd [1996] 4 BLLR 441 (IC)

Branford v Metrorail Services (Durban) (2003) 24 ILJ 2269 (LAC)

Cape Town City Council v Masitho (2000) 21 ILJ 1957 (LAC)

CEPPWAWU obo Kopi & another v Chep SA[2010] 7 BALR 711 (CCMA)

Christou v London Borough of Haringey UKEAT/0298/11/DM

Coke-Wallis v Institute of Chartered Accountants in England and Wales 2011
UKSC 1

County Fair Foods v CCMA (2003) 24 ILJ 355 (LAC)

Cox v CCMA (2011) 22 ILJ 137 (LC)

CWIU v Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC)

Edcon Ltd v Pillemer NO & others (2009) 30 ILJ 2642 (SCA)

Greater Letaba Local Municipality v Mankgabe NO (2008) 29 ILJ 1167 (LC)

Highveld District Council v CCMA (2003) 24 ILJ 517 (LAC)

Kohida v Beier Wool (Pty) Ltd (1997) 18 ILJ 1104 (CCMA)

Mahlangu v CIM Deltak (1986) 7 ILJ 346 (IC)

Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin NO
(2008) 29 ILJ 1707 (LAC)

National Union of Metalworkers of SA v Vetsak Co-operative Ltd (1996) 4 SA
577 (A)

NEHAWU v University of Cape Town (2003) 3 SA 1 CC

Ntshangase v MEC for Finance: KwaZulu-Natal 2009 30 ILJ 2653 (SCA)

NUMSA on behalf of M Walsh v Delta Motors Corporation (Pty) Ltd (1998) 3
LLD 152 (CCMA)

Rakgolela v Trade Centre (2005) 3 BALR 353 (CCMA)

Regina (Redgrave) v Commissioner of Police of the Metropolis (2003) 1 W.L.R. 1136

Rossouw v SA Mediese Navorsingsraad (2) (1987) 8 ILJ 660 (IC)

Rustenburg Base Metal Refiners (Pty) Ltd v Solidarity (2009) 30 ILJ 378 (LC)

S v Singh (1990) 1 SA 123

SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd (1999) 20 ILJ 2302 (LAC)

SAMSON v CCMA (2010) 31 ILJ 170 (LC)

SA Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining council 2011 32 ILJ 2738

Sarkar v West London health NHS Trust [2010] IRLR 508

SARS v CCMA [2010] 3 BLLR 332 (LC)

Semenya v CCMA (2006) 27 ILJ 1627 (LAC)

Sidumo v Rustenburg Platinum Mines Ltd [2007] 12 BLLR 1097 (CC)

Slagmont (Pty) Ltd v Building Construction and Allied Workers Union (1995) 1 SA 742

Solidarity on behalf of Van Rensburg v Base Metal Refineries (Pty) Ltd (2007) 28 ILJ 2888 (ARB)

SRV Mill Services (Pty) Ltd v CCMA (2004) 25 ILJ 135 (LAC)

Telkom v CCMA (2002) 23 ILJ 536 (LC)

Telkom v Frost (2001) 22 ILJ 1253 (CCMA)

Theewaterskloof Municipality v Independent Municipal & Allied Trade Union on behalf of Visagie (2012) 33 ILJ 1031 (BCA)

UASA obo Davidtz v Kloof Gold Mining Company Ltd [2005] 7 BALR 787 (CCMA)

United Steelworkers, LOCAL 6480 v Torngait Services Inc
http://www.gov.nl.ca/lra/arbitration_awards/pdf/Torngait_Services_Inc_and_USWA.pdf

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

Wium v Zondi [2002] 11 BLLR 1117 (LC)

E. Legislation

Basic Conditions of Employment Act, 75 of 1997

Canadian Charter of Rights
Constitution of the Republic of South Africa, 108 of 1996
Criminal Procedure Act 51 of 1977
Employment Act, 2002
Employment Protection Code of Practice (Disciplinary Practice and Procedure) Order 1998.
Employment Rights Act, 1996
Employment Rights Dispute Resolution Act, 1998
Employment Standards Act, 2000
Employment Tribunals Act, 1996
International Labour Organisation Convention 158 of 1982
Labour Relations Act, 28 of 1956
Labour Relations Act, 66 of 1995
Schedule 8 Code of Good Practice: Dismissal
Statutory Instrument 1998 No 14

SUMMARY

Does the doctrine of double jeopardy preclude employer intervention or the proverbial 'second bite at the cherry'? The rigid principles of double jeopardy does not form part of our labour law dispensation. The double jeopardy principle, however, is a necessary factor that is taken into account when deciding on the fairness of subjecting an employee to further disciplinary action.

Even though the employer has the primary responsibility to discipline an employee, the employer may not deviate from disciplinary procedure and standards set by itself, without justification. The employer's powers must be curtailed to some extent in order to countervail the inequality inherent in the employment relationship. A wide approach in labour disputes should be adopted when deliberating the fairness of deviating in respect of the double jeopardy rule. A disciplinary code, which is a guideline, should not be a stumbling block for fairness to prevail. Deciding against employer intervention, solely based on the absence of a provision in an employer's disciplinary code expressly providing for the right to intervene, is an unwarranted narrow approach that leads to absurd results.

The wider approach necessitates consideration of all the relevant facts and circumstances, not only the employer's disciplinary procedure, but including the effect of the employee's conduct on the trust relationship, public interest, the parity principle, reasonableness of the first sanction, appropriateness of the second sanction, reasonableness of the employer's decision to recharge the employee or reconsider the imposed sanction, prejudice to the parties, the time that has lapsed between the first and second disciplinary action and, essentially, the fairness to both the employee and employer.

It is evident that an employer may only reconsider a decision of a properly constituted disciplinary tribunal when it is fair to do so. It will be fair to do so in exceptional circumstances. These circumstances will be extremely rare. Even where an employer reserved the right in its disciplinary procedure to

intervene with the decision of a disciplinary chairperson, the intervention must nevertheless, be justified. A second bite at the cherry is, therefore, possible. Identifying *exceptional* circumstances is not an easy task, in view of the test of fairness. Employers should therefore be conscientious in executing the important task to discipline.