

CHAPTER 7

RESEARCH FINDINGS

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7.1 Introduction

Previous chapters have outlined the research problem, literature review, research approach, and the methods that were used to gather, interpret and analyse the data.

In the previous chapters, attention has been paid, to the concepts of fairness and organisational justice and an international framework of the right to discipline and dismiss was presented. The South Africa sources of law in respect of dismissal were discussed and Schedule 8 was analysed in depth. A comparative analysis of South African and international dismissal law was also done. A panel of CCMA commissioners did a peer review on the research in order to enhance the credibility, or truth-value of the qualitative study by providing an external check on the inquiry process.

The research process that was followed can thus be divided into four main phases, namely:

- i. discussing theoretical framework on fairness and organisational justice;
- ii. presenting an international overview on the right to discipline and dismiss;
- iii. analysing dismissal law in South Africa as founded in Schedule 8 of the LRA; and
- iv. requesting peer review on research results by a panel of CCMA commissioners.

The conclusions that were made at the end of each chapter have been summarised in this chapter, which also reflects the interpretation and results of the literature review.

7.2 Results of the literature review

7.2.1 Fairness and organisational justice

Employees' perceptions of fairness in the workplace are determined by the decisions taken by the employer and the procedures that were followed in order to reach that decision.¹

Employees need to feel that the different levels of organisational justice are beneficial to them. In as far as distributive justice is concerned employees want to feel that they are treated equally in an unbiased manner.² Equal and unbiased treatment in the disciplinary process forms part of the value statements contained in Schedule 8, namely:

- i. a premium is placed on employment justice in the workplace and employees must be protected against arbitrary action;³
- ii. the disciplinary rules adopted by an employer should create certainty and consistency in the application of discipline;⁴ and
- iii. the employer should apply the penalty of dismissal in a consistent manner.⁵

Procedural justice and fairness in the workplace can be achieved if the employer adheres to the following principles:

- i. providing advance notice of intent or decisions;
- ii. providing accurate information and adequate feedback;
- iii. supporting two-way communication;

¹ Vermeulen "Perceptions of Procedural Justice in the Retrenchment of Managers" (2005) *South African Journal of Industrial Psychology* 31(2) 40 – 48.

² Tyler "The Psychology of Procedural Justice: A Test of the Group-value Model" (1989) *Journal of Personality and Social Psychology* (57) 338.

³ Item 1(3) of Schedule 8.

⁴ Item 3(1) of Schedule 8.

⁵ Item 3(6) of Schedule 8.

- iv. explaining and justifying decisions;
- v. allowing employees to influence the decision process;
- vi. considering the interests, views and concerns of all recipients;
- vii. treating employees with dignity, respect and sensitivity; and
- viii. applying administrative procedures consistently.⁶

The above principles of procedural justice are automatically achieved if the employer follows the requirements of item 4(1) of Schedule 8, namely that:

- i. the employer must notify the employee of the allegations;⁷
- ii. the employee must be given an opportunity to state a case;⁸
- iii. the employee must be given reasonable time to prepare a response;⁹
- iv. the employee is entitled to be represented by a fellow employee or a trade union representative;¹⁰ and
- v. employee should be informed of the decision and reminded of right to refer a dispute to the CCMA or bargaining council.¹¹

The above requirements are not meant to be a formal checklist and deviations are permissible under certain circumstances.¹² It is clear that perceptions of procedural fairness are influenced by two important factors, namely:

⁶ Vermeulen (2005) 6.

⁷ See *Ntshangane v Speciality Metals CC* (1998) ILJ 584 (LC); *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd* (1998) ILJ 635 (LC).

⁸ *JDG Trading (Pty) Ltd v Brundson* 2000 ILJ 501 (LAC). See also *OTK Operating Co Ltd v Mahlangu* [1998] 6 BLLR 556 (LAC).

⁹ Basson, Christianson, Garbers, Le Roux and Strydom *Essential Labour Law* (2007) 127.

¹⁰ In *Molope v Mbha NO & others* [2005] 3 BLLR 267 (LC) the court confirmed that the right of representation of an accused employee at a disciplinary enquiry by a colleague, trade union official or a lawyer as one of the fundamental requirements of procedural fairness.

¹¹ In *Madikane v Personnel Consultants* [1998] 3 BALR 283 (CCMA) the commissioner ruled that the dismissal of the employee was both procedurally and substantively unfair because the employee had not been informed of the reason for his dismissal.

¹² See the discussion in par 7.2.4 below.

- i. the interpersonal treatment people receive from decision-makers; and
- ii. the adequacy with which formal decision making procedures are explained.¹³

These factors are known as interactional justice. If employees feel that they have been treated with dignity and respect during the disciplinary process and an explanation has been given for the disciplinary action taken, they are more likely to accept the outcome, even though they may have been dismissed. This would mean that interactional justice has been achieved in the workplace.

7.2.2 International framework on the right to discipline and dismiss

From the review that was done on the international framework on the right to discipline and dismiss the following is clear:

- i. There are various supranational institutions that can influence labour legislation. Not all of them have the same influence on their member states of the organisation concerned, and it would appear that some guidelines, set by these institutions, are viewed as more important than others.
- ii. The ILO through its Conventions provides minimum labour standards that should be adhered to by member states.
- iii. The ratification of a particular Convention means that the national legislation of a member state of the ILO must reflect the standards set by that Convention.

¹³ Bies and Moag “Interactional justice: Communication Criteria of Fairness” (1986) *Research on Negotiations in Organizations* (I) 44.

- iv. Ratification of a Convention also entails that a country will be subject to the supervisory bodies and institutions of the ILO.
- v. Convention C158 has not been ratified by South Africa, the Netherlands, the UK or the USA.
- vi. Three core principles in Convention C158 stand out namely: there must be a good reason before an employee can be dismissed; the employee must get an opportunity to state a case in response to the allegations made by the employer; and employee must have the right to appeal to an impartial body after the dismissal.
- vii. Article 4 of Convention C158 has been given effect to in the legislation in both the Netherlands and the UK, as employers must have a fair and valid reason before an employee can be dismissed.
- viii. Article 4 of Convention C158 is not reflected in the legislation of the USA as employees in the USA can be dismissed at any time without cause, except for a wrongful reason related to public policy concerns and the various anti-discrimination laws.
- ix. Legislation in the Netherlands does not give effect to Article 7 of Convention C158, as an employee has no opportunity to defend him-or herself against the allegations made by the employer before dismissal. The opposite is true in the UK, as the UK legislation makes provision for statutory disciplinary procedures.
- x. No pre-dismissal procedures are required in the USA and the principles contained in article 7 of Convention C158 are clearly absent from legislation in the USA, because the employment-at-will doctrine is still applicable in the USA.
- xi. In the Netherlands, employees have an opportunity to respond to the neutral CWI. It could be argued that this is in line with article 8 of Convention C158.
- xii. In the UK employees can appeal to the Employment Tribunal and provision is also made for further appeals to the Employment

Appeal Tribunal, the Court of Appeal, the House of Lords and ultimately the European Court of Justice. This is in line with article 8 of Convention C158.

- xiii. No provision is made in the USA for an employee who considers his or her dismissal to be unjustified to appeal to an impartial body. The principles contained in article 8 of Convention C158 are clearly absent from US legislation. Employees in the USA that believe their dismissal to have been unlawful, in terms of the anti-discrimination laws, can take civil action against their employers.

In both the Netherlands and the UK, a strong emphasis is placed on the reasons for dismissal, but the pre-dismissal procedures that need to be followed are vastly different.

In the UK, the onus is on the employer to ensure that a very specific pre-dismissal procedure is followed in the workplace before the decision to dismiss is taken. The employee is also given an opportunity to respond to the allegations made by the employer. If the employee believes his or her dismissal to be unfair he or she can then appeal to the Employment Tribunal.

In the Netherlands, no pre-dismissal procedures have to be followed in the workplace. However, the employer needs to obtain permission from the *CWI* to dismiss the employee. The right to respond to the allegations made by the employer, *audi alteram partem*, is not exercised in the workplace but at the *CWI*. If the employee believes his or her dismissal was unfair he or she can refer the matter to court.

The USA, also a member of the ILO, has a system, that is totally unique in the sense that most employees in the USA have no protection against arbitrary dismissals. The employment-at-will principle is still

applied. Employees are, however, protected against unlawful dismissal if the reason for dismissal is related to any of the anti-discrimination laws.

This comparison clearly indicates that national legislation, while reflecting certain principles contained in supranational instruments, is unique to each country, and illustrates the independence and unique national character of every country. It also shows, that protection against dismissal is not deemed of such importance that it has been made a core ILO convention which has to be applied by all ILO members.

7.2.3 Dismissal: South African sources of law

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

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

When one analyses the different sources of law on dismissal in South Africa, the following is apparent:

- i. In terms of common-law principles, in a contract of employment an employer can demand satisfactory conduct and work performance from employees. The employer has the right to terminate a contract of employment where the employee is found guilty of misconduct. This means that an employer must have a reason to terminate.

- ii. The common-law contract of employment did not initially require a specific procedure to be followed in dismissing an employee, but developed to include the concept of fairness. Although this move is controversial, the Supreme Court of Appeal has developed the common-law contract of employment to include the right to procedural fairness.
- iii. As time went by, it became apparent that the common-law does not make provision for the changes and developments that have taken place in the workplace especially after the Industrial Revolution.
- iv. The Constitution of South Africa provides for certain fundamental rights, of which section 23 is of the utmost importance. It states that everybody has the right to fair labour practices.
- v. South African Labour legislation incorporates and takes into account the common-law contract of employment principles, ILO standards and the right to fair labour practices as enshrined in the Constitution.
- vi. The BCEA stipulates that an employer can terminate a contract of employment provided that the required notice is given.
- vii. The BCEA also stipulates that even when the employer has complied with the required notice, an employee can dispute the lawfulness or fairness of his or her dismissal in terms of the LRA.
- viii. The LRA stipulates that every worker has the right not to be unfairly dismissed.
- ix. For a dismissal to be fair, an employer must be able to prove that the dismissal was for a fair reason and in accordance with a fair procedure.
- x. The pre-dismissal procedures that must be followed by the employer have been codified to some extent in the Code of Good Practice: Dismissal, Schedule 8 of the LRA.

- xi. Any person determining whether or not a dismissal was effected for a fair reason and in accordance with a fair procedure must take the Schedule 8 into consideration.
- xii. Schedule 8 is a guideline; thus deviations are permissible under certain circumstances. Schedule 8 does not require a formal court-like procedure to be followed during disciplinary enquiries.

It is apparent that before dismissing an employee, employers must take cognisance not only of their own rules, regulations, codes and procedures, but also of the constitutional right to fair labour practices enjoyed by everybody. Attention must also be given by employers to the requirements of the LRA, the BCEA and Schedule 8.

Commissioners of the CCMA will ultimately, at least in the vast majority of dismissal disputes determine whether a dismissal was fair or not and this can only be done by taking note of the sources of South African dismissal law, paying specific attention to Schedule 8, as, required in section 188(2) of the LRA.

7.2.4 Code of Good Practice: Dismissal (Schedule 8)

In the analysis of Schedule 8, the following stands out with regard to the application and interpretation of Schedule 8:

- i. it must be regarded as a general guideline;
- ii. it is not a substitute for disciplinary codes and procedures;
- iii. it is not prescriptive on the contents of a disciplinary code and procedure;
- iv. it is not necessary to follow formal procedures every time a rule is broken, which clearly indicates the generality and informality of the requirements of Schedule 8; and

- v. it requires the following basic five steps in a disciplinary enquiry;
- a. the employee should be notified of the allegations against him or her;
 - b. the employee should be allowed a reasonable time to prepare;
 - c. the employee should be allowed an opportunity to state a case in response to the allegations;
 - d. the employee is entitled to be represented at the enquiry by a fellow employee or a shop steward; and
 - e. the employee should be informed of the outcome of the enquiry and reminded of the right to refer dispute to CCMA or bargaining council.

For a dismissal to be considered procedurally fair it must at least meet the minimum requirements set out in Schedule 8. This is also in essence what the judgment in *Avril Elizabeth Home for the Handicapped* says. Commissioners of the CCMA are compelled to take Schedule 8 into consideration when they arbitrate unfair dismissal disputes.¹⁴

The guidelines on procedural fairness in disciplinary enquiries as contained in items 4(1) – (4) of Schedule 8, do not require a formal court-like disciplinary enquiry.

Schedule 8 must not be read as a strict code that must be followed under all circumstances. It is a guideline for employers, employees, trade unions and CCMA commissioners. Deviations from Schedule 8 can be justified under certain circumstances.

¹⁴ Section 138(6) of the LRA.

Where employers have formal disciplinary codes and procedures that form part of the conditions of service of the employees, employers are compelled to follow them as was held by the Supreme Court of Appeal in *Denel v Vorster*. The Labour Appeal Court in the *Highveld District Council* matter had a different view and preferred a more flexible approach. I agree with the approach adopted by the Labour Appeal Court.

South African dismissal law is not inflexible and rigid with formal court-like procedures in disciplinary enquiries, as is commonly believed. An overemphasis on procedures in disciplinary enquiries since the *Mahlangu v CIM Deltak* judgment by the former Industrial Court in 1986 has led employers to believe, wrongly, that such rigidity is required. Employers, employees, trade unions, labour consultants, human resources managers, attorneys and even some academics are to blame for the current situation.

With the implementation of the LRA and Schedule 8 the requirements set by the *Mahlangu v CIM Deltak* judgment was no longer required but most employers have not yet changed or adapted their disciplinary codes and procedures to be in line with the LRA and Schedule 8. Until they do, they will be bound by the rigidity and formality required by their own internal codes and procedures.

7.2.5 South African dismissal law compared to international perspectives

South African dismissal law adheres to Convention C158, as the three core principles of Convention C158 are reflected in Schedule 8. It is apparent that the legislature in South Africa has taken cognisance of international law and principles in drafting the Constitution and the LRA.

The Constitution¹⁵ requires any reasonable interpretation of legislation to be consistent with international law. The LRA¹⁶ states that one of its aims is to give effect to South Africa's obligation as a member state of the ILO. This has clearly been done with the implementation of Schedule 8. The principles of flexibility, found in Convention C158 are also reflected in Schedule 8.

From the analysis and comparison of the three international jurisdictions with South African dismissal law, it is apparent that South Africa's dismissal law is not as rigid and inflexible as many employers wrongly believe.

In both the Netherlands and South Africa, there must be a fair and valid reason to justify the dismissal of an employee. In both these countries the employee has the right to an appeal against his or her dismissal to an impartial body. In the Netherlands the appeal is directed to the *CWI* and in South Africa it is directed to the CCMA or a bargaining council. The main difference between the dismissal law in the Netherlands and in South Africa, lies in the fact that the disciplinary process is absent from Dutch dismissal law. In contrast to the South African scenario, in the Netherlands an employee on probation has no protection against dismissal as the probation period is known as a *rechteloze priode*.¹⁷

The dismissal law in the UK and South Africa are very similar in structure and nature, as both fully adhere to the three core principles of Convention C158. The disciplinary enquiry process in the UK and in South Africa are very similar and the statutory dismissal and dispute procedures are very alike. The UK's dismissal law makes provision for a

¹⁵ S 233 of the Constitution. Also see Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2008) 26-29.

¹⁶ S 1(b) of the LRA.

¹⁷ Genderen *et al* (2006) 221.

compulsory internal appeal process, which is not the case in South Africa. The UK also has a much more extensive external appeal process that an employee can use if he or she believes that the dismissal was unfair, as the final court of appeal is the European Court of Justice. Just as in the Netherlands, an employee in the UK has no protection against dismissal during the probationary period of employment. In South Africa the protection against unfair dismissal is also extended to employees during their probationary period of employment.

There is almost no similarity of any kind between the dismissal law of the USA and South Africa and for that matter also not between the USA, the Netherlands and the UK. The employment-at-will doctrine in the USA is unique. The dismissal law in the USA does not adhere to any of the three core principles of Convention C158.

What is unique in South African dismissal law when compared to Convention C158,¹⁸ the Dutch dismissal law and the dismissal law of the UK, is the fact that irrespective of the length of service of an employee and or whether an employee is employed on probation, the same disciplinary process has to be followed. This situation may be one of the reasons for employers' belief that South African dismissal law is inflexible and rigid.¹⁹

7.3 Results of peer review

A panel of commissioners at the CCMA offices in Pretoria did a peer review on the study. They were requested to act as a panel of experts and express their own views on the contents of this study and also to

¹⁸ See article 2 of Convention C158 in annexure 4.

¹⁹ The protection or non-protection of employees against dismissal during the probationary period of employment justifies further in-depth research at a postgraduate level.

make certain recommendations. The panel's report, as it was received by the researcher from the CCMA panel on 14 November 2009, is cited *verbatim*, and is printed in italics.

Peer review report from CCMA panel²⁰

Procedural fairness had always been determined by way of the following:

- 1. The employers' disciplinary code and procedure;*
- 2. If no such procedure existed, schedule 8 of the LRA;*

Despite the fact however, that schedule 8 does not require a rigorous process to be followed, the tendency had developed over numerous years based on case law to treat the process in a formal manner with a checklist of requirements that had to be followed.

Failure to follow in any way any of these steps led to a finding of procedural unfairness.

This practice led to employers often assisted by employer's organisations and attorneys drafting lengthy codes detailing steps to be taken in order to ensure procedural fair disciplinary hearings.

In the event then that dismissals were challenged at the CCMA, a large part of the arbitration would focus on the procedural aspects and hours would be spent painstakingly analysing each and every step to be

²⁰ The CCMA panel consisted of commissioners Elsabé Maree (LLM), Ronel de Wet (LLB) and John Mello (LLB).

taken. As said previously even a minor deviation from this led to a finding of procedural unfairness.

Strangely, enough one would have thought that rather than get embroiled in procedure as set out in one's own code and procedure, employer's would do away with it and rather do hearings by way of schedule 8.

This for the most part did not happen. Maybe money were being made by organisations scaring the living daylights out of employer's telling them that they had to 'follow procedure' and that this can only be done by way of their own codes and procedures.

This reasoning however, is fatally flawed as this approach led to the practice of having stringent processes developed for employers where non-compliance with the smallest detail led to findings of procedural unfairness.

Employers and the CCMA alike got entangled in a web of requirements set down to determine procedural fairness. Arguments would range from the 'charge sheet is so vague that it is embarrassing and does not constitute a charge to which the employee could enter a plea to and that the employee was not given 48 hours notice and everything in between!

As commissioners our hands were tied and still are if there exists such a procedure at the workplace to apply these requirements.

Schedule 8 had been in existence since 11 November 1995 [Today 14 years ago!!] but seems to have been ignored in the wake of the practice by employers to follow the 'criminal model'.

The employer – normally the smaller and less sophisticated one – who for various reasons had no code were then bound by the requirements of schedule 8. These employers would follow schedule 8 sometimes inadvertently, and would then have no trouble at arbitration in showing that a procedure had been followed.

However, despite this, some commissioners still tended to apply the strict ‘criminal law’ model even to these cases further creating the belief and enforcing the practice that procedure is the only leg on which a dismissal stands and that an employer had comply to a strict set of procedural rules.

Then along came Avril Elizabeth advocating that schedule 8 should be the basis for determining procedural fairness in the absence of disciplinary codes and procedures and even where they exist should comply to the less onerous guidelines set out in schedule 8 rather than the strict criminal law model followed so far.

2. The assertions made in the thesis regarding the requirements for procedural fairness to be followed are based on the decision in Avril Elizabeth which is applied by most of the CCMA commissioners.

3. It is our view that the thesis deals with every aspect of schedule 8 in sufficient detail and that a reading of this sufficiently explains the era ‘pre’ and ‘post’ Avril Elizabeth.

The opinions advocated in the thesis pronounce on the principles applied by commissioners in following the guidelines regarding a fair process as set out in Avril Elizabeth.

Regarding further research the esteemed researcher might want to venture into the following;²¹

- 1. Workplace forums – do they exist, are they functioning and if not, why not?*
- 2. Unfair labour practices – is it really for the CCMA to act as an employment agency and to determine if the most suitable candidate was promoted?*
- 3. Can the CCMA arbitrate performance issues as ‘promotions’?*
- 4. Can the CCMA arbitrate bonus issues as ‘benefits’?*
- 5. Did the provision made in LRA regarding ‘occupational detriment’ led to cases being referred either as automatically unfair dismissals or unfair labour practices?*
- 6. The hotly contested issue of labour brokers;*
- 7. Is there really a need for probation? Why the detailed process? Why not rather appoint initially on a fixed term contract?*
- 8. The issue regarding the CCMA’s jurisdiction regarding a single retrenchment;*
- 9. At what stage must in limine issues be determined? At con or at arb?*
- 10. A comparative analysis of pre and post Sidumo.*

Commissioner Elsabé Maree obo CCMA panel

14 November 2009.

²¹ The CCMA panel also made proposal on further research and even though not completely in line with the research undertaken in this study, it has been included for completeness as, with a few exceptions most of the further research proposed is touch on in one way or another in this study.

7.4 Interpretation of results

Section 23(1) of the South African Constitution states that everybody has the right to fair labour practices and section 233 further requires that all courts in South Africa must interpret legislation in South Africa in so far as it is consistent with international law. One of the primary objectives of the LRA is to give effect to South Africa's obligations as a member state of the ILO.

On the basis of the analysis of Schedule 8, it is submitted that the right to fair labour practices as contained in section 23(1) of the Constitution has been given effect to in Schedule 8. By applying the guidelines reflected in Schedule 8 the employer can ensure that the employee's right to fair labour practices is entrenched and adhered to.

In the *Key Delta v Marriner*²² judgment of 1998, the High Court suggested that the law might have developed to the point where a pre-dismissal hearing could be implied in a contract of employment. This principle in the *Key Delta v Mariner* judgment is also found in two Supreme Court of Appeal judgments ten years later.²³ In the *Gumbi* matter, Jafta JA held that pursuant to the enactment of the Constitution and the adoption of ILO Conventions into South African law, the right to a pre-dismissal hearing is "well recognised" in South African law.²⁴

²² [1998] 6 BLLR 647 (E).

²³ In *Boxer Superstores Mthatha and Another v Mbenya* [2007] 8 BLLR 693 (SCA) and *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2008] 8 BLLR 699 (SCA) the court in essence stated that the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing.

²⁴ *Gumbi supra* 701 par 5-6. The court remarked that "[i]n recognising this right our law is consistent with international law relating to pre-dismissal hearings as set out in Article 7 of the International Labour Organisation (the ILO) Convention on Termination of Employment 158 of 1982".

In the *Avril Elizabeth Home for the Handicapped*²⁵ judgment, Van Niekerk J stated that:

“[t]he nature and extent of the fair procedure requirements established by the Labour Relations Act and the Code is supported by international labour standards. International Labour Organisation Convention 158 requires procedures to promote compliance with the obligation to ensure that dismissals are based on valid reasons. Although South Africa has not ratified Convention 158, and is therefore not obliged to implement its terms in domestic legislation, the Convention is an important and influential point of reference in the interpretation and application of the LRA.”

The Constitutional Court has confirmed these principles in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,²⁶ when the Court ruled that:

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

The above judgments clearly illustrate that the courts take cognisance of international principles and the requirements of the ILO, and by doing so adhere to article 233 of the Constitution and one of the primary objectives of the LRA.

Convention C158 is not a core convention of the ILO and has not been ratified by South Africa, the Netherlands, the UK or the USA. As a result of this non-ratification, none of the four countries' dismissal laws and pre-dismissal procedures are subject to the supervisory mechanisms and inspections of the ILO. This would also explain the large differences

²⁵ [2006] 9 BLLR 833 (LC).

²⁶ [2007] 12 BLLR 1097 (CC) at para 61.

between the pre-dismissal procedures found in the USA and the Netherlands on the one hand and South Africa and the UK on the other.

The analysis that was done of Convention C158 in chapter 3 and Schedule 8 in chapter 5 makes it abundantly clear that the procedural fairness requirements for disciplinary enquiries in South Africa, as founded in Schedule 8, are in line with Convention C158 and even go beyond the requirements of Convention C158. However, contrary to popular belief that South Africa's pre-dismissal procedural requirements are among the most stringent in the world, there is almost no difference between the procedural requirements in South Africa and those found in the UK.

The former Industrial Court in South Africa has established an extensive library of jurisprudence that regulates procedural requirements for disciplinary hearings.

The most famous judgment in this regard was the *Mahlangu v CIM Deltak*²⁷ matter, where the court came close to equating a disciplinary enquiry to a court case. This led to an escalating spiral of proceduralism. Employers became fixated on procedural issues. Employers believed that if they spell out every step, gave no room for adapting the actions to the circumstances they would never have to worry that a dismissal might be deemed procedurally unfair. Human Resources managers wrote disciplinary procedures with huge numbers of forms and checklists to be completed at every stage and thereby complicated the process even further. Lawyers approached each case

²⁷ (1986) 7 *ILJ* 346 (IC) 375.

as if it were a proceeding in the High Court, focusing on procedural technicalities.²⁸

It was hoped that the new LRA of 1995 and Schedule 8 would change this, but so far it has failed to do so. Employers, employees, trade unions and CCMA commissioners continue to believe that we live in a country where proceduralism reigns. This has led to a system where the dismissal practices in South Africa have become a process bogged down by unnecessary formalities and court-like procedures.

It is interesting to note that to a fairly large extent, it is not so much the law of dismissal itself, but the practice and application of it that has led to the current situation where proceduralism is overemphasised.

It is clear that from the contents of the previous chapters in this study that the LRA, and especially Schedule 8, whilst seeking to provide protection and fairness for employees, does not go to extreme lengths to interpret this need for fairness as an inflexible set of procedural steps and actions. One of the aims of Schedule 8 was to allow employers to de-proceduralise and to move away from the formalistic approach established by the jurisprudence of the former Industrial Court.²⁹

From the case law it seems that the courts and the CCMA will henceforth take a broader view of the overall fairness of the procedures followed as opposed to whether or not a particular procedure was followed to the letter. Under normal circumstances, employers are under bound to follow their own procedures, as was illustrated in the *Denel v Vorster* Supreme Court of Appeal judgment. It is clear that our labour courts have adopted a different approach in this regard; fairness

²⁸ Levy “Rewriting your Dismissal Procedures” Masters Class Seminar presented in Johannesburg 13 October 2009.

²⁹ Schedule 8 is discussed in detail in chapter 4.

is more important than proceduralism, as was illustrated in the *Higvheld District Council* matter.³⁰

It must also be borne in mind that Schedule 8 does not have the force of law and departures from its requirements or guidelines may be justified in particular circumstances.³¹ This was clearly illustrated in the *Cornelius v Howden Africa Ltd t/a M&B Pumps*³² decision, where the commissioner stated that:

“[p]rocedural fairness under the LRA demands less stringent and formalized compliance than was the case under the Unfair Labour Practice jurisdictions of the Industrial Courts. It did not matter whether each of the procedural requirements had been meticulously observed. What is required is for all the relevant facts to be looked at in the aggregate to determine whether the procedure adopted as fair. A holistic approach must be followed.”

The watershed case for procedural fairness was the *Avril Elizabeth Home for the Handicapped*³³ judgment in which the judge made a clear statement as to what the requirements for procedural fairness were and strongly emphasised that the procedures are meant to be simple and uncomplicated and that there is no requirement at all to follow the criminal justice model.³⁴ Employers are merely required to conduct an investigation, give the employee or representative an opportunity to respond to the allegations made after a reasonable period, take a decision and inform the employee of the decision.

Van Niekerk J sums it up as follows:

³⁰ *S.A. Tourism Board v CCMA & others* (2004) 3 BLLR 272 (LC); *Khula Enterprise Finance Ltd v Madinane & others* (2004) 4 BLLR 366 (LC) and also *Higvheld District Council v CCMA & others* (2002) 12 BLLR 1158 (LAC).

³¹ *Mosopane v Gilbeys Distiles & Vintners (Pty) Ltd* (1998) 19 ILJ 635 (LC).

³² (1998) 19 ILJ 921 (CCMA).

³³ [2006] 9 BLLR 833 (LC).

³⁴ Also see *NUM obo Mathethe v Robbies Electrical* Case no. LP4837-08 (CCMA).

“On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex ‘charge sheets’ requests for particulars, the application of the rules of evidence, legal argument and the like.”³⁵

Ultimately, the employer has the responsibility for acting fairly in the case of a dismissal. The rules of procedural fairness do not replicate the criminal justice model but should rather ensure that the basic elements of fairness are in place and followed as set out in item 4 of Schedule 8.

After evaluating and analysing all the information collected in the course of this research, it is submitted that disciplinary enquiries conducted in terms of Schedule 8 should be flexible and comply with the basic pre-dismissal procedure as found in item 4.

7.5 Conclusion

From the judgments of the Constitutional Court, the Supreme Court of Appeal and the Labour Appeal Court as well as Convention C158 and Schedule 8 of the LRA, it is apparent that the so-called “criminal justice model” is no longer applicable to workplace disciplinary enquiries. It is therefore untrue that South Africa’s dismissal law is rigid, inflexible and requires court-like procedures to be followed during disciplinary enquiries.

The form and nature of disciplinary enquiries will depend on the specific circumstances and should be flexible. Strict, formalistic disciplinary codes and procedures that are set in stone do not benefit either employer or the employee. The *Avril Elizabeth Home for the Handicapped* judgment of 2006 has confirmed what Schedule 8 has

³⁵ [2006] 9 BLLR 833 (LC) at 839.

been saying since its inception. Van Niekerk J in the *National Bioinformatics*³⁶ matter again confirmed this when he stated:

“The applicant chose to ignore the *informal workplace procedures prescribed by the Code of Good Practise* and to conduct a disciplinary enquiry, at great expense to the tax payer no doubt, in a form that would make the criminal court proud.”

³⁶ *Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson & others* [2009] 8 BLLR 833 (LC) at (1). Own emphasis added.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

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8.1 Introduction

The main aim of this research was:

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

To accomplish these aims the following actions were followed:

- i. A review of international standards was undertaken regarding the right to discipline and dismiss was done. Special attention was paid to the ILO, two countries from the EU and the United States of America in order to get an international perspective.
- ii. A review was done of the sources of law in South Africa in respect of principles regulating disciplinary enquiries was done. A comparative analysis was then done between the international standards and the South African principles relating to the right to discipline and dismiss.
- iii. Schedule 8 was analysed.
- iv. Numerous CCMA awards and judgments in the Labour Court and Labour Appeal Court were analysed to identify and interpret the views of various arbitrators and Labour Court and Labour Appeal Court judges.
- v. A literature review of publications and articles on procedural requirements in terms of Schedule 8 of the LRA was done.
- vi. A peer review was done by a panel of commissioners of the CCMA based at the CMMA offices in Pretoria to test the validity of the research.

8.2 Overview of the research

Chapter 1 gave an overview of the background to the research topic. The chapter outlined the research design and approach, the aim of the study as well as the most suitable research methodology. A qualitative research approach was followed. The research focus, scope and delimitations were outlined.

Chapter 2 dealt with the concepts of fairness and organisational justice. The three pillars of organisational justice, namely distributive justice, procedural justice and interactional justice were discussed. These justice concepts were then linked to labour relations, particularly in relation to discipline and disciplinary enquiries.

Chapter 3 provided an overview on the employer's right to discipline and dismiss against an international framework. Supranational instruments were analysed paying particular attention to the ILO, with a comprehensive analysis of Convention C158. An overview of the relevant EU and SADC policies were also given. Dismissal law in three countries, namely the Netherlands, the UK and the USA, was reviewed and was then evaluated in terms of compliance with the principles contained in Convention C158.

Chapter 4 explained the different sources of law in South Africa that specifically deal with dismissal. The common-law contract of employment was analysed and an overview of the common-law duties of the employer and employee was given. Attention was paid to the South African Constitution, particularly section 23(1), which deals with labour relations. The sections in the BCEA and LRA that deal with discipline and dismissal were also discussed.

Chapter 5 outlined the analysis of the Code of Good Practice: Dismissal (Schedule 8). A comprehensive analysis was done of item 4 as it relates directly to disciplinary procedures. The elements of procedural fairness contained in item 4 were analysed. The analysis went hand in hand with a review of numerous judgments of the Labour Courts and awards of the CCMA.

Chapter 6 provided an overview of South African dismissal law, measured against the principles found in Convention C158. The dismissal law of the Netherlands, the UK and the USA were compared to the dismissal law in South Africa.

Chapter 7 gave a description of the research findings. The conclusions made at the end of each chapter were drawn into chapter 7 to provide an overall picture of the research findings.

8.3 Challenges

The greatest challenges that were faced during this study were the following:

- i. It was difficult to find a balance between labour relations and labour law. Labour relations are much more than a pure legal analysis of case law. Labour law deals with the judicial side of the employment relationship and the jurisprudence established through judgments of the courts and the CCMA. Labour relations also include the human element and the practical scenario of employer and employee facing each other in the workplace on a day-to-day to basis.
- ii. In a study of this nature, it is important not necessarily to evaluate every possible court case related to the subject matter under

investigation, but to form an overall picture of tendencies and principles by reviewing as many cases as possible.

These challenges were overcome by dividing the research into four specific phases, namely:

- i. reviewing a theoretical framework on fairness and organisational justice;
- ii. providing an international overview on the right to discipline and dismiss;
- iii. analysing dismissal law in South Africa as founded in Schedule 8 of the LRA; and
- iv. requesting a peer review of the research results by a panel of CCMA commissioners.

Two specific court cases that can be regarded as the cornerstones of this study, around which the main aims of the research were built are the *Mahlangu v CIM Deltak* and *Avril Elizabeth Home for the Handicapped* judgments. They are 20 years apart. *Mahlangu v CIM Deltak* has formed the cornerstone of disciplinary enquiries since 1986 and is still followed almost slavishly by many employers. The *Avril Elizabeth Home for the Handicapped* matter indicates a clear break from the jurisprudence established by the former Industrial Court and reminds all practitioners of the actual requirements of procedural fairness set out in Schedule 8.

The research was evaluated by a panel of commissioners from the CCMA who deal with procedural fairness disputes almost on a daily basis. The input and evaluation of the CCMA panel ensured that the research is in line with current practices.

8.4 Recommendations

8.4.1 Introduction

Organisational justice as a concept dealing with the perceptions of fairness can be a management tool that can be of great assistance in achieving fairness in the workplace. Almost every single course on labour relations that is offered by private training institutions including training at tertiary level, fails to include a module on the concept of organisational justice.

It is apparent that, for many years the training emphasis was placed on procedural issues. This included modules on grievance handling and grievance procedures, negotiation tactics and skills, retrenchment procedures, dismissal procedures, dispute resolution procedures, strike handling and the like. It was believed that employers would be able to handle almost every situation in the employment relationship if they had a clear-cut idea of the procedure that must be followed. This kind of training also contributed to the over-proceduralising of almost every aspect of labour relations, especially disciplinary procedures. The human element has been taken out of the equation by the strong emphasis on procedures.

More attention should be paid to organisational justice and the different justice perceptions contained in it, namely distributive justice, procedural justice and interactional justice, as this will contribute towards the achievement of fairness in the workplace. These different perceptions of justice and the application thereof in the workplace can lead towards greater equity, equality, outcome satisfaction, system satisfaction, sound interpersonal relationships and improved communication and overall employee satisfaction. The courses offered

at tertiary institutions in labour relations, employee relations, human resources management and/or people management should include a module on organisational justice.

Human Resources managers who understand the concept of organisational justice will be able to use their management styles and employment practices to assist employers and employees in achieving the value statement contained in the current item 1(3) of Schedule 8, namely:

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

8.4.2 Proposed amendments or changes to Schedule 8

With regard to Schedule 8, it is recommended that the following changes be made:¹

- i. Items 1(1) and 1(3) should be combined into a single new item 1(1) to read as follows:

“This Code of Good Practice deals with some of the key aspects of dismissals for reasons related to conduct or capacity. It is intentionally general. The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of the business. Although employees should be protected against arbitrary action, employers are entitled to

¹ The proposed amendments are printed in bold. The current Schedule 8 is attached as annexure 1.

satisfactory conduct and work performance from their employees.”

Combining the current items 1(1) and 1(3) into a new item 1(1) would make the importance of mutual respect and employment justice stand out much more clearly. If employers and employees adhere to these basic principles, procedural fairness may be achieved without falling into the trap of the so-called criminal justice model. This will greatly contribute towards the achievement of employment justice in the workplace. In essence, labour relations deal with the interpersonal relationship between an employee and an employer in the workplace. It is submitted that the number of dismissal dispute referrals to the CCMA or bargaining councils would be reduced if both parties adhere to these core value statements. I view it as of such importance that it is submitted that’s this point should be included in the first item of Schedule 8 and not item 3.

Items 1(2) and 2(1) to 2(4) can remain as they are and no amendments or changes to these items are proposed.

ii. It is recommended that item 3(1) be amended to read as follows:

“All employers should adopt disciplinary rules and procedures that establish the standard of conduct required of their employees. These rules and procedures should be treated as a guideline for employers and employees on how to handle disciplinary issues. The form and content of disciplinary rules will obviously vary according to the size and nature of the employers business.”

The rest of item 3(1) can remain as is. By including the part that stipulates that employers and employees must use disciplinary rules

and procedures as a guideline, flexibility will improve and the principles established in the *Highveld District Council* judgment will be adhered to. This will also prevent that employers are faced with a similar scenario as found in the *Denel v Vorster* judgment of 2004, where the employee had a disciplinary enquiry that complied with all the requirements of Schedule 8 but the employer failed to follow its own disciplinary code and procedure right down to the finest detail.

- iii. It is further recommended that the following be added to at the end of the current item 3(1):

“Employers should note that where disciplinary rules and procedures form part of a collective agreement that was agreed to at a bargaining council, and the employer and his- or her employees fall under the jurisdiction of that bargaining council, they are compelled to follow them.”

This will ensure that employers and employees that fall under the jurisdiction of a particular bargaining council adhere to the main agreement of that council. The fairness of a dismissal of an employee that falls under the jurisdiction of a bargaining council, will be measured against the disciplinary rules and procedures included in the main agreement of the bargaining council and not by those established by the employer.

The current item 3(2) can remain as is.

- iv. It is further recommended that the following be included at the end of the current item 3(3):

“ Where any disciplinary action, other than a possible dismissal, is taken against an employee it is not necessary to follow the pre-dismissal procedures contained in item 4(1).”

This will enhance the principles of flexibility and make it clear that it is not necessary to follow the pre-dismissal procedures contained in item 4(1) if the employer only wants to issue an employee with a verbal warning or even a written warning.

The current items 3(4) to 3(6) can remain as is and no amendments to these items are proposed.

v. It is recommended that item 4(1) be amended to read as follows:

“Normally the employer should conduct an investigation into the alleged misconduct of an employee to determine if there are grounds to **proceed with a disciplinary enquiry**. The employer should notify the employee of the allegations **that will be investigated during the disciplinary enquiry in a manner that the employee can reasonably understand**. The employee should be allowed an opportunity to state a case in response to the allegations made by the employer **at a disciplinary enquiry, which need not be a formal enquiry**. The employee should be allowed a reasonable time to prepare for the **disciplinary enquiry** and to the assistance of a trade union representative or fellow employee **at the disciplinary enquiry**. After the enquiry the employer should inform the employee of the decision taken and preferably do so in writing.”

At first glance it might seem that the proposed amendments are negligible, as the wording used is very similar to that in the current item 4(1). However, the proposed amendments to item 4(1) will prevent any

possible different interpretations as to what is meant by an “investigation” and by an “enquiry”.² The proposed amendments will also make it clear that the “enquiry” stage of the disciplinary process need not be formal and it is only at the “enquiry” stage and not during the “investigation” phase that an employee is entitled to the rights as stipulated in the remainder of item 4(1).

vi. It is further recommended that the current item 4(2) be amended to read as follows:

“Pre-dismissal procedures, as stipulated in item 4(1), against a trade union representative or an employee who is an office-bearer or trade union official, should not be instituted without first informing the trade union of the allegations made and inviting the trade union to attend the disciplinary enquiry.”

The proposed amendments to the current item 4(2) will prevent any confusion and different interpretations as to what is meant by “consulting the trade union”. It will also make it clear that it is not necessary for the employer to “inform and consult” with the trade union if it takes any disciplinary action against a trade union representative other than possible dismissal, for example when issuing a verbal or written warning or even a final written warning.³

Item 4(3) can remain as it is.

vii. It is further recommended that item 4(4) be amended and that following be included at the end of the current item 4(4):

² See the discussion in chapter 5 above.

³ See the discussion in par 5.8 above.

“These exceptional circumstances can include the following, where the employee waives his or her right to a disciplinary enquiry and to protect life and property in instances of extreme violence.”

The biggest challenge for employers, employees and trade union officials is to make a total paradigm shift in their mind set towards the procedural requirements in a disciplinary enquiry. The strict formalistic and almost court-like disciplinary codes and procedures that have been adopted under the jurisprudence of the former Industrial Court are so entrenched in society that it will take some time to change the situation. To complicate matters even further, many disciplinary codes and procedures that are in place have either been agreed to contractually or are part of a collective agreement. This can only be changed or amended through a process of consultations and mutual agreement. If an employer decides to adapt current disciplinary codes and procedures to reflect the principles contained in Schedule 8 and as interpreted in the *Avril Elizabeth Home for the Handicapped* judgment one-sidedly it can be regarded as a unilateral change in the conditions of employment.

Trade unions should take note of the latest developments with regard to procedural fairness and should implement a comprehensive training programme for all trade union officials, trade union representatives and their members. The same would apply to all Human Resources managers, personnel officers, Industrial Relations officers, managers, labour attorneys, labour consultants and CCMA commissioners.

8.5 Conclusions

Labour relations refer to the relationship between employers and employees in the workplace. Fairness is central to the employment relationship and both employers and employees would like to feel that they have been treated fairly. This is especially true when it comes to discipline and dismissals.

People's perceptions of fairness are vastly different and a single truth cannot be pinned down. Thus there is no recipe or procedure that can be followed to ensure fairness. The original intention of the disciplinary process was to ensure that dismissals were fair, in the sense of complying with the *audi alteram partem* rule. This principle has come to be associated imbued with an unnecessary and highly costly series of formalistic steps that parties go through, so as not to be found guilty of a procedurally unfair dismissal.

The procedures that are followed in the disciplinary process are important, but they are not the *alpha and omega*. It is more important to ask whether or not there was prejudice to the employee resulting in unfairness because a particular part of the procedure was not followed.

***“THE MORE WE PENETRATE THE SECRET CORNERS OF THE
MIND, THE GREATER THE RICHES WE DISCOVER.”***

HAROLD BROOMBERG