DISPENSING WITH PRE-DISMISSAL PROCEDURES

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APRIL 2013

UNIVERSITEIT VAN PRETORIA
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DISPENSING WITH PRE-DISMISSAL PROCEDURES

by

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Submitted in partial fulfilment of the requirements for the degree

Magister Commercii

Industrial Psychology

in the

FACULTY OF ECONOMIC AND MANAGEMENT SCIENCES

at the

UNIVERSITY OF PRETORIA

Supervisor: Dr P.A. Smit

APRIL 2013

ACKNOWLEDGEMENTS

I would firstly like to thank my wife, Renalta van der Merwe, for persistently believing in me throughout the years; without her comforting hand I would have surely not concluded this dissertation.

Furthermore; my mother, father and sister; who stood behind me throughout long days and weekends and who was always there to assist and guide me should I not know in which direction I should go; thank you for always understanding and believing in me!

I would like to furthermore express my gratitude to my study leader, Dr Paul Andries Smit for his assistance and guidance throughout not only the submission of the study, but the companionship with regards to believing in my ability to conclude this thesis; your expert guidance and assistance will always be kept close to me.

Thank you Candice Botha for assisting me with the language editing.

Finally I would like to thank The Lord for the opportunity and abilities he has given me; for keeping a watching eye over me throughout the years. Col 3:23,

“And whatever you do, do it heartily, as to the Lord and not to men.”

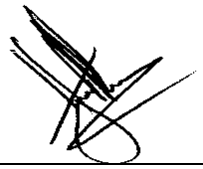
DECLARATION

I, Herman Johan van der Merwe, declare that *Dispensing with pre-dismissal procedures* is my own unaided work both in content and execution. All the resources I used in this study are cited and referred to in the reference list by means of a comprehensive referencing system. Apart from the normal guidance from my study leader, I have received no assistance, except as stated in the acknowledgements.

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

I, Herman Johan van der Merwe, declare that the language in this thesis was edited by Candice Botha.

Herman Johan van der Merwe



Signature

26 March 2013

Date

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ABSTRACT

DISPENSING WITH PRE-DISMISSAL PROCEDURES

by

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Almost 80 percent of all labour disputes referred to the Commission for Conciliation Mediation and Arbitration and Bargaining Councils are related to unfair dismissal disputes.

For a dismissal to be deemed fair, it must be for a fair reason and in accordance with a fair procedure which is also known as substantive and procedural fairness. Situations can however arise where an employer dismisses an employee without following any procedures. Can it ever be justified to dismiss an employee without adhering to the *audi alteram partem* principle?

The answer to this is not very simple. Item 4(4) of schedule 8 makes provision for dispensing with pre-dismissal procedures in exceptional circumstances. These exceptional circumstances are, however, not listed or defined. From the research it would appear that the courts and the CCMA have condoned the dispensing of pre-dismissal procedures under very specific circumstances. The circumstances could include amongst others the following:

- When an employee refuses to attend a disciplinary inquiry
- When there are threats against the life of any party in the inquiry

The main aim of this dissertation was to identify those circumstances where the courts and the CCMA have condoned very specific incidents where no pre-dismissal procedures were followed. It is clear that these circumstances are exceptional and it should serve employees well not to “create” exceptional circumstances and not to act over hastily. One of the most basic universal labour rights of every employee is the right to state a case against the allegations made by the employer.

It would ultimately fall on the employer to justify why the pre-dismissal procedure, as contained in Schedule 8 of the Labour Relations Act, has been dispensed with.

LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act, 1997
CCMA	Commission for Conciliation Mediation and Arbitration
Constitution	Constitution of The Republic of South Africa [No. 108 of 1996]
ILO	International Labour Organization
LRA	Labour Relations Act 66 of 1995
LAC	Labour Appeal Court
LC	Labour Court
OHSA	Occupational Health and Safety Act 85 of 1993
Schedule 8	Code of Good Practice: Dismissals

CHAPTER 1

INTRODUCTION TO THE RESEARCH TOPIC AND DESIGN

1 INTRODUCTION TO THE RESEARCH TOPIC AND DESIGN

1.1 INTRODUCTION

It is a well-established principle internationally and in South Africa that before an employee can be dismissed, there should be a fair reason to justify a dismissal and that a fair procedure should be followed. This principle is reflected in ILO Convention C158 and also in South Africa's Labour Relations Act 66 of 1995. These will be discussed in Chapter two, together with the Constitutional right to fair labour practices.

It should be noted that both ILO Convention C158 and the LRA makes provision for exceptional circumstances where it is not necessary to follow a pre-dismissal procedure. These exceptional circumstances are not defined nor described, and this forms the main research question for this research, namely: "What are the exceptional circumstances that justify dispensing with pre-dismissal procedures?"

1.2 THE RESEARCH AIM, FOCUS, SCOPE AND DELIMITATIONS

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

(i) To critically evaluate the basic requirements of a fair dismissal in terms of substantive and procedural fairness; and

(ii) To determine what exceptional circumstances can justify a dispensing of the pre-dismissal procedures according to *jurisprudence.*

To accomplish these aims, the following actions were followed:

(i) A review of the labour rights as stated in Section 23 of the constitution was conducted.

(ii) A review of ILO convention C158 was done

(iii) Schedule 8 of the LRA was analysed.

(iv) Numerous CCMA awards and judgments of the Labour Court and LAC were analysed to identify and interpret the views held by the courts and judges.

(v) The concept of, or definition of “exceptional circumstances” were analysed in detail.

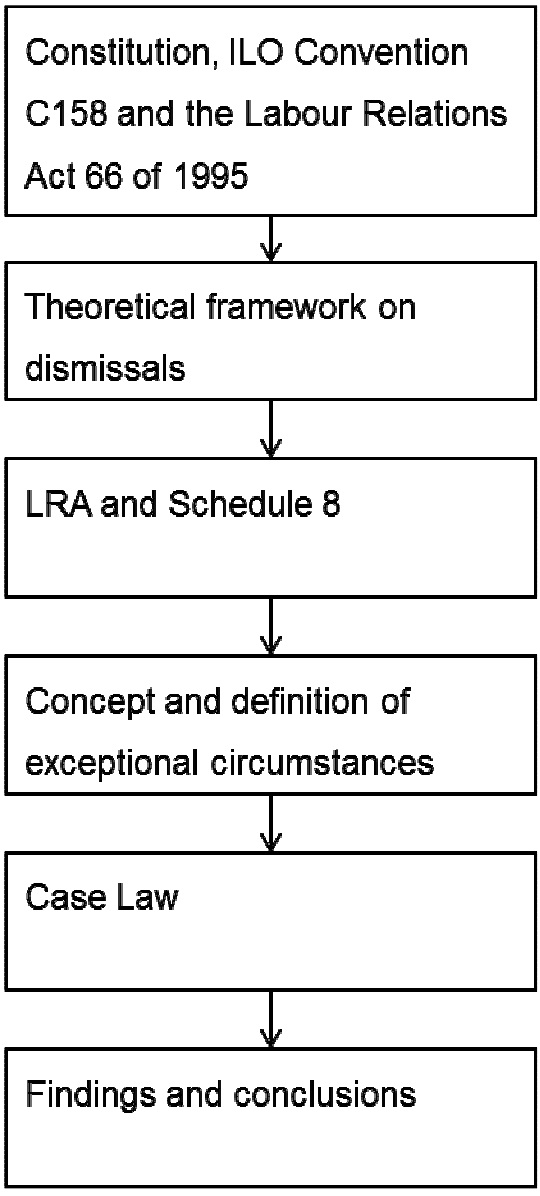
1.3 IMPORTANCE AND BENEFITS OF THE STUDY

The importance and benefits of the study are not only a thorough exploration of schedule 8 of the Code of Good Practice in dismissals but also a very specific item, which deals with dispensing of pre-dismissal procedures under “exceptional circumstances”. The study aims to determine what these “exceptional circumstances” are.

The main aims that were identified in 1.2 supra and the actions that were followed will ultimately assist the researcher to identify and describe the exceptional circumstances.

1.4 THE SCOPE AND DELIMITATIONS

1.4.1 Scope



1.4.2 Delimitations

The research does not focus on issues that justify dismissal, but only identify those circumstances that can be viewed as exceptional to justify dispensing with pre-dismissal procedures.

1.5 RESEARCH DESIGN AND METHODES

1.5.1 Qualitative research method

Qualitative research can be defined as a multi-perspective approach using different qualitative techniques and methods of collecting data through social interaction, aimed at describing, making sense of and interpreting this interaction in terms of meanings attached to the subjects (Merriam, S.B.).

Qualitative research produces findings not only arrived at by statistical procedure, but findings about a person's life, experiences, behaviour and emotions as well as about institutional functioning, socio-cultural phenomena and interaction between individuals within the same institution. (Corbin, J., & Strauss, A.).

Creswell states that qualitative research is an investigative process of understanding based on distinct methodological traditions of inquiry that explore a social problem. During this process, the researcher is able to build a complex and holistic picture, analyse words, report views of informants and restrict the study to its natural setting. Furthermore, the qualitative research process entails direct

observations and relatively unstructured interviewing in natural field settings which are genuine. Qualitative researchers use a combination of inductive and deductive reasoning when interpreting their research and observations are typically unstructured and are often spontaneous, flexible and open-ended (Stake, R.E.).

There are a number of inquiries when applying qualitative research. To clearly understand such inquiries, one needs to have knowledge of different strategic classes, which are discussed below.

- Explanatory Research: in this class, studies are conducted in order to develop a causal explanation of a particular social phenomenon. Researchers try to identify a number of variables such as social, economic or climate variables in the social environment that can be explained as a cause of the consequence of interest. The explanatory strategic class has the objectives of devising theories that are used to explain phenomena and to predict future behaviour. Furthermore, it meets characteristics of qualitative research in the sense that it allows the investigators the ability to measure control over events (McNabb, D.E.).

- Interpretive research: provides the ability for individuals to understand their actions or behaviour in social circumstances and situations. Researchers can be regarded to be interpretive when they assume that humanity's understanding of reality is a function from different meanings assigned to

some phenomenon such as language, shared experiences, publications, and consciousness (McNabb, D.E.).

McNabb identified some principles of interpretive research which are believed to be able to help researchers to evaluate and conduct interpretive research strategies studies.

- The first principle is the Hermeutic Circle, which helps individuals to understand concepts from the meanings they bring to its parts, for example words, and the way such parts relate to one another.

- Secondly, the Context Circle relates to the time and situation-specific nature of a particular social phenomenon.

- Thirdly, the principle of interaction between the researcher and subject maintains that the information is developed from the outcomes of interaction between both subjects and researchers rather than from what was inherent in the phenomenon (McNabb, D.E.).

- Fourthly, the principle of abstraction and generalisation attempts to maintain order between disagreeing parts by means of categorising them into generalisations and concepts with broader applications.

- Fifth is dialogical reasoning which is where the researcher revisits the research design assumptions in the light of new and emerging information.

- Multiple Interpretations is the sixth principle and it compels researchers to compare interpretations of phenomena against competing interpretations.

- Last is the principle of suspicion wherein the researcher is required to reject interpretations at face value and intentionally apply a healthy dose of scepticism on any created conceptualisations (McNabb, D.E.).

It becomes important for the researcher to apply these seven principle methods because it helps to understand the experiences of the impact of the research, and to maintain information based on the outcomes of the interaction that was researched.

1.5.2 Description of inquiry strategy and broad research design

In this study, the researcher will describe the significance of the study, the problem statement, research questions and the limitations of the study. Two research methods were discussed in order to provide the various lines of sight that each method generates.

There is no question as to the fact that every research project is unique and that there are no generic research designs that can fit all research projects. As such, a research design can never be superimposed. Mouton has suggested two factors which can help a researcher not to superimpose a research design onto a research task.

The first one is to determine the type of problem to be solved; the second is to consider how that problem will be scientifically solved.

In order to establish the type of problem to be solved, it is important to know ***the nature of the object studied.*** In this particular study, the nature of the problem being studied is a publication or legislative document. In other words, at the centre of this research there is something to be studied which has no physical existence in the real world. The study will focus on a publication, legislation, model, theory or case law.

The next step is to determine how that problem can be scientifically solved. Mouton lists two scientific methods of solving research problems: empirical and non-empirical. Empirical methods are used for studying an object in the real world (something that can be observed and analysed). Empirical methods can also use literary methods where textual or statistical data is analysed. In the case where the object has no physical existence in the real world but is an abstract model, the scientific method to be used in such studies is always non-empirical.

This study is, therefore, a non-empirical study, partly because of the foregoing and also partly because it aims to analyse a publication, or section within a publication as well as case law.

Mouton identifies four non-empirical research designs as Conceptual Analysis, Theory-Building Studies, Philosophical Analysis and Literature Reviews. A brief explanation (based on Mouton ibid.) of each method follows below:

By *Conceptual Analysis* is meant the clarification of ideas and the elaboration of their meaning. Research designs that employ *Theory-Building Studies* deal with the development of models or theories to understand specific phenomena. Research designs that use *Philosophical Analysis* aim at analysing arguments using value-laden positions, while those using *Literature Reviews* look at what trends are becoming evident within specific scholarship.

This study will utilise a *Literature Review*, also commonly referred to as a *Systematic Review*. The reason for this is that, through my research questions, I will evaluate and review a piece of legislative framework and systematically review this legislation in order to come to a conclusion of the meaning within a broader sense than just its literal meaning.

1.6 ETHICAL ISSUES

There were no ethical issues that had to be considered for the purpose of executing the study. Apart from simple professionalism in gaining access to the various locations for data gathering, no specific formal codes of conduct/ethics applied.

1.7 CHAPTER OUTLINE

This mini-dissertation consists of 6 Chapters:

Chapter 1: Introduction to the research topic and design

Chapter 2: Constitutional labour rights and ILO Convention C158

Chapter 3: Theoretical framework on dismissals

Chapter 4: LRA and Schedule 8

Chapter 5: Concept and definition of exceptional circumstances

Chapter 6: Case law */ jurisprudence*

Chapter 7: Research findings: Dispensing with procedure

Chapter 8: Conclusions and Recommendations

CHAPTER 2

CONSTITUTIONAL LABOUR RIGHTS AND ILO CONVENTION C158

2 CONSTITUTIONAL LABOUR RIGHTS, ILO CONVENTION C158 AND THE LABOUR RELATIONS ACT 66 OF 1995

2.1 INTRODUCTION

The aim of this chapter is to explore the fundamental basics of what governs employment law. In order to do this, one has to consider the Constitution, LRA as well as the ILO and what has been said in terms of terminations and the *audi alteram partem* rule.

2.2 CONSTITUTION OF SOUTH AFRICA

Different sections in the constitution refer to the basic rights of employees within the South African context. Important sections of the Constitution for purposes of labour law include Sections 9, 22 and 23.

Section 9 refers to the protection of employees against discrimination of various listed grounds. In terms of this section, the state may not discriminate against any person. It continues to state that no person may discriminate against another on the basis of arbitrary grounds. However, in terms of this section it would not be unfair to discriminate on the basis of affirmative action.

Section 22 refers to the right to participate freely in the economy. It also applies to contracts and the right of parties to choose to be bound to an agreement voluntarily

concluded. A limitation may be placed on this right by including a restraint of trade clause in the employee's contract of employment.

Section 23 gives a very wide definition for purpose of application of "unfair labour practice"; Section 23 states the following specifically on employees' rights in terms of the study:

> *"Everyone has the right to fair labour practices."*

The Constitution would be applicable in instances where there is no other legislation in protection of these rights or to test constitutionality of other legislation. Although the Constitution make specific reference to a right to fair labour practice, it does not define the "how to" in terms of a person's right to be heard in disciplinary hearings. The Constitution however allows for the application of the LRA to come into effect.

2.3 THE INTERNATIONAL LABOUR ORGANIZATION

South Africa furthermore is a member of the International Labour Organization (hereinafter referred to as the ILO).

As indicated previously, the ILO was established after the end of the First World War as part of the Peace Treaty of Versailles, which was signed in France in 1919.

It was one of the goals of the ILO to create international labour standards, establish social justice and to correct some of the negative effects of international competition. One of the main objectives of the ILO, as contained in its constitution, is to assist in establishing protective values for profit and social peace through equal working conditions.

Member countries of the ILO are expected to subscribe to and adhere to the international labour standards set by the ILO. South Africa, as a member of the ILO, incurs particular obligations in so far as national law and practice are concerned, simply on account of its membership (Osieke, E.) More importantly, one of the ILO's conventions, C158 aims at terminations.

2.3.1 Convention C158

The main theme of this conference and Convention C158 as it was agreed upon was *Termination of Employment at the Initiative of the Employer.* Article 4 of Convention C158 states the following:

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

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

Article 7 provides that:

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

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

Pre-dismissals procedures that need to be followed are quantified to a certain extend in Schedule 8 Code of Good practice: Dismissal in the LRA (hereinafter Schedule 8). Item 4(4) of Schedule 8 states:

> *"In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre–dismissal procedures."*

These exceptional circumstances are not mentioned or described in item 4(4).

2.4 THE LABOUR RELATIONS ACT

The Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA) states the purpose of the act as follows:

"The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are:

(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can:

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote:

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes."

As seen in the LRA, it still refers to Section 27 of the Constitution, but it is actually Section 23 that regulates labour rights. Section 23 of the Constitution state the following on employees' rights:

1. *"Everyone has the right to fair labour practices.*
2. *Every worker has the right*
    a. *to form and join a trade union;*
    b. *to participate in the activities and programmes of a trade union; and*
    c. *to strike."*

In lieu of the above, Section 185 of the LRA further give rise that every employee has the right not to be unfairly dismissed. This will be discussed in more detail further on.

2.5 CONCLUSION

With regards to the Constitution and the ILO's C158 it is clear that it is very broad in its definitions and details regarding the relevant processes to follow when proceeding with disciplinary or termination of employee's services. Although it is very broadly defined, these make provisions to the theoretical aspects to define what to do when contemplating dismissals.

CHAPTER 3

THEORETICAL FRAMEWORK ON DISMISSALS

3 THEORETICAL FRAMEWORK ON DISMISSALS

3.1 INTRODUCTION

In order to get a better understanding of dismissals, there are basic theoretical aspects one has to consider in placing the legislative framework into perspective with regards to the pre-dismissal procedures.

This chapter will explore the role of discipline in the employment context with specific reference to when one can take action against employees.

3.2 THE ROLE OF DISCIPLINE

The function of discipline in the employment context is to ensure that individual employees contribute effectively and efficiently to the goals of the common enterprise. Production and the provision of services will clearly be impeded if employees are free to stay away from work when they please, to work at their own pace, to fight with their fellow employees, or to disobey their employers' instructions. Hence it is the right and duty of employers to ensure that their employees adhere to reasonable standards of efficiency and conduct. (Bosch, C.).

During the era of the Master and Servant laws, criminal sanctions were employed to compel performance by employees of their obligations under employment contracts. The State could punish employees' breaches of contract by fines,

imprisonment (sometimes on spare diet and in solitary confinement) and, in some provinces, even corporal punishment. Even in those times, however, employers had no punitive powers beyond their contractual right to dismiss. (Finnemore, M.).

In modern employment law, the purpose of disciplinary sanctions is regarded as corrective rather than punitive. Before the promulgation of the LRA, most domestic disciplinary codes reflected this change of emphasis.

3.3 DISCIPLINARY RULES AND STANDARDS

3.3.1 Rules

Every workplace has rules for its day-to-day operations. These may arise in different ways. Certain rules arise out of the common law, for example: the rules that employees may not compete with their employers in the same line of business and must maintain reasonable efficiency in the performance of their duties. Some rules are the result of express agreement between the parties, for example: an agreement that employees will work overtime when required doing so, provided that reasonable notice is given. Still other rules may arise impliedly from the conduct of the parties, for example: where workers habitually work overtime for a long period. (Finnemore, M.).

Many firms or institutions have standard conditions of service that are usually incorporated by reference into each employee's contract.

Employers are not obliged to negotiate the rules of the workplace with unions of employees; rules may be imposed unilaterally.

A reasonable rule does not enjoy the impossible or illegal, does not discriminate unnecessarily between different classes of workers, and is not 'sprung' on workers out of the blue. The broad principle is that a disciplinary rule must be designed to promote the efficiency of the enterprise, or, to put it in words often used by the labour courts, it must have an 'economic rationale'. (Grogan, J. Also see Nel, P.S.).

The following check list may be used to assess the validity of a work rule and the legality of sanctions for infringements of such rule:

- Did the employer have the authority to make the rule in terms of the employment contract?
- Does the rule comply with the applicable statutes or regulations?
- Is the rule reasonably required for the efficient, orderly and safe conduct of the employer's business?
- Was the existence of the rule known to the employee, or could/should the employee reasonably have been expected to have known of its existence?
- Has the rule been consistently applied in similar cases in the past?

Only if the answer to each of these questions is in the affirmative will the rule be enforceable. If the answer to any one of the above questions is 'no' the employee may not fairly be disciplined for breaching it. (Grogan, J.).

3.3.2 Standards

There are also broad standards against which the suitability of disciplinary action can be assessed. Some are supplied by international law. Of these, the most important sources are the conventions and recommendations of the International Labour Organisation, to which South Africa is a signatory. Convention 158 of 1982 and Recommendation 166 of the same year, for example, contain minimum standards for the termination of contracts of service by employers.

Standards of fairness and reasonableness are also to be found in the common law, in particular the rules of natural justice, to which public officials are generally obliged to conform. Indeed, many of the guidelines developed by the labour courts can be viewed as an extension to private-sector employers of the rules of administrative law. (Venter, R.).

Finally, but by no means the least important, the Chapter on Fundamental Rights in the Constitution guarantees employees the right to fair labour practices.

3.4 CONCLUSION

The theoretical framework gave insights into the role of discipline in South Africa and what legislative practices are sought when disciplining employees; specifically with regards to rules and standards. These however need to be contextualized with regards to the relevant requirements of legislation.

CHAPTER 4

LABOUR RELATIONS ACT AND SCHEDULE 8

4 LABOUR RELATIONS ACT AND SCHEDULE 8

4.1 INTRODUCTION

In the previous chapters the research explored the overlying broad principles of what governs the employee–employer relationship with specific reference to the South African employee's rights. These constitutional rights are further governed by the LRA which gives rise to how terminations should be dealt with to ensure fairness and transparency towards the employee.

In this chapter, the focus is shifted to the enactment of the Constitution and C158; which gives rise to the LRA and Schedule 8, that governs specific references to terminations and pre-dismissal procedures.

4.2 LABOUR RELATIONS ACT

The LRA was promulgated as the "national legislation" referred to in section 23(5) and 23(6) of the Constitution to give effect to, amongst others, the right to fair labour practices.

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

Section 188(1) of the LRA provides that:

> "[1] dismissal that is not automatically unfair, is unfair if the employer fails to prove-
>
> (a) that the reason for dismissal is a fair reason-
>
> (i) related to the employee‟s conduct or capacity; or
>
> (ii) based on the employer‟s operational requirements; and
>
> [2] that the dismissal was effected in accordance with a fair procedure."

It is impossible to exhaustively enumerate the various forms of misconduct which the courts and the LRA have held to justify termination of employment contracts.

Misconduct may have a bearing on the employment contract if it is committed either before or after the employee commences service and may, in appropriate circumstances, constitute grounds for dismissal. The discovery by an employer that an employee was guilty of a criminal offence has been held to justify dismissal.

At common law, misconduct which has been held to justify summary dismissal includes dishonesty, drunkenness, gross negligence, insolence, fighting, revealing trade secrets, persistent idleness and absenteeism.

The substantive fairness of a dismissal for misconduct is assessed according to the same criteria as discussed above in 3.3.

4.3 SCHEDULE 8

Paragraph (a) of item 7 requires the employer to prove, on a balance of probabilities, that the employee was actually guilty of misconduct. This involves proving that a rule existed, and that the employee actually did contravene that rule. The existence of a rule may be proved by reference to the employee's contract, or to an applicable collective agreement or disciplinary code.

However, the rule need not exist in written form; it is generally assumed that certain conduct is calculated to destroy the employment relationship, whether or not it is expressly prohibited in a contract or disciplinary code, and that the employee knew or should have known that this conduct could lead to dismissal. When employees deny the existence of the rule upon which the employer relies, the employer is required to satisfy the court or arbitrator that the rule exists, and that the employee was, or should have been, aware of it.

Proof that the employee actually committed the offence charged presupposes a proper investigation of the allegation against the employee, and the presentation of evidence that links the employee with the offence. Unlike the criminal courts, an employer need not be satisfied beyond reasonable doubt that the employee committed the offence in question: the civil-law test of proof on a balance of probability suffices. (National Union of Mine Workers obo Mateta/New Vaal Colliery [1999] 3 BALR 332 (IMMSA). The same test is applied by the courts and

arbitrators; an award of a CCMA commissioner was set aside because he adopted the criminal standard of proof beyond reasonable doubt, rather than the civil standard.

4.3.1 Substantive fairness

Substantive fairness is related to the reason for the dismissal. Item (7) of schedule 8 states the following:

> *"Any person who is determining whether a dismissal for misconduct is fair should consider:*
>
> *a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and*
> *b) if a rule or standard was contravened, whether or not:*
>
> *i. the rule was a valid or reasonable rule or standard;*
> *ii. the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;*
> *iii. the rule or standard has been consistently applied by the employer; and*
> *iv. dismissal was with an appropriate sanction for the contravention of the rule or standard."*

Schedule 8 does not give a list of reasons that will justify dismissal. It does however state in Item 3(4) that the following types of offences can be viewed as serious misconduct:

- Gross dishonesty
- Willful damage to property
- Willful endangering of the safety of others
- Physical assault
- Gross insubordination

4.3.1.1 ***Did the employee contravene a rule?***

This proof of misconduct involves establishing that:

1. A rule existed.
2. The employee actually contravened that rule.

The existence of a rule may be proven by reference to the employee's contract or to an applicable collective agreement or disciplinary code. However, the rule need not exist in written form; it is generally assumed that certain conduct is certain to destroy the employment relationship (whether or not it is expressly prohibited in a contract or disciplinary code) and that the employee knew or should have known that this conduct could lead to dismissal.

Proof that the employee actually committed the offence they are charged with presupposes a proper investigation of the allegation against the employee and the presentation of evidence that links the employee to the offence.

Unlike the criminal courts, an employer need not be satisfied beyond reasonable doubt that the employee committed the offence in question. The civil-law test of proof on ***a balance of probability*** suffices. (National Union of Mine Workers obo Mateta/New Vaal Colliery [1999] 3 BALR 332 (IMMSA). The same test is applied by the courts and arbitrators.

4.3.1.2 ***Reasonableness of the rule***

The second requirement for a substantively fair dismissal for misconduct is that the rule the employee has contravened, which led to his/her dismissal, was valid and reasonable.

A workplace rule is regarded as valid if:

- It falls within the employer's contractual powers
- The rule does not infringe on the law or a collective agreement

A workplace law is regarded as reasonable if:

- It is operationally justified - i.e. if it serves to promote the employer's business and the welfare of employers generally

- It does not impose an unreasonable burden on the employee

(National Union of Metal Workers in South Africa & 15 others v Jack's Tyres (Metal and Engineering Industries Bargaining Council. case no. MIDB2075 dated 28/09/2010, unreported)

4.3.1.3 ***Knowledge of the rule***

Thirdly, the employer must prove that the employee was or could reasonably be expected to have been aware of the rule. This requirement is self-evident; it is clearly unfair to penalise a person for breaking a rule of which he or she has no knowledge.

(Shoprite Checkers (Pty) Ltd v CCMA & others [2008] 12 BLLR 1211 (LAC)

4.3.1.4 ***Consistency***

The fourth general requirement is consistency. The labour courts have for many years stressed the principle of equality in the treatment of employees - the so-called parity principle.

Other things being equal, it is unfair to dismiss an employee for:

- An offence which the employer has habitually or frequently condoned in the past (historical inconsistency), or
- To dismiss only some of a number of employees guilty of the same infraction (contemporaneous inconsistency); *(Parmalat South Africa (Pty) Ltd v CCMA & others (LC Case Nn: JR 462/07; judgment date 3rd February 2009)*

4.3.1.5 ***Appropriate sanction***

The final general requirement for a fair dismissal is that the appropriate sanction be applied; special reference to Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, ILJ 2405 (CC);

> *"The first applicant is Mr Z Sidumo. The litigation leading up to the present proceedings had its origins in his dismissal a long time ago. On 2 December 1985 the first respondent, Rustenburg Platinum Mines Ltd (the Mine), which as its name suggests, is a company principally involved in mining platinum, employed Mr Sidumo as part of its Security Services. He was a constable until 1992. Thereafter he was promoted to the position of a Grade II patrolman. On 20 January 2000, Mr Sidumo was transferred to the Waterval Redressing Section, where he was responsible for access control. On 26 June 2000, he was dismissed from his job at the Redressing Section. He contested his dismissal. Up until the events leading up*

to his dismissal, Mr Sidumo had a clean disciplinary record – for a period of almost 15 years.

Mr Sidumo was dismissed for negligently failing to apply established and detailed individual search procedures, significantly different from the random search procedure followed in his earlier posting, prior to his transfer to the Redressing Section. The search procedures were part of the overall effort to minimise losses due, amongst other things, to theft. The dismissal followed on an internal disciplinary inquiry and an internal appeal. Subsequently, Mr Sidumo referred an unfair dismissal dispute to the CCMA in terms of section 191(1)(a) of the LRA."

The courts found that substantively the dismissal was unfair and retrospectively re-instated Mr Sidumo due to the fact that the disciplinary inquiry should have incorporated and stressed the circumstances of the employee before dismissing Mr Sidumo.

4.3.2 Procedural fairness

Section 188 of the LRA states that:

"In order to be fair, a dismissal that is not automatically unfair must be for a fair reason and in accordance with a fair procedure."

Some important factors to remember when considering procedural fairness are:

- The requirements of procedural fairness were developed by the labour courts from the rules of natural justice of the common law, adapted to suit the employment arena.
- Basically, the rules of natural justice require employers to act in a semi-judicial way before imposing a disciplinary penalty on their employees.
- The requirements of procedural fairness are meant to discourage arbitrary and spur-of-the-moment action against employees.
- A fair hearing does not necessarily entail conducting disciplinary proceedings according to the rigorous standards of a court of law.
- Employees also cannot be forced to attend disciplinary hearings.
- The rules of natural justice require no more than that domestic tribunals must be conducted in accordance with common-sense precepts of fairness. (Grogan, J. 2010)

Item 4(1) of Schedule 8 states the following with regards to pre-dismissal requirements:

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

4.3.2.1 ***Specific procedural requirements***

The role of a chairperson at a disciplinary hearing is to ensure procedural fairness in respect of the inquiry for both the employer and employee. In fact, in most cases where procedure is raised as unfair in a disciplinary inquiry, the chairperson is called to testify to the procedure that took place at the inquiry.

The following procedural requirements exist when conducting a disciplinary enquiry: the accused has the right to be informed of the charges against him or her in writing.

The notice should as per Hammond & another v CTI (2008) 7 BALR 659 (CCMA):

- include sufficient particularity as to the charge in order to prepare a defence
- inform the accused of the date and time of the inquiry
- inform the accused as to his or her rights in the inquiry

Furthermore, other factors which are procedurally necessary during a disciplinary hearing are as follows:

- The employee should be given sufficient notice of the inquiry.
- The employee should be granted the right to have representation present.
- The employee should be granted the right to state a case, question evidence led by the company and call witnesses to substantiate his or her defence.
- The employee should be given the right to an interpreter during proceedings.
- The employee should be informed of the outcome of the inquiry in writing and of the right to appeal the matter or refer it to the CCMA. (Grogan, J. 2010). Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee (2002) 23 ILJ 1531 (SCA)

4.3.2.2 ***Recording of the hearing***

The minutes or disciplinary notes can be kept by the chairperson or the secretary. The chairperson in most cases would be expected to keep the minutes as secretaries and/or scribes are not always available.

Employers do not have to keep verbatim (word for word) minutes of the disciplinary hearing. Verbatim minutes are ideal but not always practical especially for smaller employers who cannot carry the administrative costs associated with such minutes. There are however essential elements of the disciplinary inquiry that need to be recorded.

The labour legislation does not specify the requirements of the minutes. The only reference made to record keeping is found in 'The Code of Good Practice: Dismissals'. The accused can however request written reasons for the finding on his/her guilt or innocence and written reasons for the recommendation of the appropriate penalty. (Code of Good Practice: Dismissals).

It is therefore important that these findings are recorded in detail. The chairperson should also encourage the accused and or his representative to keep their own minutes, specifically in cases where only disciplinary notes are kept.

4.4 CONCLUSION

It is seen that there is great emphasis placed on ensuring substantive and procedural fairness in order to a fair termination. In addition to the above mentioned Substantive and Procedural aspects however, Schedule 8 indicates the following;

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

This specific section in the LRA has not yet been fully explored and hence the necessity to explore what these "exceptional" circumstances entail.

CHAPTER 5

CONCEPT OF EXCEPTIONAL CIRCUMSTANCES

5 CONCEPT OF EXCEPTIONAL CIRCUMSTANCES

5.1 INTRODUCTION

Schedule 8 indicates the following;

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

Article 7 of the ILO Convention C158 provides that:

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

The ILO does not explore the full details of the procedural aspects in terms of exceptional circumstances. Section 4(4) in the LRA has also not yet been fully explored and it is therefore important to define the meaning of "exceptional circumstances".

5.2 DEFINITION OF EXCEPTIONAL CIRCUMSTANCES

According to the Thesaurus, '*Exceptional'* is described as:

Thesaurus Legend: *Synonyms Related Words Antonyms*

- ***exceptional*** *- far beyond what is usual in magnitude or degree; "a night of exceeding darkness"; "an exceptional memory"; "Olympian efforts to save the city from bankruptcy"; "the young Mozart's prodigious talents"*

  exceeding, surpassing, prodigious, Olympian

  extraordinary - beyond what is ordinary or usual; highly unusual or exceptional or remarkable; "extraordinary authority"; "an extraordinary achievement"; "her extraordinary beauty"; "enjoyed extraordinary popularity"; "an extraordinary capacity for work"; "an extraordinary session of the legislature"

- ***exceptional*** *- surpassing what is common or usual or expected; "he paid especial attention to her"; "exceptional kindness"; "a matter of particular and unusual importance"; "a special occasion"; "a special reason to confide in her"; "What's so special about the year 2000?"*

  especial, particular, special

  uncommon - not common or ordinarily encountered; unusually great in amount or remarkable in character or kind; "uncommon birds"; "frost and floods are uncommon during these months"; "doing an uncommon amount of business"; "an uncommon liking for money"; "he owed his greatest debt to his mother's uncommon character and ability"

- ***exceptional*** *- deviating widely from a norm of physical or mental ability; used especially of children below normal in intelligence; "special educational provisions for exceptional children"*

  psychological science, psychology - the science of mental life

  abnormal *- departing from the normal in e.g. intelligence and development; "they were heartbroken when they learned their child was abnormal"; "an abnormal personality"*

The Convention concerning Termination of Employment at the Initiative of the Employer (Entry into force: 23 Nov 1985) also make reference to the term exceptional circumstances; this was confirmed by Schedule 8, which refers to circumstances where the employer could not, even if he wanted to, be able to ensure that procedure is followed.

5.3 C158 - TERMINATION OF EMPLOYMENT CONVENTION

Under the C158, specific references are made in terms the termination of employees and the justification of the termination in terms of procedure;

"Article 5

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

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

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

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

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

v) absence from work during maternity leave.

Article 6

i) Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

ii) The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

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."

5.4 CONCLUSION

Thus through Convention C158, exceptional circumstances would be defined or seen whereby an employer could not have reasonably be expected to have followed the normal course of procedure as seen throughout 4.3.2 above.

The courts have furthermore given through two broad distinctions in terms of the above; namely: the crisis-zone situation; and where an employee waives his or her right to a pre-dismissal hearing. (Grogan, J. (2010)).

CHAPTER 6

SOUTH AFRICAN CASE LAW ON EXCEPTIONAL CIRCUMSTANCES

6 SOUTH AFRICAN CASE LAW ON EXCEPTIONAL CIRCUMSTANCES

6.1 INTRODUCTION

It is essential to explore different case law that substantiates the fact that one could dispense with pre-dismissal procedures. These matters would give insight on whether or not there were situations that Section 4(4) where utilized and the courts have upheld these decisions.

In this chapter, various important and recent case will be cited whereby Section 4(4) where utilized to dispense with pre-dismissal procedures. These will then be interpreted in the following chapter.

6.2 REFUSAL TO ATTEND A DISCIPLINARY HEARING

In Mphepya v The South African Weather Service (2010); the employee was dismissed *in absentia* from the post of General Manager: Operations after being found guilty of gross negligence, dereliction of duty and breaching procurement policies. Most of the charges related to a rain enhancing project conducted by the employer, and arose from the employee's failure to insure the aircraft involved.

He denied that he had breached any policies, and claimed that insuring the aircraft would not have been cost-effective because of their age. Instead, the cost of possible repairs had been separately budgeted for, and repairs to the engines had

been paid for from an amount allocated for this purpose. He claimed that his decisions had been conveyed to colleagues and superiors. It was found during the enquiry by the commissioner that other managers were involved in deciding over the budget and planning.

The commissioner noted that the employee had declined to attend his disciplinary hearing because he believed he would be unfairly treated. The employee had laid no basis for this claim. The chairperson and initiator were both outsiders, appointed because of the employee's seniority. The employee had waived his right to be heard by walking out of the hearing. Postponement would have been futile because the chairperson had no way of knowing whether the employee would ever agree to attend the hearing. The employee's dismissal was accordingly ruled procedurally fair by the CCMA.

A waiver in law occurs when a person, with a full knowledge of a legal right, abandons it. The employee would be waiving the right to a disciplinary enquiry if the employee's conduct is of such a nature that the employer cannot be expected to hold an enquiry. In terms of the above, a waiver of the right to a disciplinary enquiry may also be assumed if the employee refuses to attend the enquiry. It may also be assumed if the employee fails to attend the enquiry. However, it is important to ensure that the employee's failure to attend is because of a decision on the employee's part not to attend and not because of circumstances beyond the employee's control or unforeseen circumstances.

The Commissioner found that the hearing was procedurally fair, but substantively unfair.

6.3 ABSCONTIONS

In Lebereko v Metrorail (2011); an employee absconded from work for three weeks without notifying or contacting the employer claiming that he needed to consult a traditional healer. The company's disciplinary code stated that any employee will be dismissed after two abscondment letters were sent to them. The company sent the two abscondment letters and then a letter of dismissal. They did not have a disciplinary hearing for the matter.

With regards to procedural fairness, however, it is clear that the employee's dismissal was not preceded by a fair procedure. The employee's absenteeism from 16 December 2010 constituted misconduct by him, and it was obviously incumbent on the employer to charge the employee with this misconduct rather than simply issuing him with a letter of dismissal.

While it is true that the employer's abscondment policy provides that an employee may be dismissed if he/she fails to respond to two abscondment letters, this did not entitle the employer to dispense with pre-dismissal procedures. The employer should have notified the employee of the allegations against him, and the employee should then have been afforded an opportunity to state a case in response to those

allegations (item 4 of Schedule 8). None of this was done by the employer, and it, instead, presented the employee with his dismissal as a *fait accompli* when the employer handed him the letter of dismissal. In these circumstances, there can be no doubt that the dismissal has been procedurally unfair.

6.4 EMPLOYEE'S RIGHT TO STATE HIS CASE

In Matambuye v Road Accident Fund (2011); the employee was charged with misrepresentation and a failure to disclose his criminal record.

The commissioner noted that the record indicated that the chairperson had become increasingly irritated with the employee and had ultimately refused to allow him to testify because he had had already called several witnesses. This can clearly be seen as an irregularity.

The employee also testified that he was denied the right to testify. He also referred to the parts of the minutes of the hearing where he wanted to testify and the chairperson did not agree. On behalf of the company Mr Maphumolo submitted that the employee was not prejudiced as he was allowed to call witnesses and his version was before the disciplinary hearing. There was no explanation from the chairperson on what happened in this regard to justify his refusal to allow the employee to testify.

On the minutes, he merely questioned why the employee wanted to testify after calling his witnesses. I agree with the employee's submission that it was the chairperson who said he must call his witnesses and he called them before he testified. There is no rule that he could not testify after these witnesses. In practice, it is accepted as good practice that the employee should testify first because he remains in the proceedings and if he hears the evidence of all the witnesses before he testifies there is a danger that he may tailor his evidence to corroborate what was said by the witnesses. This, however, does not preclude him from testifying and it would be up to the chairperson to decide on the weight to attach to the evidence of the employee, considering the fact that he was in the room when other witnesses were testifying.

The commissioner indicated that it is so that some parts were not audible when transcription was done, however, on the parts to which the employee referred; he was able to read the record in context and make sense of what was happening in the proceedings. The statements that were made by the chairperson in some instances clearly indicated that he was irritated by the employee.

The commissioner further stated that the difficulty in this attitude was that he even lost sight of the fact that he had to protect the process. He would agree with most of the objections that were made by Primrose even where there was no merit. When Primrose objected to Ramaswi coming back so that cross examination could be

concluded, he agreed and upheld the objection thus denying the employee the opportunity to cross-examine this witness.

When the employee wanted to testify, Primrose said it was not necessary and the applicant was denied the opportunity to state his case. The witnesses that were called by the applicant would testify on certain aspects but that cannot serve as a substitute for the testimony of an accused employee. The employee had a right to put his version before the chairperson and denying him that opportunity was unfair.

The commissioner found the dismissal to be substantively and procedurally unfair and the employee was reinstated.

6.5 CRISIS-ZONE

In Lefu & others v Western Areas Gold Mine; a crisis-zone situation normally refers to a situation where an employer has to act immediately in order to protect life and property; for example in Lefu & others v Western Areas Gold Mine, employees engaged in strike action that was so violent that nine employees were killed and 304 were injured. The mine decided to dismiss 206 employees for misconduct during the strike without following any formal procedures. The mine argued that it would have been impossible to hold hearings.

The Industrial Court accepted this argument and held that the question of whether or not the employer was dealing with a crisis-zone situation was one of fact. (Basson, A.).

Furthermore, according to Dr Paul Andries Smit;

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

6.6 FAILURE TO ATTEND A DISCIPLINARY HEARING

In NUM v Buffelsfontein Gold Mining; "Waiver in law occurs when a person, with full knowledge of a legal right, abandons it. This can occur where an employee has been duly notified to attend a disciplinary enquiry, but refuses to attend the proceeding or in the situation where an employee abuses the employer during the enquiry." (Basson, A. Also see *Food & Beverages Workers Union & others v Hercules Cold Storage (Pty) Ltd* (1990) 11 *ILJ* 47 (LAC).

The facts in the NUM v Buffelsfontein Gold Mining Co Ltd (1988) 9 ILJ 341 (IC) were similar to that in the Lefu case. The court held that the dismissal was fair and

that the failure to hold an enquiry was understandable under the circumstances. (*Hayward v Protea Furnishers* [1997] 5 *BLLR* 632 (CCMA).

The absence of an employee due to illness does not justify dispensing with an enquiry. In such circumstances, it is advisable to postpone the enquiry. It would also serve the employer well to remember that an employee who fails to attend an enquiry without any valid reason only waives his or her right to state his or her case. The employee does not waive his or her right to a fair dismissal. The dismissal must still be procedurally and substantively fair; and it is advisable that the formal disciplinary enquiry, albeit in the absence of the employee, should still be conducted. (Basson, A. Also see *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] 8 BLLR 699 (SCA).

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

6.7 CONCLUSION

In the next chapter, the research findings are analysed in terms of the results of the literature review and applicable statutes. The results are interpreted to show when one may dispense with pre-dismissal procedures.

CHAPTER 7

RESEARCH FINDINGS: DISPENSING WITH PROCEDURE

7 RESEARCH FINDINGS: DISPENSING WITH PROCEDURE

7.1 INTRODUCTION

The initial Chapters outlined and gave insight to the problem statement, research questions, the design and methods used in the study.

Throughout the remainder of the Chapters, detailed attention was given through to the legislative framework of dismissals; specifically to that of Schedule 8 and its provisions. Furthermore, insights were given in terms of what the true meaning is of exceptional circumstances and how it is then seen throughout current practices and judgements within the Southern African sectors.

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

i. The interpretation and clarification of the legislative framework for dismissals
ii. A theoretical discussion on Schedule 8
iii. Understanding the true meaning of Exceptional Circumstances
iv. An investigation on current practices and judgements where one dispensed with pre-dismissal procedures

7.2 RESULTS OF THE LITERATURE REVIEW

7.2.1 A legislative framework for dismissals

The function of discipline in the employment context is to ensure that individual employees contribute effectively and efficiently to the goals of the common enterprise. Production and the provision of services will clearly be impeded if employees are free to stay away from work when they please, to work at their own pace, to fight with their fellow employees, or to disobey their employers' instructions. Hence it is the right and duty of employers to ensure that their employees adhere to reasonable standards of efficiency and conduct.

In modern employment law, the purpose of disciplinary sanctions is regarded as corrective rather than punitive. The Code of Good Practice: Dismissal, endorses the concept of corrective or progressive discipline.

7.2.2 Code of good practice: Dismissals (Schedule 8)

In accordance with section 188 of the Labour Relations Act, in order to determine whether or not a dismissal is procedurally fair, the court will first look to the Code of Good Practice: Dismissals in Schedule 8 of the LRA.

Clause 4(1) of the Code of Good Practice sets out the procedure to be followed:

1. The employer must conduct an investigation;
2. The employee must be notified of the allegations against him;
3. The employee must be allowed an opportunity to state his case in response to the allegations;
4. The employee is allowed the assistance of a trade union representative/ fellow employee;
5. The employer must communicate its decision to the employee, preferably in writing.

Item 3(3) of Schedule 8 furthermore state that;

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

This could be interpreted to mean that:

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

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

Keeping the above in mind; Schedule 8 then specifically mention exceptional circumstances and is reiterated in C158;

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

> *"(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."*

7.2.3 The definition of exceptional circumstances

Exceptional / extraordinary - beyond what is ordinary or usual; highly unusual or exceptional or remarkable; "extraordinary authority"; "an extraordinary achievement"; "her extraordinary beauty"; "enjoyed extraordinary popularity"; "an extraordinary capacity for work"; "an extraordinary session of the legislature"

7.2.4 Current practices and judgements where one dispensed with pre-dismissal procedures

7.2.4.1 *Lefu & others v Western Areas Gold Mine*

A crisis-zone situation normally refers to a situation where an employer has to act immediately in order to protect life and property.

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

A waiver in law occurs when a person, with full knowledge of a legal right, abandons it. This can occur where an employee has been duly notified to attend a disciplinary enquiry, but refuses to attend the proceeding or in the situation where an employee abuses the employer during the enquiry. (Basson (2002) 198; *Food & Beverages Workers Union & others v Hercules Cold Storage (Pty) Ltd* (1990) 11 *ILJ* 47 (LAC).

7.2.4.3 *Mphepya v The South African Weather Service (2010) 19 CCMA*

This matter confirms the findings of the matters in 7.2.4.1 and 7.2.4.2, whereby the applicant had declined to attend his disciplinary hearing because he believed he would be unfairly treated. The applicant had laid no basis for this claim. The chairperson and initiator were both outsiders, appointed because of the applicant's

seniority. The applicant had waived his right to be heard by walking out of the hearing. Postponement would have been futile because the presiding officer had no way of knowing whether the applicant would ever agree to attend the hearing.

7.2.4.4 ***Lebereko v Metrorail (2011) 20 CCMA***

In Lebereko v Metrorail it is reiterated that an employee absconding from his/her workplace does not necessarily justify to terminate the employee's services without following due process. Here it is clear that the employee's dismissal was not preceded by a fair procedure. The employee's absenteeism from 16 December 2010 constituted misconduct by him, and it was obviously incumbent on the employer to charge the employee with this misconduct rather than simply issuing him with a letter of dismissal.

Thus while it is true that the employer's abscondment policy provides that an employee may be dismissed if he/she fails to respond to two abscondment letters, this did not entitle the employer to dispense with pre-dismissal procedures.

7.2.4.5 ***Matambuye v Road Accident Fund (2011) 20 CCMA***

In Matambuye v The Road Accident Fund; the applicant had called upon various witnesses before he himself testified; this was clearly an irregularity. The Commissioner had agreed with the applicant's submission that it was the

chairperson who said he must call his witnesses and he called them before he testified.

There is no rule that he could not testify after these witnesses. In practice, it is accepted as good practice that the applicant should testify first because he remains in the proceedings and if he hears the evidence of all the witnesses before he testifies there is a danger that he may tailor his evidence to corroborate what was said by the witnesses. This, however, does not preclude him from testifying and it would be up to the presiding officer to decide on the weight to attach to the evidence of the applicant, considering the fact that he was in the room when other witnesses were testifying.

The above case reiterated that the Chairperson in a disciplinary inquiry may not without good cause waiver an employee's right to state his case.

7.2.4.6 ***FAWU obo Kapesi & Others v Premier Foods Ltd t/a Ribbon Salt River***

Traditionally, evidence on affidavit is only admissible where it is affirmed by oral evidence of the deponent, failing which it will be considered hearsay and as such will be inadmissible. Further, the accused may argue prejudice against the use of affidavits, as he will not have an opportunity to cross examine the evidence in the affidavit.

The employer may however have recourse in legislation on the grounds that these are exceptional circumstances, as per clause 4(4) of the Code of Good Practice, that warrant a deviation from the natural laws of justice. Further to this, section 3 of the Evidence Amendment Act 45 of 1988 affords the Court discretion to admit hearsay evidence, subject to taking various factors into account.

The case of FAWU obo Kapesi & Others v Premier Foods Ltd t/a Ribbon Salt River ILJ 1654 (LC); [2010] the Court, at paragraphs 41 to 45 of the judgment of Basson J, dealt with a situation in which the evidence of witnesses given in statement only may be deemed admissible in case the witnesses had been subject to violence and intimidation. In this case, it was to the extent that the main witness disappeared on the morning of the disciplinary hearings, never to be seen or heard from again. The remaining witnesses had given statements, but refused to give oral evidence as they feared for their safety. These statements formed part of the bundle before the Labour Court, with the names of the deponents blacked out.

Basson expressly stated that “it is possible to proceed with a disciplinary hearing on the basis of written statements in circumstances where the witnesses are too scared to testify. Allowing an individual to get away with their acts of misconduct simply because they intimidate potential witnesses will destroy the very foundation on which our society is built.”

The learned Judge used numerous examples of case law, where the courts had approved an employer's decision to rely on witness statements to substantiate his findings.

At the essence of the Code of Good Practice is that the accused employee should have an opportunity to present his case in answer to any allegations against him. The interests of justice need to be weighed against any prejudice the accused employee may suffer. Lastly, the test to be applied, in respect of the admissibility of statements , as set out in the G Smith Sugar Ltd case is whether the said statement is relevant, reliable and logically probative and of such a nature that responsible people would rely upon it in serious offences.

Thus if the statement meets the test herein and is comprehensive enough for the accused employee to answer to the allegations, then in that event, the witness need not give oral evidence and may have his identity protected. It is further opined that a genuine fear for personal safety would fall under the umbrella of clause 4(4) of the Code of Good Practice's exceptional circumstances and be acceptable as a reason to deviate from the pre-dismissal procedures.

7.3 INTERPRETATION OF RESULTS

The constitution indicates that all employees have the right to fair labour practice; this is further reiterated through the Code of Good Practice, Schedule 8. Section

188 of the LRA as well as schedule 8 has, on numerous occasions, been confirmed and in Hamata & another v Chairperson, Peninsula Technicon Internal Disciplinary Committee factors were outlined which are procedurally necessary during a disciplinary:

- The accused should be given sufficient notice of the inquiry.

- The accused should be granted the right to have representation present.

- The accused should be granted the right to state a case, question evidence led by the company and call witnesses to substantiate his or her defence.

- The accused should be given the right to an interpreter during proceedings.

However, item 4(4) of schedule 8 state in contradiction to the above, that in exceptional circumstances one can dispense with these procedures. The word exceptional should however be read in context and should not be an excuse not to follow fair procedure; as per Dr P.A. Smit, the onus should still lie with the employer to justify the term 'exceptional' and the onus of proof will still be with the employer to proof the same.

In Matambuye v Road Accident Fund (2011), Lebereko v Metrorail (2011), Mphepya v The South African Weather Service (2010), NUM v Buffelsfontein Gold

Mining Co Ltd (1988) and Lefu & others v Western Areas Gold Mine two broad categories were seen to be the norm in terms of understanding what these exceptional circumstances are;

1. When the employee waiver his rights
2. Crisis-zone

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

8 CONCLUSIONS AND RECOMMENDATIONS

8.1 INTRODUCTION

The main aim of this research was to find and define what the term exceptional circumstances refer to as stated in item 4(4) of schedule 8.

In order to achieve this, the research process that was followed was divided into four main phases, namely:

i. The interpretation and clarification of the legislative framework for dismissals
ii. A theoretical discussion on Schedule 8
iii. Understanding the true meaning of Exceptional Circumstances
iv. An investigation on current practices and judgements where one dispensed with pre-dismissal procedures

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 gave an overview of the broad legislative regulations that govern South African Labour legislation. The Constitution and ILO convention 158 was discussed to give insight on the basis of the study; the fundamental right of an employee to state his case in response to allegations against him.

Chapter 3 gave insights into the role of discipline in South Africa and what legislative practices are sought when disciplining employees; specifically with regards to rules and standards.

Chapter 4 dealt with the LRA, Schedule 8 and each individual aspect of substantive and procedural fairness. The differences and what employers need to establish to ensure fairness in disciplining employees were discussed.

Chapter 5 gave insight to the term 'exceptional circumstances'. These insights were given through item 4(4) of schedule 8 as well as according to the ILO convention C158. The definitions of exceptional circumstances as per the Thesaurus Dictionary were discussed to get a better understanding of when it could be plausible to dispense with pre-dismissal procedures.

Chapter 6 explored different Judgements as to where employers called on item 4(4) of schedule 8 as to the reason why they had dispensed with pre-dismissal procedures.

Chapter 7 gave through the research findings.

8.3 RECOMMENDATION

With regards to the term exceptional circumstances, item 4(4) of schedule 8 as well as the ILO Convention C158; I would propose the following change to the Code of Good Practice to include a better understanding of the phrase;

> *"(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures. Exceptional circumstances includes but not limited to where the employee waives his or her right to a disciplinary enquiry and to protect life and property in instances of extreme violence "*

8.4 CONCLUSION

In conclusion; it seems that there is a volt of contradictory views on whether one can terminate an employee's services with mere substantive fairness to confirm if the dismissal was in fact fair.

The courts have held, in conjunction with the Code of Good Practice, that one of the fundamental rights of an employee is to state his case in response to allegations against him.

However, it has also been found that in the following circumstances, pre-dismissal procedures could be dispensed with:

- When an employee refuses to attend a disciplinary inquiry
- When there are threats against the life of any party in the inquiry

In essence, one must always ensure that the procedure as set out in Schedule 8 is adhered to; however, in some circumstances, a chairperson or employer has the right to proceed and terminate an employee's services due to exceptional circumstances.

> *"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."*
>
> Dr P.A. Smit

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ANEXURE 1: CODE OF GOOD PRACTICE: DISMISSAL

1 Introduction

(1) This code of good practice deals with some of the key aspects of dismissals for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of employees employed in an establishment may warrant a different approach.

(2) This Act emphasises the primacy of collective agreements. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective agreements, or the outcome of joint decision-making by an employer and a workplace forum.

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

2 Fair reasons for dismissal

(1) A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and theappropriateness of dismissal as a penalty. Whether or not the procedure is fair isdetermined by referring to the guidelines set out below.

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

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

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

3 Misconduct:Disciplinary procedures prior to dismissal

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

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

(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to

degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.
Dismissals for misconduct

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

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

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

misconduct under consideration.

4 Fair procedure

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

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

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

(4) In exceptional circumstances, if the employer cannot reasonably be expected

to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

5 Disciplinary records

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

6 Dismissals and industrial action

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

(a) the seriousness of the contravention of this Act;
(b) attempts made to comply with this Act; and
(c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The

employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

7 Guidelines in cases of dismissal for misconduct

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

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

(i) the rule was a valid or reasonable rule or standard;
(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
(iii) the rule or standard has been consistently applied by the employer; and
(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

8 Incapacity: Poor work performance

(1) A newly hired employee may be placed on probation for a period that is reasonable given the circumstances of the job. The period should be determined by the nature of the job, and the time it takes to determine the employee's suitability for continued employment. When appropriate, an employer should give an employee whatever evaluation, instruction, training, guidance or counselling the employee requires to render satisfactory service. Dismissal during the probationary period should be preceded by an opportunity for the employee to state a case in response and to be assisted by a trade union representative or fellow employee.

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

(a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and
(b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

(3) The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider

other ways, short of dismissal, to remedy the matter.

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

9 Guidelines in cases of dismissal for poor work performance

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

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

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

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

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

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

10 Incapacity: Ill health or injury

(1) Incapacity on the grounds of ill health or injury may be temporary or

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

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

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

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

onerous in these circumstances.

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

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

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

(b) if the employee is not capable-

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

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

(iii) the availability of any suitable alternative work.

ANEXURE 2: C158 - TERMINATION OF EMPLOYMENT CONVENTION, 1982 (NO. 158)

Convention concerning Termination of Employment at the Initiative of the Employer (Entry into force: 23 Nov 1985)Adoption: Geneva, 68th ILC session (22 Jun 1982) - Status: No conclusions (Technical Convention).

Preamble

The General Conference of the International Labour Organisation,

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

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

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

Considering that these developments have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious

problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries,

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

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

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

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

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

Article 2

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

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:(a) workers engaged under a contract of employment for a specified period of time or a specified task;

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

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

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

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

5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude

from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

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

Article 3

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

PART II. STANDARDS OF GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

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

Article 5

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

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

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

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

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

(e) absence from work during maternity leave.

Article 6

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

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the

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

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

Article 7

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

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

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

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

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

DIVISION D. PERIOD OF NOTICE

Article 11

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

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

(c) a combination of such allowance and benefits.

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

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

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

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

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

PART IV. FINAL PROVISIONS

Article 15

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 16

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 17

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this

Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 18

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 19

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 20

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 21

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides-(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;
(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 22

The English and French versions of the text of this Convention are equally authoritative.