

International perspectives on South Africa's unfair dismissal law*

*P Smit** and BPS van Eck****

Abstract

The right not to be unfairly dismissed is well-recognised in South African labour law. Anecdotal evidence suggests that South Africa may be over-regulated in this regard. ILO Convention C158 provides standard-setting guidelines in respect of the termination of any worker's employment. In this contribution, ILO standards are considered and the respective positions in the Netherlands, the United Kingdom, the United States of America and South Africa are compared to ILO Convention C158. The authors seek to establish whether unfair dismissal law in South Africa is out of step with international standards and the position in a selection of foreign jurisdictions.

INTRODUCTION

In the modern business environment, organisations must adapt to increasingly complex technological, political, economic and legal frameworks. Employers must adhere to a plethora of legal instruments that apply to the workplace. These provisions emanate from a variety of disciplines such as company law, tax law, consumer protection law, social security law, health and insurance law and labour law.¹

In 1623 John Donne said that '[no] man is an island, entire of itself; every man is a piece of the continent'.² This phrase is still relevant today. The almost unrestricted movement of capital, goods and labour across international borders is creating a situation where uniform standards become more and more

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** MA, PhD. Lecturer: Faculty of Economic and Management Sciences, University of Pretoria.

*** BLC LLD. Professor: Faculty of Law, University of Pretoria.

¹ F van Jaarsveld & S van Eck *Principles of labour law* (2005) 46. In the South African context this includes new legislation, namely the National Credit Act 34 of 2005, the Companies Act 71 of 2008 and the Consumer Protection Act 68 of 2008.

² These words were used in the poem 'Devotions upon emergent occasions – meditation XVII' authored in 1623–1624.

relevant.³ Even though there are problems with the enforcement of such standards, the International Labour Organisation's (the ILO) conventions play a significant role in establishing uniform standards in the world of work.⁴

In South Africa more than eighty per cent of all labour disputes referred to the Commission for Conciliation, Mediation and Arbitration (the CCMA) and bargaining councils relate to unfair dismissal.⁵ In the South African business community 'anecdotal evidence suggests' that labour laws establish overly strict and inflexible standards in respect of the dismissal of employees on grounds of misconduct.⁶ In this contribution, the question is posed whether this is the case. ILO standards are considered and the respective positions in the Netherlands, the United Kingdom, the United States of America, and South Africa are compared to establish whether South Africa is out of step with international developments.

INTERNATIONAL LABOUR ORGANISATION

The ILO was established after the end of the First World War as part of the Peace Treaty of Versailles. As pointed out by Van Niekerk *et al.*,⁷ the ILO constitution states that it seeks to assist in the establishment of fair competition between countries through the establishment of standard-setting protective values and to establish social peace through equal working conditions.

³ See S van Eck & A Boraine 'A plea for the development of coherent labour and insolvency principles on a regional basis in SADC countries' in Omar (ed) *International insolvency law: themes and perspectives* (2008) 269–294 and Wisskirchen 'The standard-setting and monitoring activity of the ILO: legal questions and practical experience' (2005) 144/3 *International Labour Review* 253.

⁴ G Biffel & K Isaac 'Globalisation and core labour standards: compliance problems with ILO Conventions 87 & 89 comparing Australia and other English-speaking countries with EU member states' (2005) 21/3 *The International Journal of Comparative Labour Law and Industrial Relations* 405.

⁵ The *CCMA Annual Report (2008–2009)* 20 states that of the 101 759 conciliations and 40 229 arbitrations that were conducted in that year, eighty per cent related to unfair dismissal disputes. In the previous year it constituted eighty-two per cent of all cases referred. The report is available at: <http://www.ccma.org.za/UploadedMedia/CCMA%20Net%20AR%20Report.pdf>.

⁶ A van Niekerk 'Regulating flexibility and small business: revisiting the LRA and BCEA – a response to Halton Cheadle's concept paper' March 2007, Development Policy Research Unit, Working Paper No. 07/119 at 18, accessed on 1 April 2010 and available at <http://ssrn.com/abstract=982064>.

⁷ See A van Niekerk, M Christianson, M McGregor, N Smit and S van Eck *Law@work* (2008) 19–26. The ILO strives towards this aim by, for example, the abolishment of child labour, protection against unfair dismissal and the protection of workers against unsafe and unhealthy working conditions.

In 2009, no less than 183 countries worldwide were members of the ILO.⁸ South Africa, the Netherlands and the UK were among the founder members in 1919. The USA joined in 1934, abandoned membership in 1977, and rejoined in 1980. South Africa withdrew its membership in 1964 after its apartheid policies became a contentious point of discussion at the International Labour Conference.⁹ After its first democratic elections South Africa rejoined the ILO on 26 May 1994.

South Africa incurs particular obligations in so far as national laws and policies must be adapted to conform to those ILO conventions that have been ratified. The Labour Relations Act¹⁰ (the LRA) states that one of its purposes is 'to give effect to obligations incurred' by South Africa as a member state of the ILO.¹¹ The South African Constitutional Court has given effect to this principle. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*¹² the court held that

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

The ILO adopts Conventions that spell out its view on international labour standards. Conventions are not automatically binding on member states and only become binding once a member state ratifies a particular convention.¹³

On 2 June 1982 the Governing Body of the International Labour Office met for the 68th time in Geneva and adopted ILO Convention C158.¹⁴ The theme of the conference was 'termination of employment at the initiative of the employer'. Convention C158 has been ratified by only thirty-four of the 183 member states of the ILO. It is significant to note for purposes of this

⁸ The ILO website at www.ilo.org, (accessed on 20 May 2009), contains a list of member states as well as all conventions and recommendations that have been ratified by the various countries.

⁹ Van Niekerk *et al* n 7 above at 20; G van Arkel *A just cause for dismissal in the United States and the Netherlands* (2007) 300.

¹⁰ 66 of 1995.

¹¹ Section 1(b) of the LRA. S 3(c) of the LRA further requires that anybody engaged in the interpretation of the LRA must comply with South Africa's international law obligations. See in this regard A van Niekerk 'The International Labour Organisation (ILO) and South African labour law' (1996) 5/12 *CLL* 112.

¹² [2007] 12 *BLLR* 1097 (CC) at par 61.

¹³ Van Niekerk *et al* n 7 above at 21; Wisskirchen n 3 above at 258.

¹⁴ Convention C158, accessible at: (www.ilo.org) (accessed on 17 May 2007).

contribution that South Africa, the UK, the USA and the Netherlands have not ratified Convention C158.

Article 2 of the convention excludes certain categories of workers from protection against dismissal, namely fixed-term contract workers; workers employed on a probationary period; and workers employed on a casual basis. Article 2(5) also states that member countries can exclude other categories of employee from certain provisions of Convention C158 on the basis of the size and nature of the employer's business.¹⁵ Articles 4 to 8 of ILO Convention C158 deal with pre-dismissal requirements.

Article 4 of Convention C158 provides that

[t]he 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.¹⁶

This makes it clear that the ILO only recognises three broad categories of permissible grounds upon which a worker's services may be terminated – those related to misconduct, incapacity, or the employer's operational requirements.¹⁷ It is also clear that dismissal must be based on a valid reason which can be classified within one of these categories. It is submitted that the degree or severity of particular behaviour could play a role in determining whether the behaviour can be categorised as a valid reason for dismissal.

Article 5 of Convention C158 states that a number of reasons shall not constitute valid grounds for termination. Included in the list are union membership; acting in the capacity of a workers' representative, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and absence from work during maternity leave.¹⁸

This list of grounds, according to the ILO, should automatically be viewed as impermissible grounds upon which a worker's services may not be

¹⁵ Article 3 states that the terms 'termination' and 'termination of employment' mean termination at the initiative of the employer.

¹⁶ Our emphasis.

¹⁷ Van Arkel n 9 above at 322; Kuip *Ontslagrecht met bijzondere aandacht voor de dringende reden* (1993) 280; E Sims 'Judicial decisions concerning dismissals: some recent cases' (1995) 134/6 *International Labour Review* 675.

¹⁸ In addition to art 5, art 6 states that the temporary illness or injury of a worker shall not constitute a valid reason for termination.

terminated.¹⁹ It is clear that this list is not exhaustive and that member countries are free to include additional grounds.²⁰

Article 7 of Convention C158 provides that

[t]he 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.²¹

Article 7 is not clear on whether this opportunity to defend oneself must take place at the workplace or, in the alternative, before an independent body or forum. It is, however, submitted that there are two indications that it should be granted at the workplace. The first is contained in the second part of article 7, which states that 'the employer' may dispense with 'this opportunity' if it appears that it cannot reasonably be expected to do so. The second indicator is contained in the next article, which provides for an appeal to an independent external body. Article 8 of ILO Convention C158 provides that:

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

We suggest that there are three main principles that can be extracted from ILO Convention C158:²²

There must be a valid reason for dismissal.

A worker must be afforded an opportunity to defend him- or herself at the workplace against the allegations made by the employer.

Every worker should be entitled to an opportunity to lodge an appeal to an impartial tribunal or court against a decision to dismiss him or her.

The preliminary observation can be made that international standards do not dictate that formal court-like procedures have to be followed at the workplace

¹⁹ See ILO *Protection against unjustified dismissal* (1995) para 102 and Governing Body Paper 2001, Appendix 1 (short survey) par 9 and Heerma van Voss *Ontslagrecht in Nederland en Japan* (1992) 238 for a discussion about the background to these exclusions.

²⁰ South Africa, for example, has, in addition to the mentioned grounds included in its list of automatically unfair reasons for termination, the dismissal of an employee who engages in strike action and the dismissal of a worker as a consequence of the transfer of a business as a going concern. See s 187 of the LRA in this regard.

²¹ Our emphasis.

²² PA Smit *Disciplinary enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995* (unpublished PhD thesis University of Pretoria 2010) 47.

when the worker is given the opportunity to defend him- or herself against allegations made by the employer. Article 7 does not provide details in respect of notification periods, the right to call witnesses, or an entitlement to legal representation. In what follows, the extent to which the above three core principles have been given effect to in a selection of foreign jurisdictions is considered.

THE NETHERLANDS

Background

The history of South Africa and the Netherlands is interwoven. Large parts of the current Western Cape Province used to form part of a Dutch colony. Afrikaans, one of South Africa's eleven official languages, has its roots in the Dutch language. For many years Roman-Dutch law formed one of the corner stones of South African law – especially in respect of principles that relate to the common-law contract of employment.²³

Legislative framework concerning dismissals

The Netherlands must recognise international labour standards to the extent that this is required by virtue of its membership to the ILO.²⁴ As mentioned, the Netherlands has not ratified ILO Convention C158. However, the Netherlands is obliged to adhere to binding principles of the Council of Europe and the EU.²⁵ In December 2000 the European Community adopted a Charter on Fundamental Rights. This Charter has strongly influenced the principles contained in the Constitution for Europe, which was adopted by member states of the EU in 2004. Section 90 of the Constitution reflects article 30 of the Charter, and states that

[e]very worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.²⁶

The Constitution for Europe is less detailed as regards unjustified dismissal than ILO Convention C158.²⁷ It does not refer to the three core principles

²³ Hahlo & Kahn *The Union of South Africa: the Development of its laws and Constitution* (1960) 10–13.

²⁴ Van Arkel n 9 above at 150.

²⁵ *Ibid.*

²⁶ JHM van Erp & JM Smits *Bronnen Europees privaatrecht* 37–46; Hendrickx '10 jaar Europees arbeidsrecht: diversiteit gekoppeld aan sociale grondrechten' (2006) 3 *Arbeid Integraal* 59; B Bercusson, S Clauwaert & I Schömann *European labour law and the EU Charter of Fundamental Rights* (2002) 7; Blanpain *European labour law* (2003) 35.

²⁷ It is noteworthy that articles 111 and 112 of the Constitution for Europe, that deal with interpretation, do not stipulate that international law, which could arguably include ILO conventions, must be taken into consideration when the European Constitution is

identified above. With regard to dismissal, the Netherlands need not apply ILO standards as ILO Convention C158 has not been ratified. It must, however, take account of the Constitution for Europe.

The principles of dismissal law (*ontslagrecht*) emanate from the contract of employment (*arbeidsovereenkomst*). All employers are compelled to provide their employees with written particulars of employment.²⁸ Until the end of the Second World War all dismissals in the Netherlands were based purely on contractual principles as determined by the specific contract of employment.²⁹

During and after the Second World War, the Netherlands, like almost every other country in Europe, experienced high levels of unemployment. In an effort to prevent further unemployment the Dutch government issued emergency decrees. The most significant decree for purposes of this discussion was the *Buitengewoon Besluit Arbeidsverhoudingen* of 1944 (the BBA).³⁰ Even though it was amended on a number of occasions in the 1980s and 1990s, this decree still plays an important role in the regulation of dismissal law in the Netherlands.

During the first years of the BBA's existence, both employers and workers needed permission from the Director of the District Employment Office (*Directeur van het Gewestelijk Arbeidsbureau*) to terminate any employment relationship. Nowadays, however, it only obliges the employer to obtain permission from higher authority to terminate a contract of employment.³¹ Dutch law recognises various grounds on which a contract of employment can be terminated.³² The most common of these are:

The end of a contract of employment by operation of law (*einde van een arbeidsovereenkomst van rechtswege*).³³ In this case the employer does not have to comply with any formal procedures as the contract is terminated automatically. If the employer intends to terminate a contract of employment before the expiry date of a fixed-term contract, he or she should obtain prior

interpreted.

²⁸ Burgerlijk Wetboek 1945 art 7:655.

²⁹ Van Arkel n 9 above at 173–174.

³⁰ *Id* at 173.

³¹ *Id* at 175.

³² Diebels *De kleine gids voor het Nederlandse arbeidsrecht* (2007) 109–134; Koevoets *Wangedrag van werknemers* (2006) 101–123.

³³ This includes the death of an employee, expiry of a fixed-term contract or the termination of employment before the expiry date of a fixed term contract. If one of the parties ends a fixed-term contract before the term is due, he or she has to pay damages equal to the salary that would have been paid had the contract not been ended.

permission from the Central Organisation of Work and Employment (*Centrale Organisatie Werk en Inkomen*) (the CWI)³⁴ or from the District Court (*Kanton Hof*).³⁵

During the probationary period (*in de proeftijd*). Dismissal during the probationary period requires only that the employer notify the worker in writing before the expiry of the probation period that his or her services will be terminated on or before the expiry date.³⁶

The unilateral termination of the contract of employment (*opzegging van de arbeidsovereenkomst*). The employer or worker can terminate the contract of employment by giving notice. However, when the employer intends to terminate the contract, a written request with reasons must be submitted to the CWI or the District Court.

Summary dismissal (*ontslag op staande voet*). The law requires an urgent reason (*dringende rede*) of a serious nature before the employment relationship can be terminated summarily.³⁷ This type of termination is almost without exception based on misconduct or poor work performance.

In practice an employer can dismiss a worker for any of the above reasons without providing the worker with an opportunity to defend him- or herself at the workplace. However, the CWI and various District Court judges have held that the employer must be able to prove that other disciplinary measures such as written warnings have failed.³⁸

When an employer requests permission from the CWI to terminate a worker's contract he or she must have a valid reason or just cause. The CWI conducts an investigation into the request and the worker has the opportunity to respond to the CWI against the allegations made by the employer. Ultimately, the decision to terminate a contract of employment will be taken by the CWI or the District Court. Should the worker feel that the employer has been unable

³⁴ The CWI is the modern equivalent of the Director of the District Employment Office.
³⁵ M Diebels n 32 above at 111; G Genderen, H Dragstra, P Fluit, M Stefels, E Steverink, W Witte & J Wolf *Arbeidsrecht in de praktijk* (2006) 183.

³⁶ In Dutch law the period of probation is viewed as a period of no protection. Genderen *et al* n 35 above at 221 state that 'daarom spreekt men wel van een voor de werknemer rechteloze periode gedurende de proeftijd'.

³⁷ Burgerlijk Wetboek 1945 art 7: 678. Diebels n 32 above at 130–131. The following types of misconduct have been held to justify summary dismissal in the Netherlands: providing false information in a job application; serious incapacity; alcohol abuse despite warnings; theft; fraud; assault; and gross insubordination.

³⁸ Diebels n 32 above at 111.

to justify his summary dismissal, legal action can be taken by issuing a summons for the employer to appear before a judge at the District Court or at the CWI.³⁹

THE UNITED KINGDOM

Background

The UK is arguably the country that has had the most significant influence on the development of South African society and our legal framework. For many years South Africa was a British colony, and even though South Africa has numerous official languages, English is generally used in the business environment and in the courts. Apart from Germany, the UK is South Africa's second-largest trading partner in the EU⁴⁰ and many of the traditions in our legal and education systems stem from the UK.⁴¹

Legislative framework concerning dismissals

During the period 1870 to 1970 employment legislation in the UK provided a framework within which trade unions were able to expand and to become a powerful force.⁴² Consecutive governments adopted a *laissez faire* approach to large parts of employment law. The central purpose of labour law was to maintain an effective balance between employers and workers based on a system for voluntary collective bargaining.⁴³

This situation changed with the coming into power of Margaret Thatcher's Conservative government in 1979.⁴⁴ In a series of legislative reforms, the ability of trade unions to regulate their own conduct and organise industrial action was curtailed. This resulted in a considerable drop in trade union membership and an equally considerable drop in the number of working days lost through strike action.⁴⁵

In 1972 the UK joined the then Common Market, which evolved into the EU. Numerous laws regulating discrimination in the employment relationship were

³⁹ Diebels n 32 above at 144–152.

⁴⁰ See website of Department of Trade Industries <http://www.dti.gov.za> (accessed on 13 January 2010).

⁴¹ Hahlo & Kahn n 23 above at 443. It is generally accepted that English law has had a profound influence on certain areas of South Africa's legal system. This is especially true in respect of areas such as company law, insurance law and negotiable instruments.

⁴² S Bendix *Industrial relations in South Africa* (2010) 762. The governments of the day, in keeping with the principle of voluntarism, left it to the unions and employers to reach agreements on labour issues.

⁴³ J Davies & R Freedland *Kahn-Freund's labour and the law* (1983) 2.

⁴⁴ Bendix n 42 above at 764.

⁴⁵ Bell *Employment law* (2006) 2–3.

adopted. These included the Equal Pay Act,⁴⁶ the Race Relations Act,⁴⁷ and the Sex Discrimination Act.⁴⁸ The Employment Rights Act (ERA), enacted in 1996, also contains sections on disciplinary enquiries and dispute settlement procedures.⁴⁹ The Employment Act (EA),⁵⁰ implemented in 2002, established a statutory dispute resolution framework and also expanded pre-dismissal procedures contained in the ERA.⁵¹

The concept of 'unfair dismissal' in the UK is a statutory phenomenon consolidated almost wholly within the ERA. Section 94(1) of the ERA provides that '[a]n employee has the right not to be unfairly dismissed by his employer'. Section 98(1)(b) states that there must be a fair reason for dismissal. Such reason can be based on capabilities or qualifications; conduct; redundancy; contravention of a statute; or some other substantial reason.⁵²

Certain categories of employee are not afforded legislative protection against unfair dismissal⁵³ namely

- employees over the normal retirement age of 65;⁵⁴
- members of the armed forces and the police; and
- employees with less than one year of continuous service.⁵⁵

Schedule 2 of the EA regulates procedural fairness with regard to dismissal. The standard statutory dismissal and disciplinary procedure consists of three basic steps.⁵⁶ The employer sets out in writing the issues that have caused it to

⁴⁶ Equal Pay Act of 1970. This Act came into force on 29 December 1975 and prohibits any less favourable treatment between men and women in terms of pay and conditions of service. It has been amended on numerous occasions. Currently it is in line with European Union directive 2006/54EC that regulates equal treatment of men and women.

⁴⁷ Race Relations Act of 1976. The Act prohibits discrimination in the field of employment on any arbitrary grounds like race, colour, nationality and ethnic and national origin.

⁴⁸ Sex Discrimination Act of 1975. The Act states that it is unlawful for an employer to discriminate or fail to prevent discrimination against a worker because of his or her gender, marital or gender reassignment status.

⁴⁹ Employment Rights Act of 1999. Part X of chapter 18 of the ERA contains a section on the rights of an employee during a disciplinary hearing.

⁵⁰ Employment Act of 2002.

⁵¹ See part I of chapter 1 and chapter 2 of Schedule 2.

⁵² Section 98(2)(a)–(d) of the ERA of 1996.

⁵³ Section 94(1), s 98(1)(b), s 109 and s 110 of the ERA of 1996. See also Bell n 45 above at 138–139.

⁵⁴ Section 109(1) of the ERA of 1996.

⁵⁵ Section 110 of the ERA states that employees who are covered by collective agreements regulating dismissal procedures may also be excluded. However, such procedures must be approved by the Secretary of State to operate as a substitute for the statutory requirements of the ERA. See also Bell n 45 above at 139.

⁵⁶ G Meeran 'Employment dispute resolution in the UK', paper delivered at SASLAW National Conference in Cape Town (2007) 6.

contemplate taking action, and sends a copy of this statement to the employee inviting him or her to attend a meeting.

After the meeting, the employer should inform the employee of the decision and notify him or her of a right of appeal.

If the employee wishes to appeal, a further meeting should be arranged at the workplace, after which the employee should be notified of the outcome.⁵⁷

In the UK the Employment Tribunal⁵⁸ and the Advisory Conciliation and Arbitration Service (the ACAS)⁵⁹ deal with most disputes relating to claims based on unfair dismissal. The ACAS is an impartial body that endeavours to resolve disputes between employers and workers first through conciliation, and if no settlement is reached, then by means of an arbitration hearing.⁶⁰ Provision is also made for an appeal against awards of the ACAS. The different levels of appeal are to the Employment Appeal Tribunal, the Court of Appeal, the House of Lords and ultimately the European Court of Justice.⁶¹

THE UNITED STATES OF AMERICA

Background

The USA is considered by many to be the most powerful and resourceful country in the western world and it could be argued that no other country has had a more significant influence on developments in the global economy over the last two centuries.⁶² The USA is viewed by many as the icon of individualism, capitalism, free market economy, and democracy.⁶³ It is submitted that for these reasons it is appropriate to evaluate whether unfair dismissal law in the USA is in compliance with ILO Convention C158.

Legislative framework concerning dismissals

In the USA there are fifty states, each with its own executive, lawmaking and judicial power, that share sovereignty with the federal government of the country.⁶⁴ Hence, it would be accurate to refer to fifty-one legal systems in the USA, namely the fifty states and the federal state.⁶⁵ The USA has no national or federal legislation relating to the termination of workers' contracts of employment.

⁵⁷ Schedule 2 of EA sets out in detail the different steps to be followed.

⁵⁸ Employment Tribunals Act 1996 (Tribunal Composition) Order 2009 No 789.

⁵⁹ Statutory Instrument 1998 14 *The Employment Protection Code of Practice (Disciplinary Practice and Procedures)* Order 1998.

⁶⁰ AC Bell n 45 above at 7–8.

⁶¹ Meeran (2007) 10.

⁶² Bendix n 42 above at 755.

⁶³ *Id* at 756 states that given the strong individualist ethic that prevails in the USA, successive governments have opted for minimal interference in labour relations.

⁶⁴ J Klik *Onderzoek na de Amerikaanse recht* (1994) 11.

⁶⁵ Van Arkel n 9 above at 17.

According to Standler⁶⁶ the doctrine of 'employment-at-will' emerged in the USA in the nineteenth century in a climate of 'unbridled *laissez-faire* expansionism, social Darwinism and rugged individualism'. The doctrine of employment-at-will was first conceived by Wood in 1877.⁶⁷ He stated that an employee must be free to quit his job at any time, and that an employer must have the right to terminate an employee's services at any time. In the often quoted *Payne v Western & Atlantic Railroad Co*⁶⁸ the court held that

[a]ll may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being guilty of legal wrong.

At the beginning of the twentieth century the doctrine of employment-at-will was well established throughout the USA and still prevails in virtually every state in the USA.⁶⁹ During the Great Depression of the 1930s, the USA faced an increasingly high unemployment rate and a rapid decline in the standard of living.⁷⁰ The government under President Franklin Roosevelt realised the need to restrict the harsh applications and abuse of the doctrine of employment-at-will and in an effort to stabilise labour relations and stimulate the economy, the 'New Deal' economic recovery plan was adopted.⁷¹

The National Labour Relations Act (also known as the Wagner Act) was enacted in 1935. The main aims of the Wagner Act were to:

- encourage the rationalisation of commerce and industry;
- establish minimum wages and maximum hours of work;
- establish the National Labour Relations Board with the power to investigate and decide on charges of unfair labour practices;
- encourage collective bargaining; and
- protect freedom of association.⁷²

⁶⁶ *History of at-will employment law in the USA* (2000) 3. The expression 'you are fired' has become notorious in USA employment relations.

⁶⁷ See W Standler 'History of at-will-employment in the USA' available at <http://www.rbs2.co.atwill.htm> at 4 (accessed on 18 November 2009; Wood *Master and servant* (1877) 272–273.

⁶⁸ (1884) Tenn 519–520.

⁶⁹ RC Busse *Your rights at work* (2005) 3.

⁷⁰ Wikipedia http://en.wikipedia.org/wiki/National_Labour_Relations_Act (accessed on 7 August 2009).

⁷¹ Standler n 67 above at 5–6.

⁷² J Millis *From the Wagner Act to Taft-Hartley: a study of national labor policy and labor relations* (1950) 73.

In *Peterman v International Brotherhood of Teamsters*,⁷³ the California District Court of Appeal established the public-policy exception to the doctrine of employment-at-will when it held that an employee could not be dismissed because he refused to commit perjury when asked to do so by his employer. The concepts of wrongful discharge and the public-policy exception resulted in numerous pieces of legislation that whittled away at the pervasive employment-at-will principle.

In 1964 the USA Congress adopted the Civil Rights Act⁷⁴ and both Congress and many of the state legislatures enacted numerous anti-discrimination laws. Chapter VII of the Civil Rights Act (or Title VII) prohibits discrimination against any person in terms of conditions of employment and privileges of employment with respect to race, colour, national origin, sex and religion.⁷⁵ In practice this means that if a worker can prove that he or she was dismissed on any of these discriminatory grounds the dismissal will be wrongful and the employee would be entitled to claim damages.

During the late 1970s and early 1980s courts in the USA became responsive to the cry for just cause protection.⁷⁶ The judiciary in the USA tried to find ways to whittle away at the doctrine of employment-at-will.⁷⁷ In New Hampshire, the Supreme Court ruled in 1974 that an employee who was dismissed for refusing to date her supervisor had been wrongfully discharged.⁷⁸ In 1980 the Supreme Court in California held that an employee who was discharged for union activity after eighteen years of service could bring an action against the employer in contract and tort (delict).⁷⁹

As mentioned, with the exception a number of anti-discrimination laws, the USA has no federal legislation regulating wrongful or unfair dismissal. However, most states have developed their own rules recognising some exceptions to employment-at-will and these constitute the public policy of

⁷³ (1959) 344 P 2d (Call App).

⁷⁴ Civil Rights Act of 1964.

⁷⁵ Other federal statutes that protect workers against discrimination include the Equal Pay Act of 1963, that prohibits employers from paying different wages based on sex for the same work. Congress also passed the Age Discrimination in Employment Act 1967, the Americans with Disabilities Act of 1990 and the Family and Medical Leave Act of 1993.

⁷⁶ C Barber 'Comparison of international and US employment termination procedures: how far have we come? – A step in the right direction' (1993) 165 *Journal for International Law* 3.

⁷⁷ MA Weinstein 'The limitations of judicial innovation: a case study of wrongful dismissal litigation in Canada and the United States' (1993) 14 *Comparative Labour Law* 7.

⁷⁸ *Monge v Beebe Rubber Co* 316 A2d 549 (NH1974).

⁷⁹ *Clearly v American Airlines Inc* 168 Cal Rptr 722 (1980).

'wrongful discharge'.⁸⁰ Overall, courts have utilised the public-policy exception in a number of situations to protect workers. Examples are discharge for serving on a jury,⁸¹ for filing claims for workplace injuries,⁸² and for refusing to submit to the sexual advances of a supervisor.⁸³

By 2001, the judicial public policy exception was recognised by forty-one of forty-nine states.⁸⁴ With the exception of the state of Montana, the remedy for an arbitrary dismissal still generally depends on finding an exception to the termination-at-will rule.

In 1987 Montana passed the Wrongful Discharge from Employment Act (WDFEA).⁸⁵ The WDFEA acknowledges that employees have the right not to be wrongfully discharged. The Act excludes independent contractors, probationary workers and employees on fixed-term contracts. Workers covered by collective agreements are also excluded.⁸⁶

Section 39–2–904 of the WDFEA provides that a discharge will be wrongful if

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

Private sector employees who are subject to a collective agreement also generally enjoy protection against arbitrary dismissal.⁸⁷ These collective agreements usually include disciplinary procedures and codes that would stipulate possible reasons for dismissal and the procedures to be followed.⁸⁸

⁸⁰ Busse n 69 above at 31.

⁸¹ *Nees v Hocks* 536 P 2d 512 (Or 1975).

⁸² *Frampton v Central Ind Gas Co* 297 NE 2d 425 (Ind 1973).

⁸³ *Lucas v Brown & Root Inc* 736 F 2d 1202 (8th Cir 1984).

⁸⁴ DH Autor 'Outsourcing at will: the contribution of unjust dismissal doctrine to the growth of employment outsourcing' Massachusetts Institute of Technology Department of Economics Working Paper Series (01–32) (2001) 7.

⁸⁵ Montana Wrongful Discharge from Employment Act of 1987.

⁸⁶ P Bennet 'Montana's employment protection: a comparative critique of Montana's Wrongful Discharge from Employment Act in light of the United Kingdom's unfair dismissal law' (1996) 57/1 *Montana Law Review* 4–5.

⁸⁷ Van Arkel n 9 at 140.

⁸⁸ Busse n 69 above at 143.

However, it is to be noted that only approximately ten per cent of the total workforce in the USA are covered by collective agreements.⁸⁹

SOUTH AFRICA

Background

The historical development of South African labour law reflects the socio-political history of the country.⁹⁰ Apart from the normal thrust and pull between workers and their employers, collective conflict between different racial groups has played a prominent role in the labour environment ever since the discovery of diamonds and gold in South Africa.⁹¹ Industrial conflict, especially after the Rand Revolt of 1922, led to the promulgation of the Industrial Conciliation Act of 1924.⁹²

This Act entrenched racial discrimination in labour legislation. The primary focus of this enactment was to protect the interests of white skilled workers. At that time black employees were, for all practical purposes, excluded from the ambit of labour legislation and black trade unions were discouraged.⁹³ This led to labour unrest and conflict. Black workers used the trade union movement as a means by which to express their discontent with the political dispensation of apartheid. By the late 1970s black trade unions were a significant social force to be reckoned with, and in 1978 the National Party government appointed the Wiehahn Commission to investigate the labour relations system in South Africa.⁹⁴

The Wiehahn Commission recommended the introduction of the concept of 'unfair labour practice' into the South African labour law and the establishment of the Industrial Court.⁹⁵ Since 1980 this institution has played a significant role in the development of modern labour law in South Africa. Under its jurisdiction to determine unfair labour practices, it, amongst others,

⁸⁹ Van Arkel n 9 at 35.

⁹⁰ See D Du Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper, G Giles, C Bosch & J Rossouw *Labour relations law: a comprehensive guide* (2006) 3–57.

⁹¹ A Basson, M Christianson, C Garbers, PAK le Roux, C Mischke & E Strydom *Essential labour law* (2007) 5.

⁹² *Ibid.* This Act made provision for the establishment of industrial councils, the forerunner of the present-day bargaining council system.

⁹³ L Ehlers *Labour relations systems, procedures and practice* (2007) 25.

⁹⁴ *Ibid.*

⁹⁵ See *Die volledige Wiehahn verslag* (1982) Part 1 Ch 5 1.4.22 for a discussion of the reasons why the Industrial Court was instituted.

laid down guidelines for the dismissal of employees.⁹⁶ In *Van Zyl v O'kiep Copper Co Ltd*⁹⁷ the former Industrial Court accepted that a dismissal at the workplace must be both procedurally and substantively fair.

Initially, the Industrial Court adopted a flexible approach to the conducting of disciplinary enquiries at the workplace. Cameron⁹⁸ confirmed this approach when, at the time, he stated that the right to a disciplinary enquiry is not an inflexible package.

This flexible approach towards disciplinary enquiries came to an end when the Industrial Court in *Mahlangu v CIM Deltak*⁹⁹ laid down court-like requirements in respect of procedural fairness. It stated that:

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

Even though the Industrial Court referred to ILO Convention C158 in coming to its conclusion,¹⁰⁰ it is to be noted that the requirements in *Mahlangu v CIM Deltak* are far more detailed and formalistic than the requirements found in ILO Convention C158.

⁹⁶ See PAL le Roux & A van Niekerk *The South African law of unfair dismissal* (1994) 18–25 for a discussion regarding the concept of unfair labour practices under the jurisdiction of the former Industrial Court.

⁹⁷ (1983) 4 *ILJ* 298 (IC).

⁹⁸ 'The right to a hearing before a dismissal' (1986) 7 *ILJ* 185. In *Bosch v THUMB Trading (Pty) Ltd* (1986) 7 *ILJ* 341 (IC) the Industrial Court held that the 'rules to the holding of disciplinary enquiries cannot and should not be applied mechanically'. This view was confirmed in *NAAWU v Pretoria Precision Castings (Pty) Ltd* (1985) 6 *ILJ* 369 (IC) where it was held that the 'whole field of proper labour relations is characterized by ... flexibility, and natural justice should not be led into the trap of strict legalism'.

⁹⁹ (1986) 7 *ILJ* 346 (IC) 375.

¹⁰⁰ At 356G–I.

It is submitted that the acceptance of this checklist approach, which equated a disciplinary enquiry in the workplace with the procedures to be followed in a criminal trial, played a significant role in the development of individual labour law in South Africa.¹⁰¹ For many years the guidelines spelt out in *Mahlangu v CIM Deltak* formed the guiding principles for disciplinary procedures contained in larger employers' disciplinary codes and influenced dispute resolution fora when evaluating the fairness of disciplinary enquiries.¹⁰²

Legislative framework concerning dismissals

The LRA was the first piece of labour legislation to be promulgated after the post-apartheid elections in 1994. ILO experts assisted in the drafting of the LRA and international standards had an influential role on the current provisions of the Act. Section 188(1) of the LRA provides that

- [a] dismissal ... is unfair if the employer fails to prove—
 that the reason for dismissal is a fair reason—
 related to the employee's conduct or capacity; or
 based on the employer's operational requirements; and
 (iii) that the dismissal was effected in accordance with a fair procedure.¹⁰³

Section 188 applies to all workers, irrespective of their length of service or whether they are still on probation.¹⁰⁴ With the implementation of the LRA and its accompanying Code of Good Practice: Dismissal¹⁰⁵ (the Code of Good Practice) policymakers attempted to move away from the over-proceduralism of disciplinary enquiries developed by the Industrial Court.¹⁰⁶

Item 4(1) of the Code of Good Practice provides:

- 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*

¹⁰¹ A van Niekerk and K Linström *Unfair dismissal* (2006) 58.

¹⁰² *Ibid.*

¹⁰³ This is reflected in item 2(1) of Schedule 8 of the LRA, which stipulates that a dismissal is unfair if it is not effected for a fair reason.

¹⁰⁴ Section 2 of the LRA, does, however, exclude members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and Comsec.

¹⁰⁵ Schedule 8 of the LRA.

¹⁰⁶ S van Eck 'Latest developments regarding disciplinary enquiries' (2002) 26/3 *South African Journal of Labour Relations* 26.

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.¹⁰⁷

In *Avril Elizabeth Home for the Handicapped v CCMA*,¹⁰⁸ the Labour Court considered the basic requirements for procedural fairness and the meaning of the concept 'an opportunity to state a case' and held that it means 'no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss'. This case signalled a clear break with the court-like procedures laid down by the former Industrial Court in *Mahlangu v CIM Deltak*.¹⁰⁹

It is submitted that the *Avril Elizabeth Home for the Handicapped* judgment interprets item 4(1) of Schedule 8 correctly. The Code of Good Practice merely provides a number of guiding factors that an employer should use to ensure that a fair procedure is followed in a disciplinary process.¹¹⁰ It is submitted that this is in accordance with ILO Convention C158.

The LRA and the Code of Good Practice do not establish a right to an internal appeal hearing at the workplace. However, depending on the nature of the dispute, a dismissed employee does have the right to refer a dispute to an independent dispute resolution institution such as the CCMA, a bargaining council, or the Labour Court.¹¹¹ Item 4(3) of the Code of Good Practice provides that

¹⁰⁷ Our emphasis.

¹⁰⁸ (2006) 27 ILJ 1466 (LC).

¹⁰⁹ In *NUM obo Mathete v Robbies Electrical* [2009] 2 BALR 182 (CCMA) the commissioner stated the 'criminal justice model' no longer applies to disciplinary proceedings in the workplace. In *Avril Elizabeth Home for the Handicapped*, Van Niekerk J sums it up as follows: 'On this approach, there is clearly no place for formal disciplinary procedures that incorporate all the accoutrements of a criminal trial, including, the leading of witnesses, technical and complex "charge sheets" request for particulars, the application of the rules of evidence, legal argument and the like.'

¹¹⁰ These factors are that the employee must be provided with a notice of the investigation in a form or language that the employee can reasonably understand; an opportunity to state a case in response to the allegations; a reasonable time to prepare him- or herself; the opportunity to be represented by a fellow employee or trade union representative; and after the enquiry the employee must be furnished with the decision.

¹¹¹ S 191 of the LRA.

‘the employee should be ... reminded of any rights to refer the matter to a [bargaining] council with jurisdiction or the Commission [for Conciliation Mediation and Arbitration] or to any dispute resolution procedures established in terms of a collective agreement’.

The arbitration process referred to in the Code of Good Practice is deemed to be a *de novo* process and decision.¹¹²

COMMENTS ON COMPLIANCE WITH ILO CONVENTION C 158

The authors have identified three essential elements in ILO Convention C158, namely that employers must have a valid reason before terminating a contract of employment; that the worker must be given the opportunity to defend him- or herself against the allegations made by the employer; and that there must be an opportunity to appeal against the decision to an impartial external body.

Regarding the first core element, three of the four countries investigated comply with the requirement. In the Netherlands the emphasis is placed on the substance rather than the procedure for dismissal at the workplace, and the employer needs permission from the CWI to dismiss an employee. In the UK, section 98(1)(b) of the ERA stipulates that there must be a fair reason for dismissal and section 98(2)(a–d) includes amongst others, capabilities, conduct, redundancy, and contravention of a statute as fair reasons for dismissal. In the USA there is no general rule requiring a valid reason for dismissal. The doctrine of employment-at-will entails that an employee’s services can be terminated for ‘good cause, for no cause or even a cause morally wrong’.¹¹³ Even though exceptions to this principle have been adopted by most states (such as the principles in respect of wrongful discharge based on public policy and the anti-discriminatory legislation) these exceptions do not extend far enough to comply with article 4 of ILO Convention C158. This is in contrast to the situation in South Africa in so far as section 188 of the LRA states that a dismissal will be unfair if it is not based on a fair reason related to an employee’s conduct, capacity or operational requirements.

When compared to the ILO standard and the respective positions in the Netherlands and the UK, there are no indications that in South Africa employers are burdened with more onerous requirements relating to a valid reason for dismissal. However, there is one aspect in respect of which South Africa does stand out. It relates to the fact that South African workers are also entitled to protection during the probationary period of employment. This may

¹¹² *Malelane Toyota v CCMA and others* [1999] 6 BLLR 555 (LC).

¹¹³ *Payne v Western & Atlantic Railroad Co* (1884) Tenn 519–520.

be experienced as a more burdensome requirement on employers than the comparative positions adopted by the ILO standard, the Netherlands, the UK, and even the state of Montana in the USA.

As regards the second principle, there is no requirement on employers in the Netherlands to follow an internal disciplinary enquiry before terminating a contract of employment. However, permission must be obtained from the CWI. The situation is different in the UK. Labour legislation and regulations provide for a statutory dismissal and disciplinary procedure. An employee who faces dismissal must be informed in writing of the allegations against him or her and must be invited to attend a meeting where the employee can respond. The meeting must take place before any action is taken against the employee. Over and above this opportunity, workers also have a right to an internal appeal against the employer's decision. In the USA there are no legislative protection in respect of pre-dismissal procedures. However, if such procedures are contained in a disciplinary code or collective agreement, they must be adhered to. In our view, the Netherlands and the USA do not comply with the second core requirement, and the UK goes beyond what is required in so far as an internal opportunity to appeal must also be given to the worker upon request.

In South Africa every worker has the right not to be unfairly dismissed and a dismissal will be unfair if it was not conducted in accordance with a fair pre-dismissal enquiry.¹¹⁴ Procedural fairness is measured against the guidelines contained in the Code of Good Practice of the LRA. There can be no doubt that South Africa complies with the second requirement of ILO Convention C158, and that the requirements on employers in respect of pre-dismissal procedures are more onerous than in the Netherlands and in the USA. However, the same cannot be said of the UK, where there is the additional requirement of an internal appeal.

To what extent do the South African requirements go beyond what is required in ILO Convention 158C or the requirements of the UK? Apart from protecting a worker's right to an opportunity to defend him- or herself, ILO Convention C158 does not contain details in respect of the process. The Code of Good Practice does not require that a strict checklist approach be followed as was the case during the era of the former Industrial Court. It is submitted that the Labour Court in *Avril Elizabeth Home for the Handicapped* interpreted ILO Convention C158 correctly and has placed South Africa on the right track in this regard. If the validity of a reason for a dismissal can be determined

¹¹⁴ Section 188 of the LRA and item 2(1) of Schedule 8.

during an informal and flexible pre-dismissal procedure, as is required by ILO Convention C158 and the Code of Good Practice, this should be deemed sufficient.

The last ILO requirement relates to the right to an appeal to an impartial body. A dismissed employee can refer a dispute to the CWI or the District Court in the Netherlands, to the ACAS or Employment Tribunal in the UK, and to the CCMA, a bargaining council or Labour Court in South Africa. No provision is made for such an opportunity in the USA. The Netherlands, the UK and South Africa comply with the third ILO principle.

CONCLUSION

The ILO has identified eight core conventions that it considers fundamental.¹¹⁵ The governing body of the ILO did not deem ILO Convention C158 important enough to elevate it to one of its core conventions. Even though thirty-four members of the ILO have ratified ILO Convention C158, South Africa, the Netherlands, the UK, and the USA have not done so. However, this does not preclude member countries from being influenced by and/or implementing one or more principles contained in non-ratified conventions. This also does not preclude scholars in the employer-employee environment from using such standards as a yardstick to determine whether international standards on any particular matter are in fact adhered to or not.

It is safe to conclude that South African unfair dismissal law, and the protection granted to workers in the UK, give effect to all three core principles of ILO Convention C158. The comparison with the dismissal law of the Netherlands, the UK and the USA also indicates that with the exception of the UK, South Africa's unfair dismissal law differs vastly from the principles adopted by the Netherlands, and especially the USA.

It is further submitted that South Africa's unfair dismissal law (in particular the Code of Good Practice) does not require more in respect of pre-dismissal procedures than the norms established by the ILO and those to be found in the UK. It is our conclusion that should South African employers and trade unions agree to more formalistic and court-like procedures in their disciplinary codes (such as the ones prescribed during the era of the Industrial Court) than those

¹¹⁵ The conventions are the Freedom of Association and the Right to Organise Convention, 1948 (No 87); Right to Organise and Collective Bargaining Convention, 1949 (No 98); Forced Labour Convention, 1930 (No 29); Abolition of Forced Labour Convention, 1957 (No 105); Minimum Age Convention, 1973 (No 138); Worst Forms of Child Labour Convention, 1999 (No 184); Equal Remuneration Convention, 1951 (No 100); and Discrimination (Employment And Occupation) Convention, 1958 (No 111).

required by law, it is something of their own doing. They will have to adhere to such requirements. Such a practice does, however, not have the consequence that South African labour law is more prescriptive than the standards set by the ILO and introduced in countries like the UK.