

TITLE

**CAN A DEFECTIVE HEARING BE CURED BY A
SUBSEQUENT APPEAL? AN EXAMINATION OF FAIR
PROCEDURE IN EMPLOYER'S DISCIPLINARY
INQUIRY**

Submitted by

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CHAPTER ONE

1. OVERVIEW

The Labour Relations Act 1995 has heralded fundamental changes in the field of the law of unfair dismissal in South Africa. It has sought, *inter alia*, to codify the law of unfair dismissal and to provide guidelines for the application of the labour relations principles relating to fair procedure prior to dismissal. In entrenching the employee's right not to be unfairly dismissed,¹ the Act incorporates the requirement for a fair procedure as an essential element in the determination whether a dismissal is fair or unfair.²

The definition of what constitutes a fair procedure has long been central to South Africa's labour law vocabulary.³ LRA 1995 Act creates a division between dismissal based on the operational requirements of the employer and those based on misconduct or incapacity. It lays down the procedure which the

¹ S 185.

² Except in those instances listed in section 187 of the Labour Relations Act 1995 where the happening of any of the listed events will render the dismissal automatically unfair, any other dismissal is unfair if the employer fails to show that the dismissal related to the employee's conduct or incapacity or based on the employer's operational requirements and that it was effected in accordance with a *fair procedure* - s 188(1).

³ The requirement that an employer must observe a fair procedure for the dismissal of an employee to be fair in South African law of unfair dismissal was developed by the old Industrial Court albeit expressed in the language of the common law principles of natural justice. Even in the absence of an enabling legislation, the Court incorporated the ILO Convention 158 and Recommendation 166 of 1982 on Termination of Employment at the Initiative of the Employer in its development of the South African law of unfair dismissal in the exercise of its unfair labour practice jurisdiction under the LRA 1956. For the most robust and extensive consideration of the application of the rules of natural justice in the law of unfair dismissal by the Industrial Court under the previous labour regime see the judgment of Bulbilia AM in *Mahlangu v CIM Deltak*, *Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC). For some of the many articles and texts on the subject, see Cameron, E 'The right to a hearing before dismissal - part I' (1986) 7 ILJ 183; same author, 'The right to a hearing before dismissal: Problems and puzzles' (1988) 9 ILJ 147; Olivier, M in Brassey et al, *The New Labour Law* (1987) 407; Olivier, M 'The dismissal of executive employees' (1988) 9 ILJ 519; Rautenbach, NF 'Remedying procedural unfairness: An employer's dilemma' (1990) 11 ILJ 466; Campanella, J 'Procedural fairness and the dismissal of senior employees on the ground of misconduct' (1992) 13 ILJ 14; Rycroft, A & Jordaan, B *A Guide to South African Labour Law* (2ed) 203; Le Roux, PAK & A Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) Ch 9.

employer must follow in the event of dismissal based on operational requirements,⁴ while, if the dismissal relates to the employee's conduct or incapacity. Furthermore, the Act refers any person considering whether or not the reason for dismissal is in accordance with fair procedure to take into account the provisions of the Code of Good Practice: Dismissal appended to Schedule 8 to the Act.⁵

The issues which have arisen for adjudication in recent times concerning the fairness of disciplinary proceedings in the law of unfair dismissal in South Africa have been enormous. In the search for the minimum content of fair procedure in this context, the following contentious issues naturally call for discussion: the requirement for notice of the allegations; the all-encompassing expression 'opportunity to state a case'; whether a fair procedure contemplates the right to a disciplinary appeal; whether the employer possesses a review power over the result of a disciplinary enquiry instituted by him; the perennial question of representation at disciplinary hearings; and the disposition of the person presiding over the enquiry.

The study delves into one of the lingering issues of disciplinary procedure which has infrequently cropped up in contemporary labour litigation, namely, the question whether in a two-three stage enquiry, the proper conduct of a hearing at the appeal stage cures the procedural defect at the initial hearing. Reading the awards of the CCMA and the IMSSA, one encounters expressions clearly indicating that:

- the procedural defect "has been remedied by this arbitration"⁶; or
- "there was no reason why any unfairness could not have been cured at the subsequent inquiry"⁷; or

⁴ S 189.

⁵ S 188(2).

⁶ *BMW (SA) v NUMSA obo Mthombeni & others* [1998] 1 BALR 66 (IMSSA) where the chairperson of the enquiry was found to have been too involved in the proceedings before and had refused to allow one of the employee's to call his manager to testify on his behalf with regard to his performance as an employee.

⁷ *Muller v Trucool CC* [1997] 4 BLLR 462 (CCMA). For instance in *POPCRU & others v Minister*

– "as the chairperson of the appeal hearing was a different person and as there was no allegation of bias on that other chairperson, this must be taken to have cured the original defect."⁸

In all these circumstances procedural defects had occurred at the initial hearing. An attempt to answer the question whether subsequent hearing has cured procedural defect at the initial hearing is no mean task.

Before attempting to answer the delicate question: can a defective hearing be cured by a subsequent appeal? – the relevant provisions of code of good practice concerning dismissal will be canvassed. This is followed by exploration of the current problems surrounding the right to fair procedure in employment disciplinary matters in contemporary South African law of unfair dismissal. Difficult questions encountered in relation to curing of irregularities by subsequent hearing forms part of the discussion of the final section. A brief comparative analysis of pivotal Commonwealth and South African decisions will be undertaken.

of Correctional Services & others [2006] 4 BLLR 385 (E), the court found that a proper appeal cannot cure irregularities where initial hearing is hopelessly defective.

⁸ One of the many irregularities in the procedure leading to the dismissal in *NCFAWU on behalf of Roberts v Ons Handelshuis Koop* (1997) 18 ILJ 1176 (CCMA) was the dual role played by the chairperson of the hearing who also acted as the prosecutor thus contravening the basic rules against bias on the part of anyone who had to decide anything, a principle already well-engrained in the law of unfair dismissal. See e.g. *Townsend v Roche Products (Pty) Ltd* [1994] 8 BLLR 127 (IC); *Abeldas v Woolworths (Pty) Ltd* [1995] 2 BLLR 20 (IC).

CHAPTER TWO

DISCIPLINARY PROCEDURE

2. THE CODE OF GOOD PRACTICE ON DISMISSALS

2.1 The Code provisions on fair procedure

A perusal of the code of good practice: dismissal in Schedule 8 to the 1995 Act quickly reveals that it does not only deal with matters of fair procedure relating to dismissal, it also deals with substantive issues.⁹ Otherwise, the code deals with several issues of disciplinary procedure, for instance, the preliminary step in a disciplinary process, that of warning the employee in less serious misconduct and poor work performance cases and the steps to be followed in respect of "disciplinary measures short of dismissal"¹⁰ which are aspects of the code's "concept of corrective or progressive discipline."¹¹ These aspects are however omitted from this enquiry except where they peripherally touch on the main subject matter - the all-encompassing concept of opportunity to state case covering as it were, the right to be heard in misconduct cases, the opportunity to offer an explanation or consultation in poor work performance and illness cases, respectively.

2.2 Misconduct

In the employment sphere, misconduct is an all-embracing term. It includes every and any act arising from the conduct of the employee other than incompetence or incapacity which has a negative effect on the business of the

⁹ E.g. Item 2 (reasons for dismissal) and Item 3 (4)-(6) (dismissals for misconduct).

¹⁰ Item 3, Schedule 8, LRA 1995 on which see *National Union of Commercial Catering & Allied Workers v CCMA, Western Cape & another* (1999) 20 ILJ 624 (LC); *Khula Enterprises Finance Ltd v Madidane & others* [2005] 4 BLLR 366 (LC); *SA Tourism Board v CCMA & others* [2004] 3 BLLR 272 (LC); *SAMWU obo Abrahams & others v City of Cape Town* [2008] 7 BLLR 700 (LC). While the code is merely a guideline, employers must provide compelling reasons for departing from the provisions thereof: *Riekert v CCMA & others* [2006] 4 BLLR 353 (LC); *Highveld District Council v CCMA & others* [2002] 12 BLLR 1158 (LAC).

¹¹ Item 3, Code of Good Practice: Dismissal.

employer or employment discipline at the undertaking or outside the workplace.¹² Unlike poor work performance and incapacity, misconduct relates to the employee's negative conduct or misbehaviour. Employment misconduct consists of transgressions of some established and definite rule of action, a forbidden act, an unlawful behaviour sometimes wilful in character, in fact, any improper performance or failure to act in the face of an affirmative duty to act¹³ on the part of the employee at the workplace or outside it in so far as it affects the business of the employer.¹⁴ An attempt to catalogue the various categories of misconduct remains as elusive as ever¹⁵ but the most commonly known species of employment misconduct¹⁶ relate to:- breach of trust and confidentiality;¹⁷ dishonest behaviour of various shades - fraud, theft and unauthorised possession of employer's property;¹⁸ use of abusive language;¹⁹

¹² *SACTWU v HC Lee Co. (Pty) Ltd* (1997) 18 ILJ 1120 (CCMA); *Saaiman & another v De Beers Consolidated Mines (Finsch Mine)* (1995) 16 ILJ 1551 (IC). On non-work related misconduct generally, see Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal* (1994) Ch. 11.

¹³ See also *Black's Law Dictionary* (6ed) 999.

¹⁴ Cf in *SA Scooter & Transport Allied Workers Union & others v Karras t/a Floraline* (1999) 20 ILJ 2437 (LC) at 2449 para 39 where it was held that although unruly and rowdy conduct could conceivably justify a decision to dismiss if it takes place on the employer's premises but not as in the present case where the singing, toyi-toying and whistle blowing took place outside the premises of the employer.

¹⁵ *Per MacCardie J in Re Ruebel Bronze & Metal Co. Ltd* [1919] 1 KB 315; *Baster London & County Printing Works* [1899] 1 QB 901 at 904 per Channel J; *Clouston & Co. Ltd v Corry* [1906] AC 122 at 129 per Lord James. Cf that commendable effort by A Avin who, in his book on *Employee's Misconduct* (1968), had provided a comprehensive list of the various types of employees' misconduct in the common law world. On a similar attempt to identify specific acts of misconduct in the South African labour environment see Le Roux & Van Niekerk, *South African Law of Unfair Dismissal* (1994) Ch. 8.

¹⁶ It is not misconduct for an employee to have reported to the police rumours of assassination plot against union officials during a strike in so far as the report was reasonable, not malicious and had not adversely affected the employment relationship - *Suncrush Ltd v Nkosi* (1998) 19 ILJ 788 (LAC).

¹⁷ *Council for Science & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) 26D-E; *Sappi Novoboord v JH Bolleurs* (1998) 19 ILJ 784 (LAC); *Khoza v Gypsum Industries Ltd* [1997] 7 BLLR 857 (LAC); *Edgars Stores Ltd v Ogle* [1998] 9 BLLR 891 (LAC); *Chauke & others v Lee Service Centre t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC); *Nel v Ndaba & others* (1999) 20 ILJ 2666 (LC); *Woolworths (Pty) Ltd v CCMA*, Case No: JA 62/98 of 24/06/99 (LAC); *Standard Bank of South Africa v CCMA* (1998) 19 ILJ 903 (LC); *Tucker v Electra Personnel Consultants* [1999] 5 BALR 598 (CCMA); *SACWU obo Cleophas v Smith Kline* [1999] 8 BALR 957 (CCMA).

¹⁸ *Edgars Stores Ltd v Ogle* [1998] 9 BLLR 891 (LAC); *Nedcor Bank Ltd v Jappie* [1998] BLLR 1002 (LAC); *Standard Bank of SA v CCMA & others* [1998] 6 BLLR 622 (LC); *Toyota SA Manufacturing (Pty) Ltd v Radebe & others* [1998] 10 BLLR 1082 (LC); *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & another* (1998) 19 ILJ 1576 (LC); *Komane v Fedsure Life* [1998] 2 BLLR 215 (CCMA); *SAMWU obo Peni v City of Tygerberg* [1998] 11 BALR 1475 (CCMA); *SACCAWU obo Moqolomo v Southern Cross Industries* [1998] 11BALR 1447 (CCMA).

¹⁹ *R & C X-Press v Munro* (1998) 19 ILJ 540 (LAC); *Lebowa Platinum Mines Ltd v Hill* (1998)

violent and threatening behaviour;²⁰ fighting, drunkenness and disorderly behaviour;²¹ sabotage of employer's business or property;²² insubordination²³ and disobedience of lawful and reasonable orders;²⁴ unauthorised absence from duty²⁵ and sleeping on duty²⁶ are but some aspects of misconduct. Sometimes, negligence on the part of the employee ranks as misconduct when it is aggravated by the conduct of the employee such as when it constitutes a reckless or wanton act. In other occasions, it is an aspect of poor work performance when it represents lack of due care in performing one's duties,²⁷ for instance, failure to meet the requirements of the employer's code.²⁸ Otherwise, carelessness does not equate to misconduct.²⁹

Item 4 of the code is crucial to the discussion of fair procedure. To begin with, the employer is enjoined to conduct an investigation³⁰ in order to determine whether there are grounds for dismissal. While the investigation need not be formal, the employer should:

19 *ILJ* 1112 (LAC); *AWUSA obo Ncube v Northern Crime Security CC* (1999) 20 *ILJ* 1954 (CCMA); *TGWU obo Molatane v Megabus & Coach* [1999] 10 BALR 1279 (IMSSA).

²⁰ *AWUSA obo Ncube v Northern Crime Security CC* (1999) 20 *ILJ* 1954 (CCMA).

²¹ *County Fair Foods (Pty) Ltd v CCMA & Ors* (1999) 20 *ILJ* 1701 (LAC); *Tanker Services (Pty) Ltd v Magudulela* [1997] 12 BLLR 1552 (LAC); *NUM v Kloof Gold Mining Co. Ltd* (1986) 7 *ILJ* 375 (IC); *NUMSA obo Walsh v Delta Motor Corporation* [1998] BALR 710 (CCMA); *SACCAWU obo Ntonga & another v A1 Fisheries* [1999] 8 BALR 943 (CCMA).

²² *Chauke & others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 *ILJ* 1441 (LAC).

²³ *Air Products (Pty) Ltd v CWIU & another* [1998] 1 BLLR 1 (LAC); *Johannes v Polyoak (Pty) Ltd* [1998] 1 BLLR 18 (LAC); *PPWAWU obo Fortuin v Macrall Timbers (Pty) Ltd* (1999) 20 *ILJ* 1139 (CCMA).

²⁴ It was held in *Ellerines Holdings v CCMA & others* [1999] 9 BLLR 917 (LC) that it was not a defence to an allegation of fraud for an employee to plead that he committed the unlawful act on the instruction of a superior officer since an employee is not under an obligation to obey illegal instructions. Similarly, the Industrial Court held in *Ntsibande v Union Carriage & Wagon Co. (Pty) Ltd* (1993) 14 *ILJ* 1566 (IC) that the instruction given to the employee of 32 years service to deliver goods to an area he was not familiar with was unreasonable and he was entitled to disobey it.

²⁵ *NUM obo Boqo v Anglogold Ltd* [1998] BALR 1642 (IMSSA); *Amcoal Witbank v NUM obo Mamphoke* [1999] 8 BALR 965 (IMSSA); *East Rand Gold & Uranium Co. Ltd v NUM* [1998] 6 BLLR 781 (CCMA); *Seabelo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA).

²⁶ On this see *Boardman Brothers (Natal) (Pty) Ltd* (1998) 19 *ILJ* 517 (SCA).

²⁷ *Delta Motors v Theunissen* (unreported) PA 9/98 of 99/08/12 (LAC).

²⁸ *Webber v Fattis & Monis* (1999) 20 *ILJ* 1150 (CCMA). Mistake, however gross it may be, does not constitute a misconduct - *Hyper-chemicals International (Pty) Ltd v Maybaker Agrichem International (Pty) Ltd* 1992 (1) SA 89 (W) at 100 per Preiss J.

²⁹ *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 176 per Solomon JA.

³⁰ Para 11 of the British ACAS Code of Practice I: Disciplinary Practices & Procedures in Employment 1977 speaks of the employee being "interviewed and given the opportunity to state his or her case and should be advised of any rights under the procedure, including the right to be accompanied." On the interpretation of this paragraph see the Northern Ireland Court of Appeal in *Ulsterbus v Henderson* [1989] IRLR 253; the Employment Appeal Tribunal in *Moyes v Hylton Castle Working Men's Social Club & Institute* [1986] IRLR 483.

- _ notify the employee of the allegations using a form and language the employee can reasonably understand;
- _ allow the employee the opportunity to state a case in response to the allegations;
- _ allow the employee a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee.

The employer is further obliged to communicate the decision in writing to the employee. Where the disciplinary proceeding is against a trade union representative or if the employee involved is a union office holder, then, the trade union should be informed and consulted before disciplinary action is instituted.³¹ If dismissal is to follow, the employee should be given reason for dismissal and informed of his 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. These guidelines, it must be observed, apply *mutatis mutandis* to dismissals of probationary³² as well as temporary³³ employees.

Particularly important to this discussion is the exception to the holding of enquiry and possibly the opportunity to state case. In other words, is there a situation where an employer could be held to have fairly dismissed an employee without giving him an opportunity to state his case? The answer to this question emerges from Item 4(4) of the code which states:

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

2.3 Incapacity³⁴

³¹ *SATAWU obo Motlhalane v Spoornet* [1999] 9 BALR 1154 (IMSSA).

³² *PETUSA obo van der Merwe v Libra Bathroomware & Spas (Pty) Ltd* (1999) 2 BALR 177 (CCMA); *Roux v Rand Envelope (Pty) Ltd* (1999) 20 ILJ 2183 (CCMA).

³³ *Burger v LG Marketing* [1998] 4 BALR 387 (CCMA).

³⁴ On this see generally: *Nampak Corrugated Wadeville v Khoza* [1999] 2 BLLR 108 (LAC); *Delta Motor Corporation (Pty) Ltd v Theunissen* (LAC) PA 9/98 of 99/08/02 (LAC); *Besaans du Plessis v Engelbrecht* of 99/06/24 (LAC); *VLC Properties v Olwyn* [1998] BLLR 1234

Item 8 of the code prohibits dismissal for unsatisfactory work performance and incompatibility without having given the employee appropriate evaluation, instruction, training, guidance and counselling and a reasonable time to improve.³⁵ It goes further to provide (paragraphs (3) and (4) respectively) that:

- _ 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;
- _ 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.³⁶

The Labour Appeal Court has held that an employer is entitled to appraise an employee's performance and that this can be done as part of the disciplinary process since this is the aim of progressive discipline. Fairness dictates that an employee is entitled to be heard when the employer is not satisfied with his or her performance and be given an opportunity to improve hence such an employee cannot resign suddenly and contend that the employment relationship has become intolerable. The disciplinary process will enable the employer to attend to the employee's grievances and where the employee resigns before that process has run its course; the employee has a duty to convince the court that the employment relationship had become unbearable.³⁷

(LAC); *Quincy Products CC v Pillay* [1997] BLLR 1527 (LAC); *Ross Poultry Breeders (Pty) Ltd v Somyo* [1997] BLLR 862 (LAC); *Schrueder v Ndereduitse Gereformeerde Kerk, Wilgespruit & Ors* (1999) 20 ILJ 1936 (LC); *Webber v Frattis Monis* (1999) 20 ILJ 1150 (CCMA). See also A van Niekerk 'Dismissal for poor work performance: Guidelines from the LRA, the CCMA and the Labour Court' (1998) (9) CLL 81.

³⁵ The application of these requirements or employer's failure to comply with them before dismissing the employee can be seen through the following: *Unilong Freight Distributors (Pty) Ltd v Muller* (1998) 19 ILJ 229 (SCA); *Ross Poultry Breeders (Pty) Ltd v Somyo* [1998] 8 BLLR 862 (LAC); *Eskom v Mokoena* [1997] 8 BLLR 965 (LAC); *Mathews v Hutchinson & Ors* (1998) 19 ILJ 1512 (LC); *Schreuder v Ndereduitse Gereformeerde Kerk, Wilgespruit & Ors* (1999) 20 ILJ 1936 (LC).

³⁶ In *PETUSA obo Scott v Baci t/a D & G Fashions* [1998] 11 BALR 1439 (CCMA) Bulbring C found that these provisions were not satisfied where the employer had dismissed the employee without previously counselling or guiding her on the ground that she "was not 19 years old" and was experienced, none of the requirements of Item 8(3) and (4) was met. The employee was neither given an opportunity to state her case nor was she represented by her trade union or assisted by a fellow employee. She was not even given the correct reason(s) for her dismissal having merely been told that the company "had to let her go" as the company had "too many members of staff".

³⁷ *Old Mutual Group Schemes v Dreyer & another* (1999) 20 ILJ 2030 (LAC).

The case of *Buthelezi v Amalgamated Beverage Industries*³⁸ is a good illustration of the application of the provisions of the code relating to disciplinary actions on the ground of incapacity. The employer knew that the employee had neither the qualification nor the training for the job of public relations officer to which they promoted her from her former position of a telesales clerk. Consequently, the employer sent her on intensive and customised training as a PRO. Realising that it would invest further resources in addressing her deficiencies, the employer relieved her of her PRO duties and offered her alternative position which the employee declined to accept. The Court found that the employer was aware of its responsibility of offering the employee additional counselling and training in the circumstances and that it went a long way to accomplish that. In holding that the employer's failure to follow its own programme of action or some key recommendations made by its chosen consultancy constituted a material part of the procedure which rendered the dismissal unfair, De Villiers AJ observed:

In terms of the Code of Good Practice ... when determining fairness, the court has to weigh employment justice against the efficient operation of the business. Employment justice cannot be served by an employer who, as the respondent did, enters into a lengthy counselling session during which the employee's deficiencies are listed, devises a plan of action, and then fails to implement key elements of the plan and takes no account of key recommendations made by its chosen consultant regarding what action should be taken in order to assist an employee to address the deficiencies in their performance. To permit an employer to ignore the plan which is the result of a counselling process and the recommendations of the consultant chosen by it to remedy the employee's shortcomings, because they may not be enough to address the shortcomings, devalues the whole notion of counselling for poor performance and the remedial action that emerges therefrom. The plan which emerges from the counselling process and the implementation thereof is the essential element of procedural fairness in a dismissal which is related to an employee's competence. The whole point of a counselling session relative to the performance of an employee is to devise a plan to address the deficiencies. Once an employer enters into the counselling process, in order to give the employee a fair chance at succeeding, it is incumbent upon the employer, at the very least, to give effect to the outcome of the counselling process, implement the remedial action and allow some time to elapse to assess whether the plan is having the desired effect. Failure to do so renders the counselling process meaningless. When an employer appoints someone to a position whom it acknowledges may not meet all the requirements for that position, it is under an even greater obligation to adhere to its remedial plans for that employee. While employers should not be unduly prejudiced for taking a chance on an employee who may have key attributes for a position but not all the key competencies, there is a greater obligation on that employer to devise

³⁸ (1999) 20 *ILJ* 2316 (LC); [1999] 9 *BLLR* 907 (LC).

a remedial plan and stick to it before taking action against the employee because he/she has not succeeded.³⁹

In ill-health and injury cases,⁴⁰ the employer is expected to investigate the extent of the incapacity or injury⁴¹ and in doing so, the employee "should be allowed the opportunity to state a case in response and be assisted by a trade union representative or fellow employee."⁴² Even where the employee's performance or conduct did not meet the company's reasonably required standard over a fairly long period of time and the employee was given a fair opportunity to improve, the employer is still expected to afford the employee the opportunity of being heard before he is dismissed.

2.4 Incapacity and Disability

A recurring question is whether or not the terms 'incapacity' for ill health or injury' and 'disability' are interchangeable. Although there is fine line between on the one hand 'incapacity', and 'disability' on the other, the two remain distinct.⁴³ Incapacity implies that an employee is not able to perform the essential functions of the job. An employee with a disability⁴⁴ is suitably qualified and

³⁹ (1999) 20 ILJ 2316 (LC) at 2322 paras 20-22.

⁴⁰ It has since been held that procedural fairness pertaining to incapacity due to illness presupposes that the employer must consult with the employee about his ailment with a view to finding a suitable way of adapting the employee's conditions to alleviate his problem of absenteeism such as transfer or identifying suitable work, if possible - *Hendricks v Mercantile & General Reinsurance Co. of SA Ltd* (1994) 15 ILJ 304 (LAC); *AECI Explosives Ltd (Zomerveld) v Mombalu* [1995] 9 BLLR 1 (LAC); *Spero v Elvey International (Pty) Ltd* (1995) 4 LCD 342 (IC); *Carr v Fisons Pharmaceuticals* (1995) 16 ILJ 179 (IC). See also *International Sports Co. Ltd v Thomson* [1980] IRLR 340 (EAT).

⁴¹ Item 10(1). It was evident in *EC Lenning Ltd t/a Besaans Du Plessis Foundries v Engelbrecht* (1999) 20 ILJ 2516 (LAC) that had the employer consulted the employee or had they discussed the matter, it would have been obvious that the employee's disability was not total but limited to the extent that he was incapable of resuming his previous work in the foundry where he contracted chronic lung damage. Such consultation or investigation employee's incapacity would have enabled the employer to discuss the possibility of deploying the employee to a less noxious environment. Failure to consult and discuss the extent of the employee's incapacity rendered the dismissal procedurally unfair.

⁴² Item 10(2). Cf *NUMSA & others v Steloy Stainless Precision Casting (Pty) Ltd* [1995] 7 BLLR 87 (IC); *Dywili v Brick & Clay* [1995] 7 BLLR 42 (IC) where it was held that there is no absolute rule that the employee must be represented by an official from the union from outside the workshop.

⁴³ See Dupper *et al Employment Discrimination Law* (2004) 161 as well as Christianson, M 'Incapacity and disability: A retrospective and prospective overview of the Past 25 years' (2004) 24 ILJ 879.

⁴⁴ See Employment Equity Act 55 of 1998 s 1 ('people with disabilities'), Code of Good

generally able to perform the essential functions of the job albeit with some form of reasonable accommodation.

*IMATU v City of Cape Town*⁴⁵ concerns an applicant who suffered from diabetes that was controlled by insulin. He had been denied the position of fire fighter by the respondent employer on the ground that he did not meet the inherent requirements of the position. He claimed, inter alia, that he had been unfairly discriminated on the ground of disability contrary to section 6 (1) of the EEA. The respondent argued that denial of employment was justified by the inherent requirements of the job under section 6(2) of the EEA.

The respondent's main argument was that there was always a risk that an employee who was diabetic and dependent on insulin could suffer a hypoglycaemic attack in the course of duty and that such sudden incapacitation posed an unacceptable safety risk to the employee, his or her colleagues and the general public. The respondent decided, therefore, that a blanket ban on employing all insulin-dependent diabetics was justifiable. However, evidence adduced on behalf of the applicant, which was accepted by the court, showed that the applicant was fit and that his diabetes was optimally controlled. Moreover, he was able to fulfil the duties of a fire fighter safely, including anticipating a hypoglycaemic attack and taking remedial action. The degree of risk that the applicant posed to health and safety was according to court not "material". It was a minimal risk and no greater than the risk posed by a fire fighter without insulin-dependent diabetes.

Arbitrator Christie discussed the intersection between the incapacity process and disability in the *NEHAWU obo Lucas and Department of Health Western Cape*⁴⁶ case. The full passage needs to be quoted so we can get its drift:

'It is trite that if the person is incapacitated for work an employer should determine if the employee falls within the scope of the definition of "people with disabilities" in EEA. I do not consider that it would unduly strain the scope of item 10 of the CGP: Dismissal to construe it as also encompassing "people with

Practice: Employment of People with Disabilities items 5-6.

⁴⁵ (2005) 26 *ILJ* 747 (LC). For extensive discussion see Ngwenya, C & Pretorius, L 'Conceiving disability and applying the constitutional test for fairness and justifiability: A Commentary on *IMATU v City of Cape Town* (2007) 28 *ILJ* 747.

⁴⁶ (2004) 25 *ILJ* 2091 (BCA). See also *Wylie and Standard Executors & Trustees* (2006) 27 *ILJ* 2210 (CCMA).

disabilities” as defined in the EEA. I say this even though “people with disabilities” are treated as a discrete group or category of persons. After all the LRA dismissal code was published before the EEA was enacted and it deals with dismissal generally, that is including persons who have a disability as defined. Although the LRA code makes only brief reference to people with disabilities as a discrete group, item 11(b)(ii) alludes to people with disabilities in the context of the extent to which an employer should be required to “accommodate disability”. Andre van Niekerk in *Unfair Dismissal* notes that if an employee is permanently incapacitated but is able to perform some work, “[t]he employer’s obligation in this case are not dissimilar to those that apply in the case of employees with disability”. Marylyn Christianson in “Incapacity and disability: A Retrospective and Prospective Overview of the Past 25 Years” indicates that “the code [LTA code] used the concepts of incapacity and disability interchangeably in some instances and this is confusing in a decade when disability has a very specific meaning for the purposes of equity in the workplace. A close examination of the issues, however, indicates that incapacity and disability may lie together along a continuum for the purposes of deciding whether a person is indeed capable of performing the required work to the standards set by the employer”. But it seems to me that one ought to take a purposive approach to these interpretive questions. The general objective of the statutory arrangements – both in the LRA and of course in the EEA – is to promote procedural and substantive fairness in relation to “people with disabilities” and to encourage employers to keep people with disabilities in employment if these can reasonably be accommodated. It follows that the general concept of fairness requires an employer to consider whether a particular employee is “a person with disabilities” under the EEA in determining if there is sufficient valid fair reason to terminate employment. And I consider that this ought to be a relevant factor in the arbitration even if – as here – the employee has not specifically sought special treatment by reference to the EEA and claimed the status of a person with disability. Item 10 and 11 of the LRA code on dismissal require an employer to consider whether an employee falls within the definition of “people with disabilities” in s 1 of the EEA. I think the reason for this is that disability status is not to be considered only as a sword to claim special treatment under the affirmative action provisions in the chapter II of the EEA, it should also be considered as a shield to protect a person who has a disability from being dismissed from employment for a reason related to that disability.’

Another leading case is *Wylie and Standard Executors & Trustees*.⁴⁷ The applicant, a trust officer employed by the respondent was diagnosed with multiple sclerosis, a degenerative neurological disorder. When she could not perform to the required standards in the trusts division she was transferred to the estates division where there was less pressure. Fewer estates were given to her handle but she still could not manage all her files. Stress worsened Ms Wylie’s condition but a medical panel found that she was not totally and permanently disabled. The panel suggested that the employer consider either:

- (a) accommodating the employee within her current role;

⁴⁷ (2006) 27 ILJ 2210 (CCMA).

- (b) seeking employment for her in another role in the bank; or
- (c) assisting her to pursue something outside of the bank.

The employer did not consider option (a) to be feasible. The applicant was advised that options (b) and (c) would be explored for a period of three months after which, if no solution could be found, her employment would be terminated. No suitable positions became available and her employment was terminated at the end of the three-month period.

In arbitration proceedings the employer contended that it had complied with its Code of Good Practice: Ill Health and had treated the employee with understanding and compassion. In those circumstances it was reasonable to dismiss the applicant. It was common cause that her impairment amounted to a disability. The applicant contended that the Code of Good Practice on the Employment of People with Disabilities and Technical Assistance Guidelines published under the Employment Equity Act 55 of 1998 required much more of an employer in the case of a disabled employee, and the employer had failed to comply with these.

The commissioner first considered the definition of 'people with disabilities' in section 1 of the Employment Equity Act read with the definition of a 'physical impairment' in item 5 of the Disability Code, and found it inescapable that the applicant's condition amounted to a disability as envisaged in the Employment Equity Act and the code. Item 6 of the code provided that employers should 'reasonably accommodate' the needs of people with disabilities. The Labour Relations Act also protected employees against unfair dismissal on the basis of disability. The Code of Good Practice distinguished between dismissals for incapacity based on poor work performance and those based on ill-health or injury, and 'disability' was mentioned in passing in items 10 and 11 of that code. The commissioner considered whether 'incapacity for ill-health or injury' and disability were interchangeable, and concluded that they were not. Incapacity implied that an employee was not able to perform the essential functions of the job. An employee with disability was suitably qualified and

generally able to perform the essential functions of the job with some form of reasonable accommodation

The commissioner endorsed the views of the Christie in *NEHAWU obo Lucas and Department of Health Western Cape* and found that the respondent had not treated the Ms Wylie as a person with a disability but as a poor performer. It was clear that the employer had not complied with the guidelines set out in item 6 Disability Code in all respects. It also did not follow its own incapacity management guidelines. When the panel decided that Ms Wylie would be given a pension, the employer did nothing more, but looked for possible posts to become vacant. That was patently not enough reasonably to accommodate a disabled person. It was also unfair first to give notice of termination and then to look for possible alternative.

On the other hand, in the employer was confronted with intersection between incapacity and disability *Insurance & Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*⁴⁸The material facts were that when introducing members of the department to the manager of the internal audit department, the employee's superior, Z, referred to Ms Isaacs as 'our new slut in the department'. Ms Isaacs broke down crying and was very distressed. Although the offending superior subsequently apologized in writing and publicly and, after grievance proceedings, received a written warning, Ms Isaacs was not appeased, and wished not to have to report to him or to have to see him on a regular basis. The incident traumatized Ms Isaacs and triggered a severe depression. From 7 March to 31 May 199 she was off work and for part of the time admitted to hospital suffering from depression and anxiety.

The employee returned to work on 1 June 1999 but was still very emotional about seeing Z again and indicated that she could not work in the department with him. Z's superior, L, tried to accommodate her by fashioning a new job description for her, and suggested that she go home and return when she felt better. She returned again on 7 June and was ready to work, but was still

⁴⁸ (2000) 5 LLD 584.

unhappy to be near Z. She asked the company's human resource manager if she could move to another department, and he agreed to look at alternatives. The following day the employee told L that she no longer wanted to work in the department and that she did not think L wanted to help her or cared for her. He advised her that it would not be possible for her to avoid Z altogether and that retrenchment was not an option.

The employee left work on 8 June and did not return. On 1 June the company send her a letter advising that unless she reported for work by 14 June she would be reported as having absconded. On 17 June she advised that she was regarded as having absconded, and her contract was terminated summarily.

After reviewing the foregoing evidence and the arguments of both sides the commissioner expressed the view that the company's behaviour was inappropriate. L knew that the employee was depressed and she had been hospitalised. He knew that she was not coping at work. Very few alternatives were given any serious consideration. The employee had approached the human resources manager on various occasions looking for alternatives to her dilemma. He knew that she had been off work for depression and should have thought to suggest Pay bridge (a disability benefit available to employees who had been on four weeks' continuous sick leave and who had been traumatized or involved in an accident) to her. This would have given her the opportunity to pull herself together whilst seeking other alternatives.

The commissioner observed that the employee had 15 years' loyal service with the company and was a good and valued employee. To simply follow standard abscondment procedures was not fair. The company was a very large organisation and alternatives must have been available. If the alternatives did not work out, the correct procedure in circumstances would have been to follow the disciplinary route for incapacity. The dismissal was found to have been substantively unfair.

CHAPTER THREE

SALIENT ISSUE OF FAIR PROCEDURE IN EMPLOYER'S DISCIPLINARY INQUIRY

3.1 General Aspects

Even though the right to be heard has long been firmly established at common law,⁴⁹ the circumstances where it has been held to apply or not to apply in the employment sphere has aptly been described as "illogical and bizarre."⁵⁰ As much as the application of the common law principles of natural justice to the employment relationship is no longer an issue in the face of the statutory right to a fair procedure in the law of unfair dismissal in South Africa,⁵¹ it is clear from part two of this study that in spite of the guidelines in the code of good practice, the circumstances where the employer has been held to have observed a fair procedure and where he was excused for not so observing were no less "bizarre" nor were they logical. That apart, the content of the right to be heard, the scope of the opportunity to state a case, the requirements of procedural fairness or of fair procedure (whichever expression is preferred) is no less problematic given the conflicts inherent in the case law and contradictory speeches of eminent judges.

The inference drawn from the decided cases examined hereafter can be put thus: "fairness is indeed an elusive concept";⁵² to determine its content in any given situation is not an easy task;⁵³ certain standard requirements of fairness or fair procedure exist but their application would vary in accordance with each

⁴⁹ The earliest reported case where the right to be heard was enunciated at common law was in *R v Chancellor of the University of Cambridge* (1723) 1 Str 567. With the decision in *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, the principle had been consolidated and a solid foundation laid for fair hearing but it was not until the decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40 that the right to be heard could be said to have taken root in the employment sphere.

⁵⁰ Per Lord Wilberforce in *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 at 1294.

⁵¹ Labour Relations Act 66 of 1995, s 188(1)(b).

⁵² Per Melunsky AJA in *WG Davey (Pty) Ltd v NUMSA* (1999) 20 ILJ 2017 at 2023B. See also *NISEC (Edms) Bpk v Western Cape Provincial Tender Board & others* 1997 (3) BCLR 367 (C) at 371.

⁵³ Per Smalberger JA in *Administrator, Transvaal & others v Theletsane & others* 1991 (2) SA 192 (A) at 206C. See also Corder, H "The content of the audi alteram partem rule in South African Administrative Law" (1980) 43 THRHR 156.

case flexibility being the name of the game.⁵⁴ If there is a leading example of the application of the nebulous judicial expression: *every case will depend on its own circumstances*, it is in this field of learning. The totality of the facts of each case invariably dictates whether there is fairness or not. That standard of fairness to which much has been alluded, represents the minimum content of fair procedure.⁵⁵ In the context of disciplinary enquiry,⁵⁶ it would require that where there is an allegation of misconduct against an employee, an enquiry should be held; the employee must be made aware of the nature of the case against him; he should be given an opportunity to respond;⁵⁷ the person investigating the alleged misconduct should act in good faith.⁵⁸ Broadly stated, these are the basic requirements of the common law principles of natural justice and it is submitted that the main difference between the common law requirements and the fair procedure with which we are concerned is in the stringent observation of the former and in their less formal application in the latter circumstance.

Even where an employer's disciplinary code or recognition or collective agreement does not make provision for a procedure prior to dismissal, the right

⁵⁴ *Du Preez & another v Truth & Reconciliation Commission* 1997 (3) SA 204 (SCA); *R v Secretary of State for the Home Department, Ex parte Hickey & others (No. 2) & others* [1995] 1 All ER 490 at 497AA-H; *R v Monopolies & Mergers Commission, Ex parte Elders IXL Ltd* [1987] 1 All ER 451 at 461.B-F.

⁵⁵ It is submitted that even if one left the test at the level of the two broad fundamental requirements of a fair hearing posited by Lord Tucker in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 and re-echoed by the Appellate Division in *Administrator of Transvaal v Theletsane* 1991 (2) SA 192 (A) at 206 to the effect that "there must be notice of the contemplated action and a proper opportunity to be heard", that will include the third requirement referred to below, that of good faith on the part of the person conducting the enquiry. The expression, "opportunity to state case", by definition, incorporates the obligation to serve notice and to generally act in good faith. See further: *Byrne v Kinematograph Renters* [1959] 1 WLR 762; *University of Ceylon v Fernando* [1960] 1 WLR 223; *Clark v Civil Aviation Authority* [1991] IRLR 412; *Anglo-American Farms t/a Boschendal Restaurant v Khomwayo* (1992) 13 ILJ 573 (LAC).

⁵⁶ Cf the opinion expressed by Coleman J in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 486D-F.

⁵⁷ See e.g. *Ntsibande v Union Carriage* (1993) 14 ILJ 1566 (IC) at 1572E-J; *Jeffrey v President of South African Medical & Dental Council* 1987 (1) SA 387 (C) at 392H.

⁵⁸ *Mondi Timber Products v Tope* (1997) 18 ILJ 149 (LAC) at 152H-I; *Edwards v EMI South Africa (Pty) Ltd* [1996] 5 BLLR 576 (IC) at 584H-J; *Van Niekerk v Minister of Labour & others* (1996) 17 ILJ 525 (C) at 532; *Van Huyssteen v Minister of Environmental Affairs & Tourism* 1996 (1) SA 283 (C) at 304; *Miksch v Edgars Retail Trading (Pty) Ltd* (1995) 16 ILJ 1575 (IC); *Anglo-American Farms t/a Boschendal Restaurant v Khomwayo* (1992) 13 ILJ 573 (LAC) at 587B-H; *Twala v ABC Shoe Store* (1987) 8 ILJ 714 (IC) at 716D-F; *Khanum v Mid-Glamorgan Area Health Authority* (1987) IRLR 215.

to a fair procedure conferred by the Labour Relations Act⁵⁹ entitles an employee to at least these minimum requirements bearing in mind at all times: the size of the organisation; the fact that the framework in which it operates is in pith and substance that of employment;⁶⁰ and that "at disciplinary hearings presided over by laymen, it cannot be expected that all the finer niceties which a formal court of law would adopt will always be observed".⁶¹ It must be mentioned that neither the size of the organisation nor its economic state would *per se* relieve the employer of the obligation to investigate an allegation of misconduct, incapacity or poor work performance or of offering the employee the opportunity of addressing him on the complaints or the sanction.⁶²

3.2 Notice of the allegations

The element of surprise is certainly not one of the attributes of a fair procedure nor is the withholding of vital information. The first step to be taken in any enquiry, investigation or hearing, whether formal or informal, is to inform the person against whom the proceeding is being conducted⁶³ of the allegations against him. The requirement of notice is the beginning of wisdom in the sphere of fair procedure.⁶⁴ It is the foundation upon which the common law principle that a person must not be condemned or punished for an offence or deprived of his personal liberty or right to his property for an alleged breach of the law, without being offered the opportunity of being heard is based.⁶⁵ It has implications for

⁵⁹ S 188(1)(b).

⁶⁰ Cf *per* Lord Bridge in *Lloyd & others v McMahon* [1987] 1 All ER 1118 at 1161.

⁶¹ *Per* Goldstein J in *Mondi Timber Products v Tope* (1997) 18 ILJ 149 (LAC) at 153A. See also *NUM & another v Rand Mines Milling Co. Ltd* (1986) 7 ILJ 765 (IC) at 769A. Cf *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 9D-G.

⁶² *Dhanapalan v Adult Video News* (1997) 18 ILJ 1107 (CCMA).

⁶³ The requirement of notice applies even where persons are not necessarily being proceeded against, it is enough if they will be implicated in the outcome of the enquiry: *Du Preez v Truth & Reconciliation Commission* 1997 (3) SA 204 (SCA) at 234H-I *per* Corbett CJ; *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* [1997] 3 All SA 280 (SCA) at 290C *per* Olivier JA.

⁶⁴ In *Cycad Construction (Pty) Ltd v CCMA & others* (1999) 20 ILJ 2340 at 2346 para 24, De Villiers AJ said that the right to adequate notice, the right to be advised of what recourse the employer has made available after dismissal and the right of the accused employee to face his accusers in a disciplinary enquiry "have value in and of themselves to ensure social justice and the maintenance of industrial peace." See also *Sanny v Van der Westhuizen NO & others* [2005] 10 BLLR 1017 (LAC).

⁶⁵ In *R v University of Cambridge* (1723) 1 Str 557 at 567 the case in which the principle of natural justice was firmly established at common law, Fortesqueu J said: "The objection for want of notice can never be got over. The law of God and man both give the opportunity to make his

the other requirement that the employee be allowed a reasonable time to prepare his defence which is an integral requirement of the overall opportunity to state case. Indeed, the Privy Council once stated; "if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case made against him. He must know what evidence has been given and what statements have been made affecting him; and he must be given a fair opportunity to correct or contradict it."⁶⁶

The allegations need not be elaborately detailed since the employer is not expected to describe the employee's misconduct or poor work performance with absolute precision and in minute details.⁶⁷ However, since the purpose of that requirement is to enable the party to defend himself or answer to the complaint, it must follow that the notice must be sufficient to enable him adequately to prepare his defence or answer.⁶⁸ The notice must therefore convey sufficient information of the facts of the allegation, "the gist of the case" which the accused person has to answer.⁶⁹ In any event, the type of information which will satisfy this requirement will in each case depend on whether it is the employee's conduct or his incapacity that is being investigated. For instance, in *Ndlovu v Transnet Ltd t/a Portnet*,⁷⁰ a senior management employee was notified that she had to appear at a disciplinary hearing to face charges relating to her intentional failure to disclose to the employers during her interview for employment that her services had been terminated by her previous employer because of certain acts of dishonesty. The Labour Court held that the employee had been informed what the charges against her were and that if she needed further details or an opportunity to deal with information disclosed in evidence, she was at liberty to ask for further information or a postponement of the inquiry but not to rush to court to challenge the routine disciplinary hearing.

defence, if he has any ... that even God himself did not pass sentence upon Adam before he was called upon to make his defence."

⁶⁶ Per Lord Denning in *Kanda v Government of Malaya* [1962] AC 322 at 337.

⁶⁷ *Dywili v Brick & Clay* [1995] 7 BLLR 42 (IC).

⁶⁸ Per Buckley LJ in *Stevenson v United Road Transport Union* [1977] 2 All ER 941 at 951.

⁶⁹ Per Lord Mustill, *Doody v Secretary of State for the Home Department & others* [1993] 3 All ER 92 at 106. See also: *Korsten v Macsteel (Pty) Ltd & another* [1996] 8 BLLR 1015 (IC) at 1020C-E; *GIWUSA v VM Construction* [1995] 9 BLLR 99 (IC).

⁷⁰ (1997) 18 ILJ 1931 (LC). See too *Nitrophoska (Pty) Ltd v CCMA & others* [2011] 8 BLLR 765 (LC).

To further illustrate the foregoing proposition is the Labour Appeal Court decision in *Eskom v Mokoena*.⁷¹ While upholding the principle that a dismissal for incapacity which consisted of poor work performance, should be preceded by a fair hearing, the Court held that there was no need to put each detail of the case before the employee as there was only one "charge", namely, incapacity, hence the decision of the Industrial Court that there should have been a full enquiry into each complaint against the employee was incorrect especially where the length of the counselling process indicated that the respondent had been fully apprised of the complaints regarding his performance, and had been offered considerable assistance to overcome his problems. The Court drew a distinction between dismissal for misconduct and dismissal based on poor work performance in so far as the information which the employee must be given and what the employer will be expected to prove are concerned. Kroon JA held:

In the present case what the appellant was required to establish was the respondent's alleged incapacity. It was not necessary for that purpose that the alleged conduct on the part of the respondent which formed the subject of the complaints made against him to be established as if that conduct constituted misconduct justifying the respondent's dismissal. It was the widespread dissatisfaction of the staff in the respondent's division and the power station, of which the complaints were evidence, and their perception of the respondent as being incapable that was the problem. It was the problem conveyed to the respondent and on which the appellant was required to give him a hearing. It may well be that certain of the complaints could well have been elucidated further by Nzimande, but in my judgment sufficient detail of the substance of the complaints was conveyed to the respondent to enable him to respond to the actual charge against him, viz., that of incapacity. The fuller investigation into the truth of the various allegations embraced in the complaints and the confrontation of the respondent with more specific details, which in Maytham AM's view had been necessary, had therefore in fact not been required. I am therefore unable to uphold the first basis on which Maytham AM held that the respondent's dismissal had been procedurally unfair.⁷²

Procedural fairness in all its ramifications contemplates that the offence which the dismissed employee has allegedly committed should be communicated to him in the language he understands.⁷³ This will enable him to know what issues

⁷¹ [1997] 8 BLLR 965 (LAC).

⁷² [1997] 8 BLLR 965 (LAC) at 980-981.

⁷³ This accord with the constitutional injunction - s 35(4), Constitution of the Republic of South

to address in his defence. By this requirement too, once a person is charged with an offence - criminal⁷⁴ or disciplinary - he should be tried and either found guilty or absolved of liability in respect of that offence; it is wrong to find him guilty of an entirely different offence against which he had no notice.⁷⁵ Nor is it fair to split the charge and multiply them where, as in *Ntshangase v Speciality Metals CC*,⁷⁶ the employee was charged with lateness and absenteeism and his unacceptable and false explanations provided the employer with the ingredients to formulate yet a third charge, that of breach of duty of good faith to the company. Mlambo J held that it was clear that the basis for finding the employee guilty of lateness and absenteeism was his unacceptable explanation and that using the same explanation to formulate a third charge was unfair and took the issue beyond the realms of fairness. But the linking of the charges of drunkenness and disorderly behaviour in a hotel with the charges relating to incidents at the same hotel with that pertaining to the consumption of dagga was held not unfair in *Coalink v TWU obo Pieterse*.⁷⁷

Where an additional charge is merely an amplification of the original charge,⁷⁸ or where an employee is found guilty of a charge formulated differently from that which she was summoned to answer the procedure would not necessarily be unfair if the substance of the charge remains the same and the employee is not

Africa 1996. Indeed, s 35(3)(k) guarantees the accused person the right to be tried in the language he understands or, if that is not practicable, to have the proceedings interpreted to him in that language. See *Ntsibande v Union Carriage & Wagon Co (Pty) Ltd* (1993) 14 ILJ 1566 (IC) at 1673D-F on the failure of the employer to provide the employee the assistance of an interpreter notwithstanding that the minutes of the hearing acknowledged that the applicant had a right to be assisted by an interpreter. It is actually futile to talk of fair hearing where the person whose conduct is under investigation does not understand the language of the proceedings.

⁷⁴ S 35, Constitution of the Republic of South Africa 1996 guarantees rights of fair procedure to arrested, detained and accused persons.

⁷⁵ *SACCAWU on behalf of Mngeni v Pep Stores* (1997) 18 ILJ 1129 (CCMA). Cf the situation where the employee is charged with poor work performance whereas the real charge should be failure to carry out instructions, it was held that such mis-designation would not vitiate the proceedings - *NUM obo Grobler v Goedeheop Colliery* [1998] 12 BALR 1654 (IMSSA). This is so because an incorrect labeling of the offence does not render the procedure unfair in so far as the employee is made aware of the facts to respond to - *SAPA obo Vorster v PA Poskantoor* [1997] 11 BLLR 1524 (CCMA).

⁷⁶ (1998) 19 ILJ 584 (LC).

⁷⁷ (1998) 7 BALR 917 (CCMA).

⁷⁸ *Nedcor Bank Ltd v Jappie* [1998] 10 BLLR 1002 (LAC) where, to the original charge of dishonesty was added breach of company guidelines, this was held to be an amplification of the original charge and had not prejudiced the employee.

thereby prejudiced.⁷⁹ The principal question here is whether formulation or re-formulation had the effect or amounted to the creation of a new charge of which the employee had no opportunity to respond.⁸⁰ Thus in *Boardman Brothers (Natal) Ltd v CWIU*⁸¹ the Supreme Court of Appeal held that the real thrust of the case against the employees was that they had dishonestly taken money for work not done and that the charge against them for dishonestly claiming payment from the employers for time not worked was an incorrect formulation, nevertheless nothing turned on that difference since all the facts were canvassed at the Industrial Court and the nature of the employee's alleged dishonesty "is ultimately a matter of inference from those facts." Similarly, Marcus AJ held in *Nel v Ndaba & others*⁸² that there was no question of a new charge being introduced. As much as the original charge of accepting bribes might have been inept, the essence of the offence was "trading in an unacceptable manner". In any case, the employer was entitled to "take a dim view of the employee's conduct" - the employee having conducted himself in a manner incompatible with the employment relationship by receiving commission for turning customers from his employer.⁸³

What constitutes notice or reasonable time within which to present a case⁸⁴ is a question of fact and will vary from case to case or, as De Villiers AJ recently put it, "from adjudicator to adjudicator".⁸⁵ Although there is no fixed time limit in this regard but it would seem that a reasonable period that would enable the employee to prepare his case and make consultations would suffice. For instance, the Appellate Division found "a drumhead enquiry on a 45 minutes'

⁷⁹ *Minaar v Wedge Steel World* [1998] 2 BALR 138 (CCMA).

⁸⁰ *Per* Marcus AJ in *Nel v Ndaba & others* (1999) 20 ILJ 2666 (LC) at 2675 para 28. *Contra* in *Mndaweni v JD Group t/a Bradlows & another* (1998) 19 ILJ 1628 (LC) at 1630J-1631A where Sutherland AJ found that a new charge was introduced at the arbitration stage for the first time and held that "our law does not entitle a commissioner to hear a new charge which did not form the basis of the dismissal under consideration."

⁸¹ (1998) 19 ILJ 517 (SCA) at 521D-F *per* Smalberger JA.

⁸² (1999) 20 ILJ 2666 at 2676A.

⁸³ See also *Sappi Novoboord (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC).

⁸⁴ *Cf* in *ECCAWUSA obo JAFTA v Russells Furnishers* [1998] 4 BALR 391 (CCMA) where it was held that there is no reason why an employer should not institute action after charges had been withdrawn provided that the fairness of its actions was not compromised and that the disciplinary hearing had been delayed as a result of the withdrawal of the charges did not in itself make the dismissal unfair.

⁸⁵ *Cycad Construction (Pty) Ltd v CCMA & others* (1999) 20 ILJ 2340 (LC) at 2345 para 16. See also *Miksch v Edgars Retail Trading (Pty) Ltd* (1995) 16 ILJ 1575 (IC).

notice"⁸⁶ to be totally inadequate for the purposes of a fair hearing. And in a number of cases Commissioners had found inadequate notices issued on the day the hearing was held. Thus in *Gxabeka v Samcor*,⁸⁷ the Commissioner considered that a notification of disciplinary hearing to be held on Monday 28 July 1997 issued to the employee that morning cannot remotely be seen as sufficient time to prepare for a hearing and can only be interpreted as being vindictive. Similarly, even where the employer had proved that the employee had stabbed a fellow worker in the face with a knife, the disciplinary procedure followed was held to be unfair because the employee was only notified of the date of the hearing on the day it was held.⁸⁸

3.3 Opportunity to state a case

Whenever the question is asked as to what constitutes an opportunity to state a case, the answer that emerges is one of uncertainty. The flexibility inherent in this concept renders the enquiry somewhat of a mirage as epitomised by conflicting decisions of courts in their attempt to grapple with the problem over the years. Although it has been stated that "the so-called rules of natural justice are not engraved on tablets of stone,"⁸⁹ it has equally long been established that the notification of the case which the person against whom disciplinary action is contemplated should be followed by information as to the date, place and time, that is, where and when to appear to answer to the allegations.⁹⁰ So, where as in *SACCAWU obo Mabunza v Standard Bank of SA*,⁹¹ an employee has been found guilty of poor record of attendance and use of bad language and the disciplinary enquiry was conducted in a perfect manner in that the employee:

- _ had timeous notice and was;
- _ represented by his trade union representative;

⁸⁶ *Slagment (Pty) Ltd v BCAWU & others* [1994] 12 BLLR 1 (AD) at 12 per Nicholas AJA. The old Industrial Court had held a-30 minute notice to be grossly insufficient and unreasonable in *FAWU v BB Bread (Pty) Ltd* (1987) 8 ILJ 704 (IC).

⁸⁷ [1998] 6 BALR 683 (CCMA). See also *Sehomo v D & K Coffin Manufacturers* [1998] 12 BALR 1601 (CCMA).

⁸⁸ *NUM obo Makanye v Rustenburg Platinum Mines Ltd Amandelbult Section* [1998] 10 BALR 1289 (CCMA).

⁸⁹ Per Lord Bridge in *Lloyd v McMahon* [1987] 1 All ER 1118 at 1161.

⁹⁰ *Annumunthodo v Oilfields Workers Trade Union* [1961] AC 945 (PC).

⁹¹ [1998] 9 BALR 1185 (CCMA).

- _ allowed to plead in mitigation;
 - _ informed of his right of appeal; and
 - _ there was no evidence that the chairperson had any prior knowledge of the applicant or of the dispute and there was no iota of evidence of bias, or hostility towards the employee,
- there was not sufficient grounds shown to warrant a finding of procedural unfairness in so far as the employee's dismissal was concerned.

In as much as the Labour Court or the arbitrator is not expected to apply the rigid requirements of the common law in testing the employer's handling of disciplinary matters, it is clear that basic procedural decencies would be expected of the employer especially if he is a big employer.⁹² And in this regard, the Commissioner's award in *NCFAWU on behalf of Roberts v Ons Handelshuis Koop*⁹³ is instructive. There was a hearing but the proceedings left much to be desired. First, the chairman of the enquiry treated the allegations of theft levelled against the employee as evidence hence the complainant was not called at the initial hearing or the appeal to testify while the evidence of the prosecution was in conflict with that of the accused.⁹⁴ Secondly, the onus of proof was placed on the employee to prove his innocence thus undermining the principles of a fair hearing in that it led to a one-sided proceeding. A tribunal, formal or informal in its outlook, is not entitled to reverse the burden of proof placed on the parties by the law which, in this instance, is that the employer has to show on a balance of probabilities that the employee committed the offence for which he is being tried at the enquiry but not that the employee should prove his innocence.

Perhaps no case exists in the books to illustrate the catalogue of irregularities perpetrated in *SACCAWU v Citi Kem*.⁹⁵ The employee was dismissed after the employer had initiated two investigations into thefts which had taken place while the employee was overseas. Her dismissal had arisen from evidence tendered

⁹² See Item 1, Schedule 8, Code of Good Practice: Dismissal. The smaller the enterprise the less formal and legalistic will its disciplinary proceedings be for the simple reason that the expense which is involved in recruiting, maintaining or retaining the level of personnel well trained to handle these matters may be beyond the reach of the small enterprise.

⁹³ (1997) 18 ILJ 1176 (CCMA).

⁹⁴ *Korsten v Macsteel* (1996) 8 BLLR 1015 (IC).

⁹⁵ [1998] 2 BALR 160 at 168-169 (CCMA).

at the enquiries tending to implicate the employee of complicity but the employee denied all that. The arbitrator found the dismissal to have been substantively unfair and that the employer's witnesses appeared to have been "coached". The two investigations were accordingly set aside on the following grounds:

- The chairperson of the disciplinary enquiry was also the chairperson of the second investigation. In other words, she had prior knowledge of the case and therefore did not approach the disciplinary enquiry with an open mind thereby exhibiting the elements of bias. In the opinion of the Commissioner: "... the investigating officer and the chairperson could never be one and the same person. Such would result in one person being the judge and prosecutor at the same time, which could never constitute a fair hearing. The investigating officer is expected to present the case of the employer, and that is not the duty of the chairperson."
- The employee was not afforded the opportunity to state his case in response to the allegations against him. Rather, the employees were "bombarded and interrogated with questions and were never afforded an opportunity to state a case in response. Witnesses were not sworn in and "this is a serious procedural defect."
- Not a single employee had been represented during the hearing. In view of the fact that the charges against the employees related to serious offences, the chairperson of the enquiry should have postponed the hearing in order to allow representation.⁹⁶
- The employees were not allowed to call witnesses of their choice whereas the chairperson elected to call the witnesses who merely implicated the accused. Furthermore, where a person is accused of an offence such as stealing or dealing in property belonging to the employer, he must be allowed the opportunity of confronting the witnesses face to face and to cross-examine them. It is a breach of fair procedure⁹⁷ not to allow the

⁹⁶ Refusal of an application to adjourn in order to allow the employee bring his witnesses is also a breach of fair procedure - *Makhetha v Bloem One Stop* [1998] 5 BALR 566 (CCMA).

⁹⁷ *SACCAWU obo Moqolomo & others v Southern Cross Industries* [1998] 11 BALR 1447 (CCMA).

accused person even in disciplinary matters the opportunity of cross-examining his accuser.⁹⁸

- The chairperson neither explained to the employees about their right to plead in mitigation nor were they given the opportunity to do so, in effect, the chairperson had failed to hear all the personal circumstances of the employees in accordance with Item 3(5) of the code of good practice.⁹⁹
- A mass hearing was held in this case raising doubts as to whether justice was seen to be done. It was totally unnecessary since hearings *en masse* are only allowed in exceptional circumstances such as strikes, where it is not possible to give individual hearings.¹⁰⁰

Even though a formal hearing may not be necessary in all cases,¹⁰¹ sometimes, the question turns on whether what took place could properly be described as a "hearing". That was the question in *Concorde Plastics (Pty) Ltd v NUMSA & others*.¹⁰² There were no notices of any disciplinary enquiry and no charges were put to the employees. They were simply brought into the manager's office and asked whether they wished to resign. They were also treated collectively without any attempt by the official in charge to identify the particular role played by the individual employee during the defamation trial between the managing director and the employees' union. The employees had been subpoenaed but only two of them gave evidence in an action for defamation brought by the managing director of the company against the employees' union and one of its officials. Consequently, the employees were informed that their contracts of

⁹⁸ *Tsoedi v Topturf Group* [1999] 6 BALR 722 (CCMA) at 727C-D; *Korsten v Macsteel* [1996] 8 BLLR 1015 (IC); *Ngcobo v Durban Transport Management Board* (1991) 12 ILJ 1094 (IC). Although De Villiers AJ did not decide the question of the failure to afford the employee the right to cross-examine the witness because the accused had admitted committing the offence of which he was accused, the judge nonetheless emphasised the right to cross-examination as one of the valuable attributes of fair hearing. See *Cycad Construction (Pty) Ltd v CCMA & others* (1999) 20 ILJ 2340 at 2346 paras 21, 22 and 24.

⁹⁹ See also *SAMWU obo Biyela v North Central & South Central Local Councils* [1998] 10 BALR 1378 (IMSSA). Contra in *Nongqayi v Shuter & Shooter* [1998] 2 BALR 143 (CCMA) where the employee's complaint that he was not given the opportunity to address a senior official who had ratified his dismissal was not raised by the employee on appeal and it was held that it was not so flawed as to taint the dismissal as a whole with unfairness. It was also held in *NUMSA v Gentyre Industries* [1998] 2 BALR 148 (CCMA) that failure to tick the entry "mitigating factor" on the company checklist did not warrant the conclusion that the chairperson did not take them into consideration when deciding on the penalty.

¹⁰⁰ See the discussion in part one of this article.

¹⁰¹ See e.g. *CSIR v Fijen* (1996) 17 ILJ 18 (A).

¹⁰² 1997 (11) BCLR 1624 (LAC).

employment had been terminated. The employer regarded their conduct in the defamation action as an act of "severe disloyalty" and "intended dishonesty in that any evidence given against (the managing director) would have been blatantly untruthful". Marcus AJ held that equity demanded that the employees ought to have been given a hearing before they were dismissed. "The nature of the hearing is determined by exigencies of the situation so that it may, in appropriate circumstances, be attenuated." But in the present case, there were no special circumstances which would have justified the entire absence of a hearing before dismissal. There was therefore a manifest failure of natural justice and the dismissals were procedurally unfair.¹⁰³

In *Cornelius & Ors v Howden Africa Ltd t/a M & B Pumps*¹⁰⁴ the Commissioner adopted the view expressed in *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd & another*¹⁰⁵ that procedural fairness under the 1995 Act is less stringent than that under the previous law such that each requirement in the code need not be meticulously observed. On the other hand, what was required was for all the relevant facts to be looked at in the aggregate to determine whether the procedure adopted was fair. "A holistic approach had to be adopted. Each factor could not be considered in isolation but had to be looked at to determine whether on balance the procedure adopted amounted to such a deviation from the Code of Good Practice as to justify the granting of relief."¹⁰⁶ It was held that the employees concerned were given adequate time to prepare, afforded a full opportunity to respond and rebut the charges against them, and had abandoned their right to an internal appeal.

In addition to the fundamental requirements that an employee accused of misconduct or incompetence should be confronted with the evidence against him, be given the opportunity to controvert that evidence, be present throughout the hearing so that he can deal with any evidence put against him and to cross-

¹⁰³ Ibid at 1632. *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) was distinguished on its facts.

¹⁰⁴ (1998) ILJ 917 (CCMA).

¹⁰⁵ (1998) 19 ILJ 921 (LC).

¹⁰⁶ Ibid at 922D.

examine the witnesses,¹⁰⁷ it has already been observed that it is also necessary that even after the employee has been found guilty, he should be prompted by the chairperson to lead evidence of personal circumstances and generally plead in mitigation. It has been well established that a disciplinary enquiry does not only establish the guilt or otherwise of the employee, it is also intended to enable the enquiry to deal with the appropriate sanction which, after taking every circumstance into account including the length of service and disciplinary record of the employee, a decision is taken whether dismissal, suspension, demotion or warning is the appropriate sanction. It is therefore unfair for the enquiry chairman to fail to give the employee the opportunity of dealing with the question of appropriate sanction.¹⁰⁸ The duty of taking evidence in mitigation is on the chairman of the enquiry and not the arbitrator or Commissioner of the CCMA as the employee in *Nel v Ndaba & others*¹⁰⁹ appeared to have misdirected his attack.

3.4 Does the right to a fair procedure include the right of disciplinary appeal?

Ordinarily, a right of appeal is not automatic. It must be granted by the Constitution or statute or it may not be exercised. But appeals against disciplinary decisions are somewhat of a different nature, they have no constitutional or statutory basis, yet they have become a regular practice in South African labour relations.¹¹⁰ The right of appeal and the provision of the appellate machinery are common features in employers' disciplinary codes and procedure agreements¹¹¹ that the employer is under an obligation to inform an

¹⁰⁷ It is to be noted that the issue of cross-examination arises where there is a dispute of fact to be resolved or where credibility finding was necessary for if the employee admits the misconduct, his right to cross-examine witnesses becomes literally irrelevant. See *Cycad Construction (Pty) Ltd v CCMA & others* (1999) 20 ILJ 2340 at 2346 para 20.

¹⁰⁸ *Yichiho Plastics (Pty) Ltd v Muller* (1994) 15 ILJ 585 (LAC) at 602G; *Mondi Paper Co v Dlamini* [1996] 9 BLLR 1109 (LAC); *Nyembezi v NEHAWU* (1997) 18 ILJ 94 (IC); *Pitcher & another v Golden Arrow Bus Service (Pty) Ltd* [1994] 8 BLLR 105 (IC); *CNA (Pty) Ltd v CCAWUSA & another* (1991) 12 ILJ 340 (LAC); *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 3 (6) SALLR 1 (LAC); *Durban Confectionery Works (Pty) t/a Beacon Sweets v Majangaza* (1993) 4 (6) SALLR 1 (LAC).

¹⁰⁹ (1999) 20 ILJ 2666 (LC).

¹¹⁰ *Minister of Safety & Security v Safety & Security Sectoral bargaining Council & others* [2004] 9 BLLR 56 (LC)

¹¹¹ It was held in *Ngwenya v Supreme Foods (Pty) Ltd* [1994] 11 BLLR 77 (IC) that where the

employee of his right of appeal in the event of a finding of guilt. The question however is: does the fact that the code is silent on the question of disciplinary appeal mean that it is not part of the right to a fair procedure under the Act? One thing is clear: the Act places a premium on fairness, equity, and employment justice as its hallmark.¹¹² It follows from this, that the right of appeal is an integral part of the overall principle of the opportunity to state a case under the present legislative scheme. It is an essential part of fair procedure in employment disciplinary matters. Where, therefore an employment code provides for the right of appeal, the absence of similar provision in the code of good practice cannot excuse the employer from complying with the stipulations of its own code. The employer must inform the employee of his right to appeal and go further to convene the appeal hearing in accordance with his code if the employee desires it.¹¹³ Where there is no disciplinary code or the right of appeal is not provided for in an existing employer's disciplinary code, the problem of the absence of the right of appeal in the code of good practice becomes a crucial issue. This being an employment relationship, it would appear that in the absence of statute or contractual terms, the employee may be hamstrung to insist that such a right exists.

In response to the employer's contention that its disciplinary procedure allowed for a "review" which did not require the attendance of the employee or his representative where the employee alleged that the appeal hearing was held in his absence, Marcus C observed in *Mekgoe v Standard Bank of South Africa*, that it was for the Commissioner to decide in the circumstances whether the procedure followed was in consonance with the general tenor of the code, to wit, to afford the employee the opportunity to state a case in response to allegations

provisions of a collective agreement had the effect of attenuating an employee's equitable rights, such as in this case, restricting the employee's right of appeal, such provisions were to be restrictively construed. See also *Dell v Seton (Pty) Ltd & others* [2009] 2 BLLR 122 (LC).

¹¹² See *NCFAWU on behalf of Roberts v Ons Handelshuis Koop* (1997) 18 ILJ 1176 (CCMA).

¹¹³ This conclusion coincides with that of the Labour Court in *Cycad Construction (Pty) Ltd v CCMA & others* (1999) 20 ILJ 2340 (LC) at 2345 para 18 where the point was made that the essence of a disciplinary appeal was not to afford the most senior employee an opportunity to make the final decision but rather to afford the employee a further opportunity to persuade management to reconsider their decision. See also Cameron, 'The right to a hearing - Part 1 (1986) 7 ILJ 187 at 214.

of misconduct prior to dismissal. It was held¹¹⁴ that as the code made no reference to an employee's right of appeal against a decision to dismiss him, once a right of appeal was conferred by a disciplinary code a proper procedure should be observed by the employer. That proper procedure is the *audi alteram partem* principle which "must be incorporated into the appeal procedure as well as the initial hearing in the absence of good reasons to the contrary."¹¹⁵ Accordingly, the failure to afford the applicant employee the opportunity to make representations to the person determining his appeal, was a breach of the *audi alteram partem* principle of natural justice entitling a person accused of misconduct to be heard in the matter, whatever the forum whether it be at the initial hearing or the appeal.

It is important to distinguish between an appeal process proper where the employee is to be afforded an opportunity to state his case and the situation where management inter-meddles with the findings of the enquiry. Take the case of *Kohidh v Beier Wool (Pty) Ltd.*¹¹⁶ The employee was found guilty of complicity in a theft of employer's property. The decision of the enquiry was that he be given a final written warning but in its apparent desire to maintain consistency, management changed the sanction to one of summary dismissal. Van Dokkum C found this to be a serious defect and a gross violation of the principles of natural justice which would not be condoned under any guise. Since the chairperson of the enquiry was the employer's appointee, his agent, thereby authorised to make a decision on his behalf, the employer is bound by that decision and is not at liberty to change it at whim or because he does not agree with it. On the other hand, if the employee had appealed against the decision of the hearing and the appeal hearing had instead substituted a more onerous sentence, then that would be a different matter, as an appeal is initiated by the employee and in doing so he is taking the chance of having his sentence increased or the fortune of having it decreased or for that matter thrown out entirely. On its own initiative, the employer had substituted a decision handed

¹¹⁴ [1997] 4 BLLR 445 (CCMA).

¹¹⁵ Ibid. at 455G-H.

¹¹⁶ (1997) 18 ILJ 1104 (CCMA).

down by a properly constituted hearing, on the ground that it did not agree with that decision.¹¹⁷

The case of *SAMWU obo Nkuna v Lethabong Metropolitan Local Council*¹¹⁸ is not too different from the foregoing except that the disciplinary committee had recommended dismissal whereas the appeal hearing set the penalty of dismissal aside and substituted, as they were empowered to do, a demotion and a fine. The council declined to accept the appeal finding and confirmed the employee's dismissal. There was no challenge involving the regularity of the disciplinary hearing and the appeal committee but it is clear that the council did not invite the employee to make a representation to it before it decided to confirm his dismissal. This was found to be a breach of the basic principle of workplace justice and the principle of natural justice. The employee's absence from this crucial stage of the proceedings was a breach of the elementary rules of natural justice and there was no way representation before an inferior body will substitute for that of the superior body which proposes to implement an adverse determination against the employee. Adv. Jajbhay's reasons for arriving at this decision is better reproduced than paraphrased:

Where an employee is afforded the right to appeal from an adverse finding by a disciplinary inquiry, the proceedings at the appeal must amount to more than mere formality. The members of the appeal panel must apply their minds fairly and impartially to all the relevant factors and considerations in the same manner as the disciplinary inquiry itself. In the present matter, neither of the parties argued that the fairness of either the disciplinary committee or the appeal committee was in question. In the present matter, the employee was clearly disadvantaged by the method adopted by the council in acting as it did. It can be stated that in not being afforded the opportunity to be present during the deliberations at the council, the employee was not afforded the opportunity of speaking in rebuttal or in mitigation of the complaint in accordance with the *audi alteram partem* rule.¹¹⁹

3.5 Does management possess review powers over disciplinary hearing?

¹¹⁷ Ibid. at 1106B-D.

¹¹⁸ [1999] 7 BALR 867 (IMSSA).

¹¹⁹ [1999] 7 BALR 867 (IMSSA) at 870B-D.

Granted that a right of appeal may by implication be read into the code of good practice, can such also be said of the employer's prerogative to review disciplinary proceedings? The question is: does the employer retain a general review power over disciplinary enquiries instituted by it in the undertaking? In other words, since the employer decides ultimately whether to dismiss or not to dismiss in any given case, can he, in taking such a decision review the findings of a disciplinary enquiry instituted by his authority? Can he cancel the findings or substitute it with his own? Put differently, can the employer proceed against the employee twice over for the same offence?

When this question came before the Industrial Court for the first time,¹²⁰ it considered it unfair for senior management to set aside two months after it had been made a decision of a properly constituted tribunal set up in terms of the company's disciplinary procedure with the facts adequately canvassed in accordance with the company's disciplinary code and to subject the employees concerned to a fresh enquiry. Like in this case, the employer in the second case¹²¹ also substituted a final warning with dismissal after a second enquiry had found the employee guilty. The employee's appeal was dismissed. The Industrial Court found this second enquiry and the subsequent appeal to have been tainted by the bias of the chairman but it however observed, *obiter*, that there may be circumstances where an earlier enquiry may justifiably be set aside and reheard.¹²²

In the subsequent case of *Botha v Gengold Ltd*¹²³ the Industrial Court held that it was procedurally unfair for the employer to hold the second enquiry drawing analogy from that well-known American constitutional protection against double

¹²⁰ *Amalgamated Engineering Union of SA & others v Carlton Paper of SA (Pty) Ltd* (1988) 9 ILJ 588 (IC).

¹²¹ *Maliwa v Free State Consolidated Mines (Operations) Ltd SA (President Steyn Mine)* (1989) 10 ILJ 934 (IC).

¹²² In *Bhengu v Union Co-operative Ltd* (1990) 11 ILJ 117 at 121A, the Industrial Court held that: "An employer is not entitled to hold a second enquiry if it is unhappy with the outcome of a first properly constituted enquiry. The fact that higher management may feel that the finding in regard to guilt is incorrect or that the sentence is too lenient does not entitle it to retry the matter. Such a second enquiry would be an unfair labour practice."

¹²³ [1996] 4 BLLR 441 (IC).

jeopardy¹²⁴ which, at common law is presented as the pleas of *auterfois acquit* and *auterfois convict*¹²⁵ and recognised in the Canadian Charter of Rights¹²⁶ and the South African Constitution as an essential element of the right to a fair trial in criminal matters.¹²⁷ The employee, a general manager of the company, was found guilty of fraudulently claiming travelling expenses and was given a final warning. The company's audit committee which had authorised the enquiry in the first instance was unhappy with the penalty as perpetrators of similar forms of dishonesty had been dismissed in the past. A fresh disciplinary enquiry was arranged whereupon the employee was found guilty and dismissed. The Court found that the official who conducted the first disciplinary enquiry was competent to do so, and that the hearing had been fair. Further, the company's disciplinary code did not provide for the audit committee or any other body to set aside a finding by a disciplinary committee at the instance of the company. A second enquiry on the same facts exposed the employee to double jeopardy and was accordingly unfair. Stating the reasoning behind this decision Van Zyl AM said:

The respondent's disciplinary code does not make provision for the audit committee or any other official to set aside the finding of a disciplinary hearing. To allow such procedure would amount to powers of review, which would be unthinkable as it could lead to never-ending enquiries against an employee. Bearing in mind that a disciplinary enquiry remains a matter of fairness it is evident that a second enquiry on the same facts cannot be allowed, as it will amount to double jeopardy. We have come to the conclusion that it was unfair for the respondent to subject the applicant to a second enquiry."¹²⁸

¹²⁴ This concept was developed by the United States Supreme Court based on the interpretation of the Fifth Amendment to the American Constitution. See e.g., *Coleman v Tennessee*, 97 US 509; *US v Sanges*, 144 US 310 (1892); *Kepner v US*, 195 US 100 (1904); *Green v US*, 355 US 184 (1957); *US v Josef* (1924) 9 Wheaton 579; *Barktus v Illinois* 359 US 121 (1959); *Benton v Maryland* 395 US 784 (1969). Contra *Canada v Schmidt* [1987] 1 SCR 500. See generally Ward, F "The double jeopardy clause of the Fifth Amendment" (1989) *Am Crim LR* 1477; Friedland, MR *Double Jeopardy* (1969).

¹²⁵ By these maxims, a person either acquitted or convicted for a specific criminal offence cannot be tried again for that same offence. See e.g., *Wemyss v Hopkins* (1875) LR 10 QB 378 at 381 *per* Blackburn J; *Kienapple v The Queen* (1975) 44 DLR (3d) at 364-365, *per* Laskin J.

¹²⁶ S 11(h); PW Hogg, *Constitutional Law of Canada* (1997) 16.5(b).

¹²⁷ S 35(3)(m), Constitution of the Republic of South Africa 1996. See generally, Nico Steytler, *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* 1996 (1998) Chapter 25.

¹²⁸ [1996] 4 BLLR 441 (IC) at 450F-H.

A similar question was considered in *Strydom v USKO Ltd*¹²⁹. The employee was charged before a disciplinary enquiry for theft in that he removed rusted and unused tools valued at R50,00. The chairman of the enquiry found that the unauthorised removal of the tools by the employee was an infraction of company disciplinary code but that dismissal was not the only appropriate punishment and imposed a written warning as penalty. Under the employer's disciplinary code, no dismissal could be effected without the approval of the manager or the divisional manager. In exercise of this power, the manager substituted the penalty of a written warning for dismissal because he was of the view that the chairman did not give sufficient weight to certain aggravating factors. But the code did not expressly authorise the manager or divisional manager to review the findings of the enquiry or to set aside the penalty imposed. Patel C held that it was *ultra vires* the powers of the divisional manager under the company's disciplinary code to act as a review body to the panel findings, and had the code allowed such a procedure, it "would be tantamount to vesting *powers of review* in the hands of senior management; such empowerment would indeed be unconscionable since it would be nothing but a second enquiry against an employee."¹³⁰ Accordingly, the disciplinary enquiry is a matter of procedural fairness and any further enquiry, under the subterfuge of a review, on the same allegations or facts cannot be countenanced since it amounts to double trial.¹³¹

The principle in *Botha* was considered in *NUMSA obo Walsh v Delta Motor Corporation (Pty) Ltd*¹³² with varying conclusion. Subsequent to an assault perpetrated by the applicant on a fellow employee, the supervisor whose duty it is to prefer disciplinary charges against the employee, had decided instead to confine action against the employee to counselling. As a result, it was agreed that the employee pay the fellow employee's medical expenses and lost earnings. The company's personnel department ordered the supervisor to prefer formal charges and the employee was subsequently dismissed. The union argued on behalf of the employee that this precluded the employer from taking

¹²⁹ [1997] 3 BLLR 343 (CCMA).

¹³⁰ Ibid. at 350H. See also *Kohidh v Beier Wool (Pty) Ltd* (1997) 18 ILJ 1104 (CCMA).

¹³¹ Ibid. at 351C-D. See also *Hendricks v University of Cape Town* [1998] 5 BALR 548 (CCMA).

¹³² (1997) 8 (2) SALLR 1 (CCMA).

further disciplinary action against the employee since he would effectively be disciplined a second time for an offence for which he had already been disciplined. The employer contended that what the supervisor did was not part of what he was authorised to do under the company's disciplinary code and therefore should not be regarded as a formal disciplinary action. In any case, argued the employer, the continuance of such an arrangement in respect of serious, dismissible offence, such as assault, would lead to the inconsistent treatment of the employee when compared to other employees who had been dismissed for the same offence. Distinguishing *Botha* where there were two proper enquiries in respect of the same offence, *Le Roux C* found that the institution of disciplinary action in respect of the incident did not amount to double jeopardy,¹³³ but merely to comply for the first time with employer's policies. The procedure was therefore fair.

The only factor common to the *USKO* type situation and that in *Nyembezi v NEHAWU*¹³⁴ is that of undue interference by some higher organ or person with the findings of a panel of enquiry. Otherwise, *Nyembezi* contains several irregularities some of which were similar to those in *Concorde Plastics*. Yet *Nyembezi* contained ingredients which distinguishes it from these lines of cases. The applicant in *Nyembezi* was an official of the union who was dismissed for drinking and disruptive behaviour at one of the union's regional congresses. He was charged by an *ad hoc* disciplinary committee which found him guilty and decided that he be issued with a final warning. The national executive committee subsequently reversed this decision and dismissed the applicant. The first breach in the union's disciplinary proceedings was that the employee was not charged nor were relevant witnesses called by the employer. The enquiry was like an interview; the chairperson put the charges to the employee; he denied them, he was then told that the committee will make a

¹³³ Where the chairperson of a disciplinary hearing discovers that certain clerical errors appear in the charge sheet, adjourns the proceedings and convenes a second hearing, it was held not to amount to the employee having been tried a second time for there was indeed no first and second trial; one trial does not amount to double jeopardy - *SATAWU obo Sigasa v Spoorinet* [1999] 7 BALR 872 (IMSSA). In like vein, double jeopardy principle is not applicable because a court is not bound by findings or views of presiding officer – *Tshishonga v Minister of Justice & Constitutional Development & another* [2006] 6 BLLR 601 (LC).

¹³⁴ [1997] 1 BLLR 94 (IC).

recommendation to the regional executive committee. Secondly, under the union staff code, any staff member may be disciplined by "the structure he or she is accountable to" and "in case of branch officials this is the BEC" (branch executive committee). Here, the employee, an official of the East London branch, should have been proceeded against by the branch executive committee of the East London branch and not the *ad hoc* committee. No explanation was offered as to why the union staff code was not followed. Thirdly, the contention that the national executive committee had the power under the union constitution to "hire and fire" and therefore had the power to amend the recommendation of the *ad hoc* committee was untenable. This was also a breach of fair procedure. Fourthly, even though the staff code did not provide that after an employee has been found guilty of the charges levelled against him, it is the case that the chairperson of should give him the opportunity of leading evidence in mitigation. None of the various organs that handled this matter complied with this requirement. The *ad hoc* committee made their recommendation without inviting the employee's plea in mitigation. So, too, the regional executive committee endorsed it without hearing evidence in mitigation neither did the national executive committee which overturned that decision and dismissed the official. All these the Industrial Court found, rendered the dismissal procedurally unfair.

The distinction between *Delta Motors* approach and that in *Usko* and *Botha* is clear. The employee in *Delta* underwent only one stage enquiry as the conciliatory approach of the supervisor was not such enquiry as envisaged in the company's disciplinary proceedings hence it was properly discountenanced. Even if equating disciplinary procedures in the employment context to criminal proceedings in the ordinary court is "a false analogy" with "unfortunate consequences" as Professor Le Roux has submitted,¹³⁵ an employee is entitled, after the conclusion of a disciplinary hearing and the appeal, to a feeling that the matter is finally put to rest. The re-opening of the issue by senior management in the form of review or for whatever reason (except fraud and impropriety in the conduct of the proceedings and this must be attributable to the employee) would

¹³⁵ PAK Le Roux, 'Overturning disciplinary decisions: Can more severe penalties be imposed by senior management?' (1997) 7 (4) *Contemporary Labour Law* 31 at 34.

tantamount to harassment of the employee. The reasoning that an employer could set aside a hearing process if it is found to have been in violation of the procedures laid down in the employer's disciplinary code,¹³⁶ comes up against the essence of an appeal process which, for all practical purposes, is to review the earlier proceeding, examine the facts and affirm or set the decision aside.¹³⁷ Sometimes, it is not a matter of the time it took to overturn the decision, but of the fairness of the second enquiry, indeed, the entire process,¹³⁸ fairness being the overriding consideration in contemporary labour disputes settlement whether at the level of the undertaking or the labour tribunal.¹³⁹

3.6 The Issue of representation

The right to representation originates from the common law right to legal representation for the ventilation of one's civil rights or obligations or the right to defend oneself in criminal matters in a court of law. Modern Constitutions guarantee the right of a person charged with a criminal offence to a legal representative of his own choice.¹⁴⁰ The South African Constitution, like most Commonwealth African Constitutions, is silent on the right to legal representation in civil matters although it guarantees the right to just

¹³⁶ *SARS v CCMA & others* [2010] 3 BLLR 332 (LC).

¹³⁷ *Country Fair Foods (Pty) Ltd v CCMA & others* [2003] 2 BLLR 134 (LAC); *Oerlikon Electronics SA v CCMA & others* [2003] 9 BLLR 900 (LC); *MISA/SAMWU obo members v Madikor Drie (Pty) Ltd* [2006] 1 BLLR 12 (LC); *Brandford v Metrorail Services (Durban) & others* [2006] 199 (LAC); *Samson v CCMA & others* [2009] 11 BLLR 1119 (LC); *SAMWU obo Mahlangu v SALGBC & others* [2011] 9 BLLR 920 (LC).

¹³⁸ In *SAMWU obo Nkuna v Lethabong Metropolitan Local Council* [1999] 7 BALR 867 (IMSSA), the arbitrator carefully avoided the double jeopardy debate but faulted the council's decision overturning the disciplinary appeal's recommendation on the ground that the proceedings before the council were conducted behind the back of the employee who was consequently denied the opportunity of making representations. This was held to be in clear breach of the basic principles of natural justice. See also *BMW (SA) (Pty) Ltd v Van der Walt* [2000] 2 BLLR 121 (LAC); *Wium v Zondi & others* [2002] 11 BLLR 1117 (LC); *Rustenburg Base Metals Refiners (Pty) Ltd v Solidarity & others* [2008] 12 BLLR 1223 (LC); *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another* [2006] 8 BLLR 737 (LC); *Armstrong v SA Civil Aviation Authority* [2011] 10 BLLR 980 (LC).

¹³⁹ See particularly, the Botswana Court of Appeal in *Botswana Railways Organisation v Setsogo & 198 others* (1996) (Unreported) Civil Appeal No. 51 of 1995; the Court of Appeal of Swaziland in *Swaziland Federation of Trade Unions v The President, Industrial Court & Another* (1997) (Unreported) Case No. 11/97.

¹⁴⁰ S 35(3)(f), Constitution of the Republic of South Africa 1996; art 12(1)(e), Constitution of the Republic of Namibia 1990; s 18(3)(d), Constitution of the Republic of Zimbabwe 1979 as amended by Act No 13 of 1993; s 10(2)(d), Constitution of the Republic of Botswana 1966; s 9(2)(d), Constitution of the Kingdom of Lesotho 1966.

administrative action which is lawful, reasonable and procedurally fair.¹⁴¹ If "procedurally fair" includes, as it must, the observance of the recognised principles of natural justice well entrenched in the legal system, does it by definition cover legal representation in administrative and disciplinary matters? It would appear that the question of one's entitlement to legal representation in the determination of one's civil rights and obligations will depend on whether the matter is before a court of law or whether it is simply at the level of a domestic tribunal where the application of the right to counsel remains a subject for debate and conflicting judicial opinion.¹⁴²

Decided cases are overwhelming on the side of refusal of legal representation in disciplinary proceedings.¹⁴³ The broad proposition which was postulated by Van Zyl J in *Lace v Diack & others*¹⁴⁴ while considering legal representation in an internal disciplinary enquiry in a company whose code only allowed for representation by an employee or shop steward, was that: "there is certainly no absolute right to legal representation in our law". Again, the Appellate Division had made it clear in *Lamprecht & Nissan SA (Pty) Ltd v McNellie*¹⁴⁵ that the term "representative" in the employer's disciplinary guidelines does not include a

¹⁴¹ S 33(1), Constitution of the Republic of South Africa 1996; art 18, Constitution of the Republic of Namibia 1990.

¹⁴² See the following:- English cases: *Pett v Greyhound Racing Association Ltd (No.2)* [1969] 2 All ER 221 at 228G-H (CA); *Enderby Town Football Club v Football Association* [1971] 1 All ER 215; *Fraser v Mudge* [1975] 3 All ER 78; *Hone v Maze Prison Board of Visitors, McCartan v Maze Prison Board of Visitors* [1988] 1 All ER 321 at 325F-H (HL); South African cases: *Dabner v South African Railways & Harbours* 1920 AD 583 at 589; *Balamenos v Jockey Club of SA* 1959 (4) SA 381 (W) at 388A-390C; *Embling v Headmaster, St Andrew's College (Grahamstown) & another* 1991 (4) SA 458 (E); *Ibhayi City Council v Yantolo* 1991 (3) SA 665 (E); *Cuppan v Cape Display Supply Chain Services* 1995 (4) SA 175 (D); *Dladla & others v Administrator, Natal & others* 1995 (3) SA 769 (NPD); Zimbabwe: *Marumahoko v Public Service Commission* 1991 (1) ZLR 27, 1992 (1) ZLR 304; *Vice-Chancellor, University of Zimbabwe v Mutasha & Another* 1993 (1) ZLR 162.

¹⁴³ In the few circumstances where the right has been held to avail, it has been based on: (1) where the offence of which the person is accused is a serious one which will involve severe penalty or complicated legal ramifications - this impelled Lord Denning MR in *Pett v Greyhound Racing Association Ltd (No.2)* [1969] 2 All ER 221 at 228G-H to allow such representation and which according to Van Zyl J in *Lace v Diack & others* (1992) 13 ILJ 860 (W) at 865D-F was an exception to the general rule as he postulated it; (2) the ruling by Didcott J in *Dladla & others v Administrator, Natal & Others* 1995 (3) SA 769 (N) that once legal representation is neither allowed nor disallowed by the statute, regulation or rules governing proceedings, then an occasion arises for a discretionary decision to be made on the point. It is submitted that there is no reason why these exceptions should not continue to apply even in employment disciplinary circumstances.

¹⁴⁴ (1992) 13 ILJ 860 at 865D-F. See also *Myburgh v Voorsitter van die Shoemanpark Ontspanningsklub Dissiplinere Verhoor & ander* [19995] 9 BCLR 1145 (O).

¹⁴⁵ [1994] 11 BLLR 1 (AD).

legal representative¹⁴⁶ and, in any case, whether the principles of natural justice will apply to an employee whose employment had no public element would depend on the express and implied terms of the employee's contract. In other words, unless the employee's contract of employment or employer's disciplinary code so states, the employee will ordinarily not be entitled to legal representation in such proceedings.

In order to consider whether the new constitutional dispensation and the labour regime have changed the pre-1994 situation, one has to look at the surrounding circumstances. First, the right to legal representation at the CCMA when the arbitrator is considering dismissals based on conduct or incapacity is not automatic; whether it will avail depends on a number of statutory factors.¹⁴⁷ Secondly, individual employees, co-employees an office-bearer or official of that party's trade union or employers' organisation all have been given a right of audience in the Labour Court and the Labour Court of Appeal.¹⁴⁸ These factors tend to confirm Jali AJ's viewpoint that time has not yet arrived when public policy would demand the recognition of such a right in disciplinary hearings.¹⁴⁹ Thirdly, the express constitutional provisions on legal representation deal with persons accused in a court of law and "had no application to domestic disciplinary tribunals."¹⁵⁰

Thus, following in the example of Page J in *Cuppan v Cape Display Supply Chain Services*,¹⁵¹ Jali AJ had affirmed the pre-1994 situation in so far as legal representation in employment disciplinary proceedings is concerned and has come to the conclusion that the coming into effect of the 1993 and 1996 Constitutions had not altered that state of affairs. In *Police & Prisons Civil Rights*

¹⁴⁶ It was held in *Davids v ISU Campus (Pty) Ltd* [1998] 5 BALR 534 (CCMA) at 539 that "A disciplinary process is an internal hearing and there is no entitlement to be represented by a legal representative as Schedule 8, the Code of Good Practice for dismissals, provides only for the assistance of a trade union representative or a fellow employee. Similarly, there is no entitlement to record these proceedings."

¹⁴⁷ S 140(1)(a); *Afrox Ltd v Laka & others* (1999) 20 ILJ 1732 (LC); *Smollen (Tvl) (Pty) Ltd v Lebea NO & another* (1998) 19 ILJ 1252 (LC); *Vidar Rubber Product (Pty) Ltd v CCMA & others* (1998) 19 ILJ 1275 (LC); *Strydom v USKO Ltd* [1997] 3 BLLR 343 (CCMA).

¹⁴⁸ Labour Relations Act 1995, ss 161 and 178 respectively.

¹⁴⁹ *Public & Prisons Civil Rights Union v Minister of Correctional Services & others* (1999) 20 ILJ 2416 at 2424 para 28.

¹⁵⁰ *Ibid.* per Jali AJ.

¹⁵¹ (1995) 16 ILJ 846 (D)

Union v Minister of Correctional Services & others,¹⁵² the collective agreement between the applicant/union and the respondent/employer provided that "every employee has the right to be represented by a fellow employee of his choice, or a representative of his employee organisation (shop steward) and a union official, should he so wish". It was held that the inference to be drawn from this stipulation in the collective agreement is that as there is no other form of representation allowed except for representation by a fellow employee or shop steward, no other right to representation was intended to be conferred at such an enquiry. According to Jali AJ, if the employee accused of misdeeds feels that the charges are complex and that there is need for legal representation, or that justice would only be done by having legal representation, the appropriate remedy for the accused would be to raise this issue with the chairman of the disciplinary enquiry.¹⁵³

However, common sense and fairness dictate that where the employer is represented by a legal practitioner in a disciplinary proceeding, it is only equitable that the employee be allowed such representation as well. The issues in *Blaauw v Oranje Soutwerke (Pty) Ltd*¹⁵⁴ present an interesting dimension to the problem. The employee had been "prosecuted" in the disciplinary enquiry by a qualified attorney. When the employee's attorney applied to represent her at the enquiry, the application was turned down by the chairman and the employee was unrepresented throughout the enquiry. To further complicate the employer's already weak case was the fact that the 'prosecutor'/attorney was the wife and partner in a law firm of the attorney to the employers. Hambidge C found this arrangement not only capable of creating "the impression of bias" since as the wife and partner of the attorney to the employer, she had an interest in the outcome of the disciplinary enquiry but also the failure to allow the employee to be represented by an attorney rendered the employee "automatically" to "a disadvantage". Justice was not seen to be done. To further strengthen the case

¹⁵² (1999) 20 *ILJ* 2416 (LC).

¹⁵³ *Ibid.* at 2424 para 30.

¹⁵⁴ [1998] 3 *BALR* 254 (CCMA).

for legal representation in this instance was the fact that the employee was a manager and no other senior member of staff was available to represent her.¹⁵⁵

The question is: can a hearing, investigation or enquiry be invalidated because the employer refused the employee a representative of his own choice?¹⁵⁶ In *Motswenyane v Rockface Promotions*,¹⁵⁷ there was no dispute as to the hearing which the employee conceded was properly conducted both prior to the dismissal and on appeal but it was contended that it was "amazing" in this day and age that the company should have refused the employee's union's request to represent the employee at the appeal hearing and that the employee should not be limited in her choice of representative to a fellow employee as was the company's policy in this matter. The company's policy is that an employee in an internal hearing can only be represented by a fellow employee and not by an outside organisation such as a trade union or legal firm. It was argued for the employee that the company's refusal to allow union representation at the hearing and the appeal rendered the employee's dismissal procedurally unfair. Rejecting the employee's argument which was unsubstantiated by evidence, Marcus C held that this practice is not uncommon in the South African industry and was not found to be "inherently unfair by our labour courts in the past as long as the employee is afforded the right of representation by at least a fellow employee (as was accorded to Ms Motswenyane in the present case). I do not believe the code of good practice alters this position."¹⁵⁸ There may be instances where an arbitrator might find that to exclude union representation or even legal representation for internal hearings would be unfair, but this was not such a case where there was nothing to suggest that the employee was not afforded the opportunity of a fair hearing in which to present her case. Her dismissal was held to be procedurally fair. An employee is left in no better stead where his union representative walks out and the hearing holds in his

¹⁵⁵ Ibid. at 267D-E. Note also the Commissioner's disapproval of using an outsider as a 'prosecutor' rather than as the chairperson of the enquiry.

¹⁵⁶ The Commissioner rejected a claim to this effect in *NCFAWU obo Roberts v Ons Handelshuis Koop* (1997) 18 ILJ 1176 (CCMA) at 1182 holding that the code did not stipulate a representative of the employee's choice but merely "a representative". On the facts however there was no evidence of refusal to allow the employee the right to be represented; instead, the representative could not attend the hearing on personal grounds.

¹⁵⁷ [1997] 2 BLLR 217 (CCMA).

¹⁵⁸ Ibid. at 220A-B.

absence.¹⁵⁹ It was thus held that when the representative walked out of the office, he had no intention of proceeding with the hearing. Nor did he attend when given a later starting time. In so doing, the union waived its right to state a case in defence of the charges against the employee. The company might have re-scheduled the hearing for another date, and its insistence on proceeding may have been rather hasty, but that, in itself, does not render the dismissal procedurally unfair.¹⁶⁰

3.7 The disposition of the person investigating the matter

Just as the code makes no provision in respect of the right of appeal, so too, it is silent on the well known requirement of good faith on the part of the person investigating the misconduct. It has long been established that the rule against bias applies to "every person who undertakes to administer justice, whether he is a legal officer or is only for the occasion engaged in the work of deciding the rights of others".¹⁶¹ We are here concerned with industrial and social justice and dismissal from employment not only involves decision of some sort especially when it involves dismissal for misconduct or incapacity; dismissal consequent therefrom involves the imposition of the ultimate sanction which had aptly been described as "akin to capital punishment in criminal law"¹⁶² for it takes away the employee's means of livelihood and completely crushes him economically. It therefore involves a decision affecting a right to work, the right to earn a living and a determination of right. Such a determination must at least respect the elementary principles of procedural decencies at common law.

The non-inclusion in the code of the requirement that the chairperson investigating the allegations against the employee or the chairperson of the

¹⁵⁹ Query: should the panel not have adjourned proceedings while the chairman ascertained from the employee as to whether he would wish to be represented by another representative? On this see *Laurence v I Kuper Co. (Pty) Ltd t/a Kupers, a Member of Investec* [1994] 7 BLLR 85 (IC).

¹⁶⁰ *Benjamin v Sea Harvest Corporation Ltd* [1998] 12 BALR 1565 (CCMA).

¹⁶¹ Per Solomon J in *Liebenberg v Brakpan Liquor Licensing Board* 1944 WLD 52 at 54-55.

¹⁶² Per Joffe J in *SA Polymer Holdings (Pty) Ltd t/a Megpipe v Llale* (1994) 15 ILJ 277 (LAC) at 281.

enquiry hearing should conduct the proceedings in good faith does not mean that this important aspect of natural justice is thereby excluded. For it is implicit in the requirement that the party against whom the disciplinary charges have been brought should be afforded the opportunity to state his/her case, such a case could only be fairly stated if it is addressed to a body or person or tribunal that is constituted in such a manner as to ensure its independence and impartiality. The all-embracing principle of opportunity to state a case or of acting fairly or indeed of procedural fairness generally, is elastic enough to embody the obligation on the part of the person conducting the enquiry to place himself in such a position that he is manifestly and undoubtedly disposed to receive the employee's testimony and generally conduct the proceedings with an open mind. Such a person or body must be purged of all prejudices, bias and partiality against the party appearing before him of whom he has to decide his guilt or innocence.

Take the case of *Ntsibande v Union Carriage & Wagon Co (Pty) Ltd*¹⁶³ where the chairperson admitted that when he was approached to chair the disciplinary hearing, he was shocked to learn that the applicant whom he knew too well had been disobedient and that he least expected such conduct from him. Bulbilia DP held that this would imply that the chairperson had already formed a perception as to the applicant's guilt and this fact alone, if known at the time, could have disqualified him from presiding over the hearing.¹⁶⁴

The chairperson of the enquiry must conduct himself in such a manner that his impartiality cannot be doubted by the accused employee or for that matter by an officious bystander, "the legal fiction of the reasonable man.... the hypothetical reasonable man"¹⁶⁵ who, observing the proceedings, would go away concluding that the chairman was not disinterested and impartial and ought not sit to hear the matter.¹⁶⁶ The chairperson must not by his conduct¹⁶⁷ or utterances¹⁶⁸

¹⁶³ (1993) 14 ILJ 1566 (IC) at 1573B.

¹⁶⁴ See also *Maliwa v Free State Consolidated Gold Mines (Operations) Ltd SA (President Styen Mine)* (1989) 10 ILJ 934 (IC); *Mineworkers Union v Consolidated Modderfontein Mines (1979) Ltd* (1987) ILJ 709 (IC); *Bissessor v Beastores (Pty) Ltd t/a Game Discount World* (1986) 7 ILJ 334 (IC).

¹⁶⁵ *BTR Industries SA (Pty) Ltd & others v MAWU & another* 1992 (3) SA 673 (A) at 695C-E.

¹⁶⁶ *Mekler v Penrose Holdings Ltd* [1995] 5 BLLR 71 (IC). In *Ellerines Holdings v CCMA & Ors*

betray his prejudice towards one side or the other in the dispute or allow his personal knowledge or feelings impair his sense of judgment thereby rendering himself incapable of assessing the evidence tendered in a rational manner.¹⁶⁹ It is a well-established common law norm that a person closely associated with a matter in terms of financial or personal interest or relationship or previous knowledge of the subject matter of the dispute be disqualified to sit in judgment over such matter.¹⁷⁰

Even though the rule against bias is "a cornerstone of any fair and just legal system",¹⁷¹ a *sine qua non* of fair hearing in both criminal and civil cases in the courts of law as well as administrative tribunals, as it is too well-known in

[1999] 9 BLLR 917 (LC) at 930 para 56, Zondo J held that: "Such suspicion as a party might have of bias on the part of a presiding officer, is required to be one which can reasonably be entertained by a lay litigant." And since there was no rational connection between the alleged suspicion of bias and the material placed before the arbitrator, his finding of unfairness based on procedural ground was set aside. Cf the test propounded by Lord Denning in *Westminster Properties Co. (FGC) Ltd v Lannon* [1970] 1 QB 577 at 599.

¹⁶⁷ In the adversary system, the adjudicator is a passive umpire who may participate in the proceedings only to the extent of directing it or of asking questions for clarification of doubts. He cannot join issues with the parties or descend into the arena of employer-employee conflict by what has been described as "over exuberant" questioning of one of the parties or generally interfering with the proceedings. Thus in *Aranes v Budget Rent A Car* [1999] 6 BALR 657 (CCMA) at 669-671, the arbitrator set aside a disciplinary hearing because the chairperson intervened ever too frequently in the proceedings that the dismissed employee was inhibited in his cross-examination of the witnesses again, the tone of the chairperson's ruling against the employee's cross-examination was peremptory and by telling the employee "do not lie", "are you saying that they lied", "is that a reasonable explanation" and "you have brought the company into disrepute" had the cumulative effect of rendering the disciplinary inquiry unfair. They combined to detract from the employee's opportunity to state his case. The employee was not treated with proper respect. The classical common law rule in this respect was stated by Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55 at 61. See also *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570E; *Moch v Nedtravel (Pty) t/a American Express Travel Service* 1966 (3) SA 1 (A) at 14E. Contra in *Gregory v Russells (Pty) Ltd* (1999) 20 ILJ 2145 (CCMA) at 2160A-B where the Commissioner found no tangible evidence on which to base a finding that asking "most" of the questions during the hearing was indicative of bias on the part of the chairperson. Nor is interrupting a witness necessarily such an indication.

¹⁶⁸ Such as where the chairperson tells an accused employee presenting his case to the best of his ability to "stop talking nonsense" - *Makhetha v Bloem One Stop* [1998] 5 BALR 566 (CCMA); or calls the shop stewards demanding the right to be represented by an official of their union in a disciplinary hearing against them "bullshit shop stewards" - *Coin security Group (Pty) Ltd v TGWU & Others* [1997] 10 BLLR 1261.

¹⁶⁹ *Sikhonde v Viamax Distribution* [1996] 7 BLLR 935 (IC).

¹⁷⁰ For this same reason, it is irregular for the official who conducted the first disciplinary hearing to preside over the appeal irrespective of whether the second hearing was regarded as an appeal or an enquiry *de novo* - *Hotelicca & another v Armed Response* [1997] 1 BLLR 80 (IC).

¹⁷¹ See the judgment of the Full Court of the Constitutional Court in *President of the RSA & Others v SARFU & others* 1999 (7) BCLR 725 (CC) at 747 para 35. See also *S v Kroon* 1997 (1) SACR 525 (SCA) at 531; *S v Van der Sandt* 1997 (2) SACR 116 (W) at 132; *S v Malindi* 1990 (1) SA 962 (A) at 969.

Commonwealth public law,¹⁷² may not necessarily be applicable in its full strength, and perhaps may never be rigidly applied in the employment sphere given the informal setting of disciplinary panels in business undertakings, and sometimes too, the existence of structural departmental bias or prejudice,¹⁷³ yet, there remains the basic requirement that some form of detachment or independence be maintained between the chairperson of the enquiry and management.¹⁷⁴

What has been said elsewhere¹⁷⁵ may, with respect, be repeated here with equal effect: "The rule against bias in the adjudicatory process ... contemplates that the membership of a tribunal hearing or investigating an allegation of wrongdoing on the part of any person must be such that it would not have any interest in the outcome of the investigation, enquiry or adjudication. Members of the panel must be seen to be independent, impartial and not prejudiced in favour or against one party or the other."¹⁷⁶ Or simply put, the person taking the disciplinary decision should not be biased¹⁷⁷ or appear to be so.¹⁷⁸ He/she

¹⁷² See Wade & Forsyth, *Administrative Law* (7ed) Ch. 14; Baxter, *Administrative Law* (1985) 557; Yu, HL & Shore, L 'Independence, impartiality, and immunity of arbitrators – US and English perspectives' (2003) 52(4) *ICLQ* 395

¹⁷³ See the discussion in "The opportunity to state case in the law of unfair dismissal in Swaziland in the light of the developments in south Africa & the United Kingdom" 11 (1999) *African Journal of International & Comparative Law* 392.

¹⁷⁴ The arbitrator put it bluntly in *SACCAWU v Citi Kem* [1998] 2 BALR 160 at 168 that "the chairperson of the disciplinary enquiry is obliged to be independent, impartial and unbiased at all times."

¹⁷⁵ Okpaluba, C 'The opportunity to state case in the law of unfair dismissal in Swaziland in the light of the developments in South Africa and the United Kingdom' 11 (1999) *The African Journal of International and Comparative Law* 392.

¹⁷⁶ The leading English cases on this point are: *Dimes v Grand Junction Canal* (1852) 3 HLC 759; *R v Rand* (1866) LR 1 QB 230; *R v Sussex JJ ex p. McCarthy* [1924] 1 KB 256 at 259; *Metropolitan Properties v Lannon* [1969] 1 QB 577; *R v Gough* [1993] 2 All ER 724. The House of Lords recently laid it down in its recent decision in *R v Bow Street Metropolitan Stipendiary Magistrate & Others, Ex p. Pinochet Ugarte (No 2)* [1999] 1 All ER 577 that the principle that a judge was automatically disqualified from hearing a matter in his own cause was not restricted to cases in which he had a pecuniary interest in the outcome, but also applied to cases where the judge's decision would lead to the promotion of a cause in which the judge was involved together with one of the parties to the litigation.

¹⁷⁷ Cf *Goosen v Caroline's Frozen Yoghurt* [1995] 2 BLLR 68 (IC); *Abeldas v Woolworths* [1995] 12 BLLR 20 (IC).

¹⁷⁸ On the question of reasonable suspicion of bias not on the part of the employer but on the part of a presiding officer of the Industrial Court, see *BTR Industries SA (Pty) & others v MAWU & Ors* (1992) 13 ILJ 803 (A); *BHT Water Treatment (Pty) Ltd v Maritz NO & others* (2) (1993) 14 ILJ 676 (LAC). In *Nel v Ndaba & Ors* (1999) 20 ILJ 2666 at 2670 para 12, it was alleged that the chairperson of the disciplinary enquiry was seen with two of the employer's witnesses some minutes before the commencement of the hearing, but it was held that the facts were not such as to create an apprehension which is reasonable.

should enter into the proceedings with an open mind¹⁷⁹ so that the enquiry should not appear to be an attempt to whitewash what was a decision already taken.¹⁸⁰ The person taking on the investigation must not be the accuser or witness to the facts sought to be established.¹⁸¹ The hearing must not be conducted in such 'a domineering and highhanded way' that the *bona fides* and complete impartiality of the conductor is put to question.¹⁸² It is always preferable that the person who conducts the proceedings should make the decision himself and not delegate or abdicate that role to some superior officer or management."¹⁸³

A chairperson need not necessarily recuse himself or herself from presiding over the disciplinary proceedings simply because the employee requests him/her to do so.¹⁸⁴ Evidence of bias or reasonable suspicion of it must be shown on the part of the chairperson of the enquiry to support an application for recusal. It is not sufficient to allege that he/she is of a different racial group from that of the accused since the differences in race do not *per se* suggest that even-handed justice could not thereby be administered by a member of a racial group as against the other.¹⁸⁵ Of course, the application for recusal will be treated differently if, through his conduct, actions or utterances, the presiding officer is known to have harboured racial prejudices. Refusal of an application for an adjournment is in itself not a ground to apply for recusal nor would these

¹⁷⁹ *Per* Solomon J in *Liebenberg v Brakpan Liquor Licensing Board* 1944 WLD 52 at 54-55; Le Roux and Van Niekerk *op cit* 162.

¹⁸⁰ *Gird v Holt Leisure Parks Ltd* [1994] 8 BLLR 98 (IC).

¹⁸¹ In *Townsend v Roche Products (Pty) Ltd* [1994] 8 BLLR 127 at 129, the chairman of the enquiry took active part in the proceedings such that he acted as both prosecutor and witness, harboured strong suspicion against the applicant and was involved in a previous endeavour to entrap him, it was held that he was not a fit person to conduct the enquiry. See also *Hauser v Partnership in Advertising (Pty) Ltd* [1994] 11 BLLR 36 (IC) where the chairman of the enquiry doubled also as prosecutor and sole witness; *NCFAWU on behalf of Roberts v Ons Handelshuis Koop* (1997) 18 ILJ 1176 (CCMA); *Specialized Belting & Hose (Pty) Ltd v Sello NO & others* [2009] 7 BLLR 704 (LC) where human resources manager acted as presiding officer after initiating complaint against an employee.

¹⁸² *NUM & another v Unisel Gold Mines Ltd* (1986) 7 ILJ 398 (IC) at 403.

¹⁸³ *Steelmobile Engineering (Pty) Ltd v NUMSA* (1992) 1 LCD 91 (LAC). See also *National Union of Wine, Spirit & Allied Workers v Distillers Corpn. (Pty) Ltd* (1987) 8 ILJ 789 (IC) at 788F-G; *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC); *SA Breweries Ltd v FAWU & others* (1992) 1 LCD 16 (LAC) discussed in Le Roux & Van Niekerk *op cit* at 166-167.

¹⁸⁴ On the application to recuse a Commissioner who had conciliated a dispute from arbitrating it see s 136, LRA 1995; *CWIU on behalf of Mthombeni v Amcos Cosmetics* (1999) 20 ILJ 2739 (CCMA) at 2741.

¹⁸⁵ *S v Collier* 1995 (2) SACR 648 (C) at 650G-H *per* Hlope J.

two factors put together support an allegation of bias.¹⁸⁶ For as Zondo J (now AJP) put it in *Afrox Ltd v Laka & others*¹⁸⁷ where it was contended that the representatives of the applicant at the arbitration hearing formed the impression that the arbitrator lacked impartiality: "... the test for bias is the existence of a reasonable suspicion of bias. The question therefore is whether, on the facts on which the applicant relies, it can be said that the applicant's representatives at the arbitration proceedings developed a reasonable suspicion of bias on the part of the first respondent. The suspicion of bias or impartiality must be one which might reasonably have been entertained by a lay litigant in the circumstances of the applicant. If such a suspicion could reasonably have been apprehended, the test of disqualifying bias is satisfied. It is not necessary to show that the apprehension is that of a real likelihood that the first respondent would be biased or was biased."¹⁸⁸ However, the Constitutional Court, in the unusual application to recuse several of its members from sitting in the controversial *SARFU* litigation, had indicated its preference for the test of "apprehension of bias" to that of "suspicion of bias" in view of the "inappropriate connotations which might flow from the use of the word 'suspicion'".¹⁸⁹ The Full Court held that the test - which is an objective one - is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the justice in question had not or would not bring an impartial mind to bear on the adjudication of the case, that is, a mind that is open to persuasion by evidence and submissions of counsel.

¹⁸⁶ *Transport & General Workers Union & others v Hiemstra NO & another* (1998) 19 ILJ 1598 (LC).

¹⁸⁷ (1999) 20 ILJ 1732 (LC) at 1742 para 31.

¹⁸⁸ See also the Appellate Division decisions in *BTR Industries SA (Pty) Ltd & others v MAWU & another* 1992 (3) SA 673 (A) at 693I-J; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A).

¹⁸⁹ *President of the RSA & others v SA Rugby Football Union & others* 1999 (7) BCLR 725 (CC) at 748D para 38. The first Constitutional Court case concerning the same parties [1999 (2) SA 14 (CC)] dealt with the jurisdiction of the Court to hear the President's appeal, while the third concerned the substantive issues of constitutionality and validity of the presidential order establishing a commission of enquiry into the affairs of the South African Rugby Football Union. See *President of the Republic of South Africa & others v South Africa Rugby Football Union & others* 1999 (10) BCLR 1059 (CC). It should be mentioned that the Constitutional Court did not consider itself obliged to decide whether the manner in which the trial judge, De Villiers J [1998 (10) BCLR 1256 (T)], conducted the hearing (including summoning the President to give evidence in open court, subjecting him to rigorous cross-examinations and making adverse findings on his evidence) created the impression of partisanship and raised a reasonable apprehension of bias, since the Court found it sufficient to decide the case on the record. See 1999 (10) BCLR 1059 (CC) at 1077 para 32.

A person cannot preside over an enquiry hearing or an appeal hearing in a situation where he is a witness in that he was present when the officers of a security company interrogated the employees who were accused of stealing and dealing in employer's property¹⁹⁰ or where he had witnessed the incident leading to the charge against the employee.¹⁹¹ In both instances, it was held that their impartiality must have been impaired since none of them could have entered into the hearing with an open mind thus transgressing the revered principle of natural justice.¹⁹²

In *Goosen v Caroline's Frozen Yoghurt Parlour (Pty) Ltd & another*,¹⁹³ a tape recording evidence which was admitted in evidence showed that the chairperson of the enquiry, an attorney, held discussions with two members of the company's management in respect of the disciplinary matter before him. The Industrial Court accepted the employee's allegation of bias on the part of the chairperson and held that the employee had not been afforded an objective and fair hearing. The chairperson had not acted in an independent manner. He had collaborated with the company management, did not keep an open mind and had acted *mala fides*. It also appeared that the company was intent on getting rid of the employee and the disciplinary enquiry was a mere charade.

The foregoing illustrations notwithstanding, breaches of fair procedure do not in all cases vitiate a hearing however trivial they may be.¹⁹⁴ The fact the presiding

¹⁹⁰ *SACCAWU obo Moqolomo & others v Southern Cross Industries* [1998] 11 BALR 1447 (CCMA).

¹⁹¹ In *Blaauw v Oranje Soutwerke (Pty) Ltd* [1998] 3 BALR 254 (CCMA) at 268B-C, the Commissioner made it clear that: "The chairman of a disciplinary enquiry should never be a witness, as it is expected of a chairman to enter into such hearing with an open mind and he/she should never pre-judge the case before him/her. The fact that he had discussions on the case prior to the hearing creates the impression of bias. Also, the fact that the chairman of the disciplinary enquiry had refused to allow the employee to be legally represented in an instance where the 'prosecutor' is a qualified attorney is a clear indication of bias on the part of the chairman."

¹⁹² A dismissal would be procedurally unfair where the management official who issued the instructions which were disobeyed turns round to chair the disciplinary hearing against the disobedient employee thus acting also as a witness - *Ndlovu v Promex* [1995] 12 BLLR 59 (IC).

¹⁹³ [1995] 2 BLLR 68 (IC).

¹⁹⁴ In *NUM v CSO Valuations (Pty) Ltd* [1999] 2 BALR 168 (CCMA) at 175, it was held that although the telephone call made by the chairperson of the disciplinary enquiry to a member of management in order to establish certain facts against the employee's evidence might be construed as perceived bias, this procedural defect was not serious enough to warrant an

officer is subordinate to the initiator is not itself sufficient to prove a reasonable apprehension of bias.¹⁹⁵ The split decision of the Labour Appeal Court in *Mondi Timber Products v Tope*¹⁹⁶ which can be contrasted with the cases of *Goosen* and *Moqolomo* is authority for this proposition. It also suggests that the rule against bias may be viewed from a less formal spectacle when it comes to employment disciplinary enquiries. Like in *Goosen*, the chairperson in *Mondi* had on at least two occasions caucused with members of the management team, to wit,¹⁹⁷ the operations manager and the human resources manager, before the employee was found guilty of repairing own motor vehicle at company expense and before his dismissal and the terms thereof were announced. It was the operations manager who first confronted the employee with the allegation, he suspended the employee and framed the charge-sheet. These two management personnel were present at the enquiry. The Industrial Court found these circumstances to have been in breach of the principles of fair procedure. The question before the Labour Appeal Court was whether the operations manager should have been present during the caucuses at all. Although Goldstein J thought that in an ideal situation, the operations manager ought not to have been present during the caucuses, on the facts however, he came to the conclusion that as the employee had admitted guilt, was "heard fully and fairly" and on "a moral or value judgement as to what is fair in all the circumstances" there was nothing that rendered his presence unfair. Since the facts alleged in the charge-sheet were admitted, and the suspension justified, there was nothing unfair in the participation of the operations manager in "these mechanical acts".¹⁹⁸

award of compensation. In *Boss Logistics v Phopi & others* [2010] 5 BLLR 525 (LC) a presiding officer sent e-mail outlining manager's complaints against an employee before hearing. It held that an e-mail was not a proof of bias because it contained no more than material in charge sheet and the hearing was fairly conducted.

¹⁹⁵ *Avril Elizabeth Home for the Mentally Retarded v CCMA & others* [2006] 9 BLLR 833 (LC).

¹⁹⁶ (1997) 18 ILJ 149 (LAC).

¹⁹⁷ In *Van Tonder v International Tobacco* [1997] 2 BLLR 254 (CCMA) the chairman was found to have acted improperly by consulting with the company representative while considering his verdict.

¹⁹⁸ (1997) 18 ILJ 149 at 152.

CHAPTER 4

CURING OF IRREGULARITIES BY SUBSEQUENT APPEAL

4.1 General Aspects

Reading the awards of the CCMA and the IMSSA, one encounters expressions clearly indicating that:

- the procedural defect "has been remedied by this arbitration"¹⁹⁹; or
- "there was no reason why any unfairness could not have been cured at the subsequent inquiry"²⁰⁰; or
- "as the chairperson of the appeal hearing was a different person and as there was no allegation of bias on that other chairperson, this must be taken to have cured the original defect."²⁰¹

In all these circumstances procedural defects had occurred at the initial hearing. It is also important to note that these rulings find support in the decision of the Appellate Division in *Slagment*.²⁰² Although that Court had refrained, in the same manner as the Privy Council²⁰³ and the House of Lords²⁰⁴ in England had, from laying down a general rule in this regard, the majority held in that case that where a decision to dismiss two employees summarily without a hearing had been taken due to no fault of the employer, but was the result of the intransigent attitude of the employees, there was no reason in principle why an unfairness at

¹⁹⁹ *BMW (SA) v NUMSA obo Mthombeni & others* [1998] 1 BALR 66 (IMSSA) where the chairperson of the enquiry was found to have been too involved in the proceedings before and had refused to allow one of the employee's to call his manager to testify on his behalf with regard to his performance as an employee.

²⁰⁰ *Muller v Trucool CC* [1997] 4 BLLR 462 (CCMA).

²⁰¹ One of the many irregularities in the procedure leading to the dismissal in *NCFAWU on behalf of Roberts v Ons Handelshuis Koop* (1997) 18 ILJ 1176 (CCMA) was the dual role played by the chairperson of the hearing who also acted as the prosecutor thus contravening the basic rules against bias on the part of anyone who had to decide anything, a principle already well-engrained in the law of unfair dismissal. See e.g. *Townsend v Roche Products (Pty) Ltd* [1994] 8 BLLR 127 (IC); *Abeldas v Woolworths (Pty) Ltd* [1995] 2 BLLR 20 (IC).

²⁰² *Slagment (Pty) Ltd v BCWU & others* [1994] 12 BLLR 1 (A).

²⁰³ *Calvin v Carr* [1980] AC 574 at 593 *per* Lord Wilberforce.

²⁰⁴ *Lloyd & others v McMahon* [1987] 1 All ER 1153 at 1165 [1987] AC 625 at 697 and 716 *per* Lords Bridge & Templeman respectively. Lord Keith (at 1157) thought that the issue did not arise for decision in this case.

the stage of the dismissals should not have been cured by a full and fair hearing on appeal.

4.2 The approach of English courts

The question here is: whether a hearing which was conducted in breach of the rules of natural justice could be cured by a well conducted hearing on appeal? The awards referred to earlier tend to portray the matter in very simplistic light thus tending to suggest that a clear-cut answer could be found for this very thorny problem of natural justice. The fact is that answer to this question has not always been straight-forward for when the matter first arose in the English courts, Megarry J held that: "If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?" His lordship went on to lay down: "... As a general rule ... I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appeal body."²⁰⁵ In his determination of what, at that time, was a novel question in English law except for a *dictum* of Lord Reid in *Ridge v Baldwin*,²⁰⁶ Megarry J had to consider a maze of conflicting decisions from Canada²⁰⁷ and New Zealand.²⁰⁸

Although the Privy Council in *Calvin v Carr*²⁰⁹ thought that the general rule formulated by Megarry J was too broadly stated, it held that where there was a contractual nexus such as where a person has joined an organisation or body

²⁰⁵ *Leary v National Union of Vehicle Builders* [1970] 2 All ER 713 at 720. See also *R v Ashton University Senate ex p. Roffey* [1969] 2 QB 538; *Glynn v Keele University* [1971] 1 WLR 487.

²⁰⁶ [1963] 2 All ER 66 at 79 Lord Reid had said that where a tribunal had hastily acted on a matter and realising that it has done so and considers the matter afresh, then its later decision is valid provided that the proceeding observed the requirements of natural justice.

²⁰⁷ The judge found support in the Canadian case of *Posluns v Toronto Stock Exchange & Gardiner* (1968) 67 DLR (2d) 165 (SCC) while distinguishing the other Canadian case of *King v University of Saskatchewan* (1969) SCR 678. For the Canadian cases on the subject since *Leary*, see *Re Chromex Nickel Mines Ltd* (1970) 16 DLR (3d) 273 *sub nom Re Hretchka et al & Chromex Investment Ltd*; *O'Laughlin v Halifax Longshoremen's Association* (1972) 28 DLR (3d) 315; *Re Cardinal & Cornwall Police Commissioners* (1973) 42 DLR (3d) 323.

²⁰⁸ See *Denton v Auckland City* [1969] NZLR 256. See also *Reid v Rowley* [1977] 2 NZLR 472; *Pratt v Wanganui Education Board* [1977] 1 NZLR 476. For the Australian cases on the subject see *Fagan v Coursing Association* (1974) 8 SASR 546; *Hall v NSW Trotting Club* [1976] 1 NSWLR 323; *Twist v Randwick Municipal Council* (1976) 12 ALR 379.

²⁰⁹ [1979] 2 All ER 440.

and was deemed, on the rules of that organisation and the contractual context in which he joined, to have agreed to accept what in the end was a fair decision, notwithstanding some initial defect, the task of the courts was to decide, in the light of the agreements made and having regard to the course of the proceedings, whether at the end of the proceedings there had been a fair result reached by fair methods. However, Lord Wilberforce stated that: "Naturally there may be instances when the defect is so flagrant, the consequences so severe, that the most perfect of appeals or rehearing will not be sufficient to produce a just result. Many rules (including those now in question) anticipate that such a situation may arise by giving power to remit for a new hearing."²¹⁰ The question how far in domestic and administrative two-tier adjudicatory systems a procedural failure at the level of the first tier can be remedied at the level of the second tier was not decided in *Lloyd v McMahon* because "the question arising in the instant case must be answered by considering the particular statutory provisions here applicable which establish an adjudicatory system in many respects quite unlike any that has come under examination in any of the decided cases to which we were referred. We are concerned with a point of statutory construction and nothing else."²¹¹

But it is neither *Calvin v Carr* nor *Lloyd v McMahon*, both of which fall within the public law divide, that had influenced the development of English law in this field. It has been the decisions in *West Midlands Co-operative Society Ltd v Tipton*²¹² and *Polkey v AE Dayton Services Ltd*²¹³ that had directed the path the industrial tribunals in England have threaded when considering whether the dismissal procedure was fair viewed holistically and whether an improper initial hearing was cured by an appeal hearing conducted in accordance with the rules of natural justice. While it was held in *Qualcast (Wolverhampton) Ltd v Ross*²¹⁴ that a properly conducted appeal does not provide justification for unfair procedure at a lower level, it was held in *Sartor v P & O European Ferries*

²¹⁰ *Ibid.* at 448.

²¹¹ *Per* Lord Bridge [1987] 1 All ER 1118 at 1165.

²¹² [1986] IRLR 112.

²¹³ [1987] IRLR 503.

²¹⁴ [1979] IRLR 98.

(*Felixstowe*) *Ltd*²¹⁵ that although the employee ought to have been told the terms of the charge against her prior to the hearing before the captain, the appeal which was by way of rehearing and well conducted had cured any defects on the initial trial. The Court of Appeal however held in *Westminster City Council v Caba*²¹⁶ that the failure of the employer to observe the contractual appeals procedure regarding the composition of the appeals tribunal was a significant contractual failure but that an employer's failure to observe its own contractually enforceable disciplinary procedure does not inevitably require an industrial tribunal to conclude that a dismissal was unfair since the question which the tribunal had to determine was not whether the employer acted reasonably in dismissing the employee but whether the employer acted reasonably or unreasonably in treating the reason shown as sufficient reason for dismissal. It was further held that the relevance of that question of a failure to entertain an appeal to which the employee was contractually entitled, as Lord Bridge pointed out in *West Midlands Co-operative Society v Tipton*,²¹⁷ was whether the employee was "thereby" denied the opportunity of showing that the real reason for dismissal was not sufficient. And as Lords Mackay & Bridge indicated in *Polkey v AE Drayton Services Ltd*,²¹⁸ it is also relevant to consider whether the employer acted reasonably if he actually considered or a reasonable employer would have considered at the time of dismissal that to follow the agreed procedure would in the circumstances of the case be futile.

4.3 The case law before *Slagmont*

Prior *Slagmont*, there were contradictory judicial decisions on this subject in South Africa. The Appellate Division had held in *Turner v Jockey Club of South Africa*²¹⁹ that the various procedural transgressions committed by the Inquiry Board against a member charged of bribing an apprentice jockey could not be corrected by a remittal or by further evidence, or in any other manner short of a hearing *de novo*. The other case which is also not an employment case was

²¹⁵ [1992] IRLR 273.

²¹⁶ [1996] IRLR 399.

²¹⁷ [1986] IRLR 112 at para 24.

²¹⁸ [1987] IRLR 503 *per* Lord Mackay at para 4 and Lord Bridge at para 28.

²¹⁹ 1974 (3) SA 633 (A).

*Council of Review, SADF & others v Monnig & Ors*²²⁰ where the Appellate Division emphasised that the proceedings before a court-martial subject of the appeal was in substance a court of law even though it was a court of laymen the propriety of its proceedings should be judged by the normal standards pertaining to a court of law. Accordingly, as the court-martial should have recused itself on the ground of likelihood of bias, it means that the trial which it conducted after the application for recusal had been dismissed should never have taken place at all. What occurred was a nullity. The irregularity was fundamental and irreparable so that an appeal to the council of review could not in any way validate what had gone before the court-martial.

There are two decisions of the Labour Appeal Court presided over by Combrinck J both of which support the reasoning that where procedural irregularities had occurred at the first hearing, an appeal hearing would not cure that defect. In *Empangeni Transport (Pty) Ltd v Zulu*,²²¹ the hearing was riddled with several irregularities that it was held that the appeal tribunal hearing which "did not fare much better" could not cure such deficiencies. The reasoning here, is that "once the appeal takes the place of the disciplinary enquiry the employee is denied his right of appeal. He is furthermore placed in the position that at the appeal he bears the burden of displacing an adverse decision which for lack of natural justice ought never to have been reached."²²² Combrinck J came to a similar conclusion in *SACTWU & another v Martin Johnson (Pty) Ltd*²²³ where there was no hearing in the first instance. The logic here is that where there was no hearing, no evidence and no finding to appeal against, there could be no question of the appeal hearing which was undoubtedly "a full and fair hearing" curing the defective 'hearing'. But Van Zyl J arrived at an opposing conclusion in

²²⁰ 1992 (3) SA 482 (A).

²²¹ (1992) 13 *ILJ* 352 (LAC). The procedural irregularities which were not cured by the appeal hearing in this case included: (a) the decision to dismiss was taken simultaneously with the decision that the employee, a professional driver, was guilty of causing a major accident; (b) the chairman of the disciplinary enquiry did not give the employee or his representative an opportunity of addressing him on the issue of the appropriate sanction hence the employee's length of service and personal circumstances were not taken into account; and (c) the chairman had acted as if he had no discretion and acted as if dismissal was the inevitable sanction.

²²² (1992) 13 *ILJ* 352 at 358E.

²²³ (1993) 14 *ILJ* 1033 (LAC).

Henred Freuhauf Trailers (Pty) Ltd v NUMSA & others.²²⁴ It was held that the denial of the employees' rights to be represented by a trade union official was cured by the appeal hearing where such representation was allowed. Since the appeal hearing amounted to a rehearing and it was not suggested that it was by any means unfair, except in regard to the failure of the appeal body to consider mitigating factors in respect of each individual respondent, these defects could be cured.

4.4 The cases since *Slagment*

Not only that the decision in *Slagment (Pty) Ltd v BCAWU & Ors*²²⁵ cannot be regarded as definitive pronouncement on the issue discussed in this chapter, but that decision should also be confined to its peculiar facts and could accordingly be distinguished. If it may be recalled, the employees in that case had insisted on a joint hearing. They had 12 clear days within which to take advice and consider the employer's offer. They were given a full opportunity of meeting the case against them of which they were fully informed. In such circumstances, the initial procedural unfairness had been overtaken by the appeal hearing and such unfairness had no influence on the course of that hearing or its eventual result. This decision provided Maytham AM with the ammunition to distinguish *Slagment* when faced with the respondent's suggestion that any defects in the original enquiry were cured by a subsequent appeal which took the form of a further hearing in *Ndwandwe v M & L Distributors (Pty) & another*.²²⁶ It was held that the debate on curability does not extend to a situation where there was in effect no disciplinary hearing and therefore nothing to cure. To extend it to such a situation would in effect be tantamount to saying that an employer was entitled to summarily dismiss employees provided that he allowed them a right of appeal.

A number of lessons emerge from the cases decided since *Slagment* which were squarely brought home by the recent case of *Nasionale Parkeraad v*

²²⁴ (1992) 13 *ILJ* 593 (LAC).

²²⁵ 1995 (1) SA 742 (A).

²²⁶ [1996] 5 *BLLR* 657 (IC).

Terblanche.²²⁷ The first point is: whether the holding of a proper appeal would cure the defect in the initial hearing would depend on the circumstances of each case. Secondly, where the failure to observe the rules of fair procedure amounts to "technical procedural irregularity"²²⁸ which will be of no material consequence to the overall fairness of the disciplinary measure, that initial defect will not affect the outcome of the case. It would appear that this is the attitude the courts take of the failure to allow the employee already found guilty to lead evidence in mitigation.²²⁹ Thirdly, where the subsequent hearing is a rehearing, then the initial defect is cured. In *Nasionale Parheraad*, the Labour Appeal Court affirmed the finding of guilty of fraud and unauthorised absence from work on the part of the dismissed pilot on the merit. It also found that by discussing the pilot's disciplinary record with the prosecutor in the absence of the pilot, the chairperson of the enquiry was in breach of the rules of natural justice since the pilot was not given the opportunity to plead in mitigation. However, the Court held that where the appeal took the form of a rehearing, an earlier departure from the rules of natural justice could be rectified. This was especially in labour law where an employee is afforded further opportunity of approaching a court or arbitrator and in the present case, the employer's disciplinary procedure also permitted defects in a disciplinary hearing to be corrected on appeal.

In contrast to both the facts of *Ndwandwe* and *Nasionale Parkeraad* is *Coin Security Group (Pty) Ltd v TGWU*²³⁰ where, unlike in *Ndwandwe*, there was a hearing, albeit a procedurally defective one, and unlike in *Nasionale Parkeraad*, the appeal hearing was equally procedurally flawed. The disciplinary proceedings were vitiated, firstly, by a reasonable apprehension of bias on the part of the shop stewards who feared that the chairperson would not give them a fair and unbiased hearing in that he, (the chairperson) had referred to them as "bullshit shop stewards". Secondly, the chairperson refused the demand by the shop stewards that an official of the union represent them. Even when

²²⁷ (1999) 20 ILJ 545 (LAC)

²²⁸ Per Zulman JA in *Dube & others v Nasionale Swiesware (Pty) Ltd* 1998 (3) SA 956 (SCA) at 968D. Although this case did not concern curability of prior defect, the reasoning in this context is analogous to the issue at hand.

²²⁹ *Khoza v Gypsum Industries Ltd* [1997] 7 BLLR 857 (LAC) is illustrative of this proposition. It was there held that failure properly to consider sanction was rectified on appeal.

²³⁰ [1997] 10 BLLR 1261 (LAC).

management subsequently approved the request, the chairperson would not postpone the hearing to a date when the union representative could be present. Thus in the absence of the union representative and behind the back of the shop stewards the chairperson proceeded with the disciplinary hearings over charges of undermining discipline against the shop stewards after they had refused to participate in the hearings. These were held to be fundamentally unfair and amounted to a failure of justice. Yet the appeal fared no better. The wrongful refusal of the chairperson of the disciplinary hearing to recuse himself was raised, but the presiding officer dismissed the point. He did so on the basis of a private and secret telephone conversation which he had with the same chairperson. The details of that conversation were not conveyed to the representative of the shop stewards. This compounded the irregularity. It was held that the fact that the shop stewards were subsequently afforded an appeal hearing did not, in the circumstances, cure the fatal defects attaching to the disciplinary hearings.

4.5 The Namibian Labour Court approach

The question which arose in the Namibian Labour Court in *Kamanya & others v Kuisch Fish Products Ltd*²³¹ was whether the appeal hearing in a case where the employees charged with violence, intimidation and threats on board the respondent's fishing vessel was in accordance with a fair procedure and whether the dismissal confirmed on appeal was for a fair reason in accordance with section 45 read with section 46 of the Namibian Labour Code 1992. In the first hearing, the records of past misconduct had been taken into account in deciding to dismiss the erring employees without giving them the opportunity to admit or deny their previous misconduct. O'Linn J held that whether a hearing at the appellate level cures the defect in the initial hearing would depend on whether it is a full rehearing or an appeal on the record since an appeal in a disciplinary code may have in mind the setting aside of the proceedings of the initial inquiry, precisely because such initial inquiry was unfair. In such a case the appeal corrects the procedure and considers the issues afresh or on new

²³¹ (1996) 17 *ILJ* 923 (LCN).

evidence adduced at the rehearing. The Court rejected the approach of Combrinck J in *Empangeni*²³² and *South African Clothing*²³³ as being "too formalistic and loses sight of the objective of the law, namely to maintain the right of the worker not to be unfairly dismissed, not the right to have *two* hearings, each of which must be fair."²³⁴ He rejected any attempt to transplant the South African approach to Namibian labour law. "After all, our Labour Act requires a fair hearing and a fair reason for dismissal, whether or not this was done in the course of a single hearing or in the course of more than one hearing and irrespective of whether one of those hearings is labelled an 'appeal' hearing."²³⁵ According to the judge: "Even where the employer's disciplinary code provides for an initial hearing and a subsequent appeal, such provision must not be allowed to obscure and frustrate the aim of the Labour Act to protect workers against unfair dismissals and on the other side of the coin, protect employers from being forced to keep employees who are in fact and in truth guilty of serious misconduct."²³⁶

²³² *Empangeni Transport (Pty) Ltd v Zulu* (1992) 13 ILJ 352 (LAC).

²³³ *SACTWU & another v Martin Johnson (Pty) Ltd* (1993) 14 ILJ 1033 (LAC).

²³⁴ (1996) 17 ILJ 923 (LCN) at 926D.

²³⁵ *Ibid.* at 925-926I-A.

²³⁶ *Ibid.* at 926D-E.

CHAPTER FIVE

SUMMARY AND CONCLUSIONS

It is true that the prescriptions of fair procedure within the context of the code of good practice is by definition informal in nature thus removing disciplinary hearings from a stringent or rigid adherence to the common law attributes of natural justice as they operate in the courts of law. This has prompted some to contend that most of the principles evolved by the previous system of labour adjudication would be inappropriate in the present circumstances. Too much weight need not be made of the informal nature of fair procedure in disciplinary matters lest we run the risk of sacrificing our time-honoured principles of natural justice on the altar of informality. So far, the arbitrators and the Labour Court are wary of informal nature of the disciplinary process and are grappling with the delicate balance between informal observation and non-observation at all of the rules of fair procedure. In that scheme of things, they are wary of the burden which may befall a small entrepreneur who may ill-afford an elaborate investigation process. At the same time, all appreciate that it is totally idle to argue that such an employer be exempted from the application of fair procedure because of the size of his undertaking.

It seems that if the employee is entitled to a right to a fair procedure which has its roots in the democratic Constitution, such a right deserves to be given content; it ought not to be emptied of content because some, especially the employers smarting out of the abundance of privileges which they enjoyed by courtesy of erstwhile oppressive laws over many years, are slightly inconvenienced by the application of some procedure regarding employment discipline based on Western capitalist values. The right to a fair procedure in any sense of that expression must ensure that the party against whom punishment of any type, especially "capital punishment" in employment, is given full opportunity of putting across his side of the story before any disciplinary action is taken against him. And if it is accepted that this is the essence of fair procedure, however formal it be, then obviously, there must be an investigation,

an enquiry. The employee concerned must be told of the case against him and be allowed to adduce evidence to controvert those allegations, to be represented and to be able to question his accusers all in an effort to get to the root of the case. These are constant principles of a fair hearing, the applications of which inherently vary from case to case depending on the circumstances of each case.

The code which is a guide and not an enactment, itself provides that the fair procedure which is a process, may, in "exceptional circumstances" be dispensed with. Granted that what is an exceptional circumstance is a question of fact and will depend on the circumstances of each case, it is doubtful if the *Chauke* type situation presents such an exceptional circumstance. Except in instances where it is shown that a common purpose exists between the employees to commit a certain act or to continue to act in a particular way injurious to the employer's business, the burden must remain with the employer to prove the individual employee's involvement in respect of a particular act of misconduct or poor work performance in order to be entitled under the law of unfair dismissal to dismiss that employee for a fair reason. Ordinarily, it is doubtful if a collective dismissal and a collective sanction whereby the individual employee is pronounced guilty as a part of a group whether he be innocent of the offence or not can satisfy the time-honoured concept of fair procedure. If the total rejection by the arbitrator and the Court of double enquiry by the employer is good law, the same cannot be said of rampant findings by Commissioners that an appeal hearing necessarily cures the defect in the initial hearing. This tends to ignore the realities of the situation. A decision has already been rendered by the initial hearing albeit by way of an irregular procedure. In the employment environment, it is hardly likely that an appeal conducted by another management personnel will find fault with that decision. Even a hearing *de novo* will suffer this same fate. It is difficult to believe that any of these subsequent hearings will produce a result different from the initial hearing far less a fair procedure.

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