The Mauritian Law of Procedural Fairness within the Context of Dismissal for Misconduct: A Comparative study with the South African Doctrine of Unfair Labour Practice.

By

V.P.TORUL

DEDICATION

TO My Guru and Guide

Bhagwan Sri Satya Sai Baba

&

My Loving Parents

Mr & Mrs S. Torul

&

Mr & Mrs D. Baichoo

Qui aliquid statuerit parte inandita altera, aequum licet dixerit, hand aequum fecerit.

He who decides a thing without the otherside having been heard, although he may have said what is right, will not have done what is right.

Seneca

Medea 6 co.Rep.52

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PREFACE AND ACKNOWLEDGEMENT

The main premise of this treatise is to discuss the Mauritian Law of Procedural Fairness within the context of Dismissal for Misconduct: A comparative study with the South African Doctrine of unfair Labour Practice. It analyses in detail the types of misconduct that eventually leads to the dismissal of an employee. The dismissal has not only to be substantively fair but also procedurally fair.

To support the views expressed in the research, reference has been made to labour law cases decided mainly in Mauritius and South Africa. There are, however, references to other jurisdictions such as India, England, Australia, Namibia.

The major constraint that the researcher encountered was the unavailability of decided cases referred from the Industrial Court of Mauritius. Most of the cases referred to in the Mauritian context are the Supreme Court decisions on dismissals due to misconduct. Thus for lack of relevant cases in Mauritius, there is a heavy reliance on cases decided in South Africa and other jurisdictions. These references have constructively enhanced the legal dimension of the topic under discussion.

The production of this legal treatise is a culmination and assistance given by different persons in numerous ways. I would like to register a very profound measure of gratitude and appreciation to the following persons whose names appear hereunder for the roles they have individually played in assisting me to realize this research project which is of an indescribable material value to my academic endeavour.

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Finally and most importantly I wish to convey my sincere dedication, appreciation and gratitude to my dearest family in the person of my eldest brother Messrs J.P. Torul M.B.E. and S.P. Torul, my loving wife, Premila and my beloved children Dipak (an addition to my family, my son-in-law) Mone and Nandish and particularly Mr & Mrs R. Bansee and his loving family and Mr. P. Ramlackan who have always been a source of courage, support and inspiration during my trying moments and sleepless nights of hard work.

May the Lord Bless them all!!

V.P. Torul

SYNOPSIS

In Mauritius and South Africa, the present workplace law prescribes that an employer having a prima facie ground to dismiss an employee for misconduct will in great majority of cases not act rationally in treating the reason as a sufficient reason for dismissal unless and until he/she has taken the steps conveniently classified in most of the authorities as "procedural" which are necessary in the circumstances of the case to justify that cause of action. Consequently, for lack of procedural fairness, the industrial court in Mauritius now hold that the employers action would constitute an 'unjustified termination' of services, and in South Africa it would constitute an 'unfair labour practice'.

Although momentous changes have taken place in the societal and legal attitudes during the last two decades in Mauritius, the law relating to procedural fairness within the context of dismissal for misconduct is not yet firmly entrenched in the Mauritian law of dismissal. This study has, therefore, become imperative, as with the development of workplace law, the administrative law principles of procedural fairness has to be given a precise substance. Hence the title 'The Mauritian Law of Procedural Fairness within the Context of Dismissal for Misconduct : A Comparative Study with the South African Doctrine of Unfair Labour Practice", is of topical significance.

Chapter I attempts to highlight the key issues that will be discussed in preceding chapters. The question, is it sufficient that a substantive reason for dismissal exists, or is it also incumbent upon an employer to adhere to an acceptable procedure prior to taking the decision to dismiss?, puts the thinking process into motion.

Chapter II identifies three important concepts that have to be defined, their meanings analysed and their implications critically examined. The concepts are 'dismissal', 'misconduct' and 'procedural fairness'.

Chapter III examines the enabling Acts on procedural fairness which provide safeguards against dismissals that are procedurally unfair. The Constitutions and the Labour Relations Acts of both countries are carefully examined so as to make the comparative study significant.

Chapter IV refers mainly to Section 32 (2) (a) and (b) of the Labour Act 1975 of Mauritius and the Labour Relations Act 1996 of South Africa. The South African labour jurisprudence is critically examined so as to give a holistic approach to the requirements of procedural fairness.

Chapter V discusses those exceptional circumstances where the employers have deviated from the accepted norms and deemed it unnecessary to hold disciplinary hearing before the ultimate sanction of dismissal is laid on an employee.

Chapter VI discusses and examines critically, from a comparative perspective, the concept of procedural fairness in Mauritius and South Africa within the limits of unfair labour practice jurisdiction, and makes proposal towards a legal regulation of procedural fairness within the context of dismissal for misconduct in Mauritius.

ABBREVIATIONS

AIR	All India Report
ALLER	All England Report
BARYL	Butterworths Arbitration Law Reports
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
CCMA	Commission for Conciliation, Mediation and Arbitration
CLLR	Contemporary Labour Law Reports
IC	Industrial Court
ICA	Industrial Court Act
ICR	Industrial Court Reports
IRLR	Industrial Relations Law Reports
LAC	Labour Appeal Court
LC	Labour Court
MR	Mauritius Report
KB	Kings Bench
QB	Queens Bench
SA	South Africa
SALLR	South African Labour Law Reports
SALJ	South African Law Journal
SAJHR	South African Journal of Human Rights
SAJLR	South African Journal of Labour Relations
SCJ	Supreme Court Judgment
WLR	Weekly Law Report
ZLR	Zimbabwe Law Report

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CHAPTER 1

1.1 Introduction

The present study on the Mauritian law of procedural fairness within the context of dismissal for misconduct is based on three important concepts, namely, 'dismissal', 'misconduct' and most importantly, 'procedural fairness'. They need to be defined, explained and critically examined from a comparative perspective with the South African doctrine of unfair labour practice.

From the vast area of the law of dismissal, the topic of discussion has been narrowed down to dismissal for misconduct only. This being the case, the study will exclude all other forms of dismissals such as redundancy, retrenchment and constructive dismissals.

With the advent of rapid industrialisation and the recognition of inherent dignity of man at his workplace, the law of dismissal in Mauritius has become very significant, but complex in nature and imprecise in practice. The central problem that occupies the mind of the labour law practitioners, therefore, is that, how far can an employer be said to have acted reasonably in failing to go through a procedure for dismissal when it seems there were good and substantive grounds for dismissal? In more precise terms it means, did the employer hold an enquiry in accordance with the rules of natural justice so as to give the employee an opportunity to state his version and, if necessary, in mitigation of the penalty?

The Mauritian labour jurisprudence does not have a clear and adequate answer to this. It has left many contentious issues implicit in the definition of `procedural fairness' unresolved. Although statutory provisions on disciplinary procedures have been made in section 109 of Part VIII of the Code of Practice in the Mauritian Industrial Relations Act 1973 and Section 32 (2) (a) of Labour Act 1975 on `Unjustified Termination of Agreement', the term `procedural fairness' still remains elusive, fragile and shrouded with uncertainty and confusion. It is, however, left to the Industrial

Court and the Supreme Court of Mauritius to develop the notion of substantive as well as procedural fairness. These courts have been empowered to determine the reasonableness of an employer's decision to dismiss an employee on the criteria based on equity and fairness. During the course of the discussion, examples from decided cases in *Mauritius and South Africa* will show that where the employer has fairly and honestly conducted an enquiry and come to a decision which is fair and reasonable, in the circumstances, he cannot be faulted, but where he unreasonably and unjustifiably failed to hold such enquiry or where his decision is not fair and reasonable in the circumstances, such failure may amount to a procedurally unfair dismissal which, in the context of South African labour jurisprudence, is termed as an unfair labour practice.

It is against this background that it is proposed to look at, initially the absolute and some times, irrational disciplinary powers of an employer under the common law contract of employment in Mauritius and South Africa, and then discuss the way in which the South African doctrine of unfair labour practice, in its procedural form, can provoke a search for a better version of procedural justice that will provide safeguards to employees against unfair dismissals due to misconduct in Mauritius.

1.2 Deficiency of the Common Law Principles and the Public Law Remedy

The employment law in Mauritius and South Africa is based on the common law principles [1] which has, particularly, in the area of dismissals, given the employers wide discretionary and even arbitrary powers [2] to terminate the services of an employee with or without notice. [3] It therefore, offers little protection against arbitrariness and unfair dismissals. In this regard Brassey points out: [4]

> ***"It (common law) confers on the party to whom it relates an absolute discretion to perform or not , as he chooses ....it allows the party with greater bargaining power to exact any bargain he wants, however oppressive, perverse or absurd it may be, provided that it is not illegal or immoral ....and all this he is allowed to do without consulting the other party first or paying him the slightest heed."***

In supporting this view, Rycroft and Jordaan also write: [5]

> ***"The common law rule, however, has always been one of dismissal or nothing. It holds that, unless the parties have agreed otherwise, there is no obligation on the employer to warn the employee before finally dismissing him or her ; [6] or to conduct an enquiry before dismissal; [7] or to grant the employee an opportunity to improve his or her conduct or performance; or to consider alternatives to dismissal; [8] or to provide reasons for dismissals – all of which are nowadays regarded as essential elements of sound industrial relations practice."***

The symptoms of this perceived weakness of the common law to regulate the arbitrary exercise of the employer's traditionally wide disciplinary powers has now stimulated the administrative law principles and has found remedy in the public law process of procedural justice. [9] Sedley acknowledges this phenomenon in labour law as "a high point of development of the protection of an employee by ...the importation of what are today recognisable as public law doctrines into private law relationship". [10]

Implicit in this argument is that the new jurisdiction invoked by the public law remedies of procedural justice has put brakes on the wide disciplinary powers, which an employer enjoys at common law.

1.3 Substantive and Procedural Fairness

In the area of dismissals, in particular, the court has departed significantly from the common law position. It has held in no uncertain terms that it is not sufficient for the employer to act lawfully when dismissing the employee, it has also to act fairly. [11] This entails that for a dismissal to be fair, it requires not only sufficient reasons, it also needs to apply fair procedures prior to termination of the employee's services. [12] Thus to give full efficacy to the doctrine of fair dismissal, the court partly for methodological reasons came to distinguish between the substantive and procedural aspects of a dismissal. [13] Substantively, the dismissal has to have a " good and sufficient cause," [14] and procedurally the employee has to be " afforded a fair and a reasonable opportunity of speaking in rebuttal or in mitigation of the charge against him. [15]

Rationalising the view on the merits of procedural fairness as distinct from substantive fairness, the House of Lords in *West Midlands Co-operative Society Ltd v Lipton* [16] was of the opinion:

> ***To separate them and to consider only one half of the process in determining whether the employer acted reasonably or unreasonably in treating real person for dismissal as sufficient, is to introduce an unnecessary artificiality into proceedings in a claim of unfair dismissal calculated to defeat rather than accord with equity and substantial merits of the case.***

Based on this distinction between the concepts of substantive and procedural fairness, the industrial court jurisprudence formulated the principle that an employer who wishes to terminate the services of an employee on grounds of misconduct, must be satisfied that there are sound substantive reasons for the dismissal, i.e. legally justified, and must follow a fair procedure in arriving at the conclusion. [17] In *Mawu & others v Stobar Reinforcing (Pty) Ltd & another* [18] the court was emphatic on this point:

> ***" The whole tenor of the decision seemed to support the view that the court was concerned more with the fairness of the dismissal than its lawfulness."***

These judicial interventions, to a large extent mitigated the harshness of the common law principles and created a new jurisprudence, which introduced elements of equity and fairness in the law of dismissal. [19]

1.4 Procedural Fairness

Considering, therefore, that prevention of abuse of power is nowadays a preferred categorisation of the nature and aims of the public law jurisdiction,[20] the following questions become invariably pertinent especially when an employer decides to dismiss an employee for misconduct:

(i) Is it sufficient that a substantive reason for dismissal exists, or is it also incumbent upon the employer to adhere to an acceptable procedure prior to taking the decision to dismiss?

(ii) How far can an employer be said to have acted reasonably in failing to go through a fair procedure when it seems that there were good and substantive grounds for dismissal?

(iii) And, most importantly, what is procedural fairness with regard to dismissal for misconduct?

These questions show a powerful impetus to an emergent trend in administrative law, which has not been thoroughly exhausted in the field of the law of unfair dismissal. It is evident from these questions that the issue of procedural fairness and dismissal lie at the core of security of employment and it is the considered view of jurists and legal writers[21] that the branches of law, namely administrative law and labour law, should serve to enhance the security of an employee in his employment. There is an attempt, therefore, to cover all possible exigencies that are created by the non-observance of fairness in cases of dismissal due to misconduct.

It is found that although in a pure master and servant case there is no inherent or imposed obligation to observe fair procedures,[22] the discipline of fair procedure have anyway largely been injected into the law of contractual employment by statutes[23] and judicial interventions. The landmark decision in *Polkey V.A.E. Dayton services Ltd*[24] puts the new trend into practical perspective. It is stated:

> ***An employer having prima facie ground to dismiss for one of these reasons will in great majority of cases not act rationally in treating the reason as sufficient reason for dismissal unless and until he has taken the steps conveniently classified in most of the authorities as procedural which are necessary in the circumstances of the case to justify that cause of action."***

Lord Mackay of Clashfern LC quoted Neill LJ to support his view:[25]

> ***"A failure to observe a proper procedure may make a dismissal unfair, but this is not because such failure by itself makes the dismissal unfair but because the failure, for example to give am employee an opportunity to explain may lead the tribunal to the conclusion that the employer in all circumstances, acted unreasonably in treating the reason for dismissal as a sufficient reason. The tribunal will look at the practical effect of the failure to observe the proper***

procedure in order to decide whether or not the dismissal was unfair. Where an employee is alleged for misconduct and he then complains that he was unfairly dismissed, it is to be anticipated that the industrial tribunal will usually need to consider (a) the nature and gravity of the alleged misconduct: (b) the information on which the employer based his decision; and (c) whether there was any other information which the employer could or should have obtained or any step which he should have taken before he dismissed the employee."

This pronouncement by the House of Lords may be considered, as Davies and Friedland put it, 'a real breakthrough'[26] in the law of unfair dismissal. As already discussed, for too long the employment law was governed by the common law principles which made an employee always vulnerable to the abuse of an employer's disciplinary power. Now it is upon the new concept of procedural fairness that the law of dismissal has been able to build its central premise, and has subjected an employer's decision to dismiss to a degree of judicial scrutiny on both substantive as well as procedural grounds. Consequently, the benefit flowing from such an opportunity has materially changed the employer/employee relationship. It means that an employer who with a view to possibly having to justify his action to dismiss an employee, will have to ensure that during the decision making process he had adhered to the standard of procedural justice, i.e. the employer will have "to listen fairly to both sides and to observe the principles of fair play; to discharge its duties honestly and impartially; and to act in good faith."[27] This innovation into the labour law not only protects the employee, it also assists the employer. In *NUM and Another v Western Areas Gold Mining Co. Ltd*[28] the court held that an employer can also benefit by following a fair pre-dismissal procedure:

"It is necessary because if properly and honestly held, it places the employer in a position to judge the merits of the conduct of the employee after all the relevant facts and considerations have been investigated and the applicant's version has been stated. It also enables the employer, should he be reasonably satisfied that the alleged infraction has taken place, to decide on the appropriate disciplinary action."

1.5 Natural Justice and Procedural Fairness

Having much said about procedural fairness in dismissals for misconduct, it is common knowledge that central to this administrative law principle lies the rules of natural justice. Brassey submits that "where the procedural fairness is at issue, the court has sometimes had regard to the administrative law principles in particular, the rules of natural justice."[29] These principles have usually been expressed in the form of two latin maxims, namely audi alteram partem (hear the other side), and nemo index in propria causa sua (no man may be judge in his own cause). These rules have fully been embedded into disciplinary proceedings. In *Twala v ABC Shoes Stores*[30] Fabricus A.M. said

> ***"...there are only three basic requirements of natural justice which have to be complied with during the proceedings of a domestic disciplinary enquiry:***
>
> - ***Firstly, that the person should know the nature of the accusation against him***
> - ***Secondly, that he should be given an opportunity to state his case***
> - ***Thirdly, that the tribunal should act in good faith."***

The norms emerging from these judicial decisions have been incorporated in the Industrial Relations Act 1973 and Labour Act 1975 of Mauritius[31] and the Labour Relations Act 1995 of South Africa.[32] As much as it is the expressed intention of the Labour Acts of both countries to simplify the pre-dismissal procedures, they also enjoin the employers to develop their own procedures to deal adequately and effectively with any disciplinary matters before they are taken to the Industrial Courts or any other statutory dispute resolution apparatus for adjudication such as the Commission for Conciliation, Mediation and Arbitration in South Africa.

Along with these statutory provisions there is also a growing number of case law which by judicial precedent have contributed to the formulation of guidelines on fair procedure before dismissal due to misconduct. In Mauritius, the court held in *Bundhoo v Mauritius Breweries Ltd*[33] and reiterated in *Medine Sugar Estate Co. Ltd v Wodally*[34] that

> ***"Although in certain circumstances, an employer may be justified in terminating the employment of a worker whose conduct is suspect in some serious measure, nevertheless where no hearing is granted to the worker in order to give him an opportunity to dispel the suspicion, then there is a violation of Section 32 (2) (a) of the Labour Act……"***

Similarly, in *J.C.Paul v Longtill (Mauritius)*[35] the court ruled that

> ***"It is now settled that an employer who avers having lawfully dismissed a worker must prove not only that he had reasons to do so but that the dismissal was effected in compliance with Section 32 of the Labour Act….(which) provides that a dismissal without a hearing as provided by its subsection (2) shall be deemed to be an unjustified dismissal."***

The Mauritian labour statutes and judicial decisions therefore pose two general requirements to make a dismissal by reason of any disciplinary action fair. There must be

(i) a valid and fair reason for a dismissal; and

(ii) the dismissal must be in compliance with a fair procedure.

1.6 Procedural Fairness and South African Unfair Practice Concept

At this point it is interesting to note that both Mauritius and South Africa apply the same terms to make a dismissal reasonable and fair. The entrenched provisions in their respective Labour Relations Acts have set out basically the same requirements for dismissal due to misconduct. These requirements are for instance:

(a) The right to notice;

(b) The right to fair hearing;

(c) The right to be represented;

(d) The right to appeal.

It is amply clear that by codifying the above requirements, there is a reasonable consistency in the application of procedural fairness in both countries.

South Africa has, however, gone a step further in its legislative enactment and case law in ensuring some kind of protective shield for employees from the vulnerability to dismissal that prevails at common law. As a result of the reforms contained in the recommendations of the Wiehahn Commission (1979)[36] the industrial tribunal was replaced with an industrial court with an extensive "unfair labour practice" jurisdiction[37] to determine unfair labour practice disputes in terms of Section 46(9) of the Labour Relations Act 1956, and to issue `status quo' orders in terms of Section 43 reinstating dismissed employees and preventing unfair labour practice. Consequently, for lack of procedural fairness, the Labour Court in South Africa has held that the employer's action constituted an unfair labour practice.[38] Thus, although this jurisdiction of the industrial court has left the common law regarding termination of services intact, it has "held a dismissal to be an unfair labour practice, if the dismissal did not comply with a two fold test. The dismissal had to be both procedurally and substantively unfair."[39]

It is also argued in *NUM and others v Driefontein Consolidated Ltd*[40] that failure to grant an employee the right to a hearing before dismissal can amount to an unfair labour practice, and thus where the employees were dismissed without adhering to proper procedure, it therefore, "prima facie constituted an unfair labour practice because a proper predismissal enquiry had not been held."

The second point that is worth highlighting in the South African jurisprudence is the entrenched provisions on the right to procedural justice in The Constitution of the Republic of South Africa Section 23 (1) casts an onus on the employer, as a decision maker, to effect "fair labour practices", and Section 33 articulates the norms of administrative justice which has the effect of strengthening the hands of the court in enforcing standards of due process and fairness.

In addition to the above, with a view to give effect to the right to administrative action that is "lawful, reasonable and procedurally fair" as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996, the Promotion of Administrative Justice Act No.3 of 2000 has been enacted to "promote an efficient administration and good governance" at the work place. This Act relatively gives precise substance to the administrative law principles of procedural fairness which makes it mandatory on

the decision maker to exercise his/her power according to the established code of procedure and with due regard to the rights of the individuals including, the right to natural justice.

In this respect, Mauritius has been less dynamic in widening the scope and giving content to the concept of procedural fairness in dismissal. As it stands, Mauritian statutes namely the Industrial Relations Act 1973 and the Labour Act 1975, have not created an unfair labour practice jurisdiction as laid down and practiced in South Africa. The sole concern of the industrial court in Mauritius is to see the law of unfair dismissal within the narrow confines of the common law principles of contract, which lacks consistency and stability. In *Stratford College v Mrs K.B. Jugessur* the court quoted from Camerlynck:

> ***Le contrat du travail a dureé indetermineé demeure placé par sa nature même sous le signe de l'instabilité par le jeu du droit de résiliation unilatérale qui lui est inherent*** [41]

Thus, unless the unfairness complained of actually leads to dismissal, the matter is not justiciable. The only relevant question as mentioned earlier, is whether in dismissing his employee the employer has acted lawfully in terms of the contract.[42] Although momentous changes have taken place in societal as well as legal attitudes during the last two decades, the principle of procedural fairness based on the rules of natural justice are not yet firmly fixed in the Mauritian law of dismissal. Hence the significance of the title of this research, "The Mauritian law of Procedural Fairness within the context of Dismissal for Misconduct: A Comparative Study with the South African Doctrine of Unfair Labour Practice."

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[1] *In Harel Frères Ltd v Veerasamy and Anor 1968 MR 218 where Garioch ASPJ pointed out "the fundamental freedom of the employer to dismiss his employee under the common law" and "the employer's common law right to put an end to a worker's employment unilaterally," form the core principle in employment relationship.*

South African employment law is also based on the same common law principles. Rycroft A and Jordaan B write in "A Guide to South African Labour Law 1992 2nd Ed.Juta & Co Ltd. at 44 "The common-law contract of employment constitutes the broad foundation of the employment relationship."

[2] *In Raman Ismael v United Bus Service 1986 MR 182 it was stated: "Whether the power is extra contractual or derives from the contract (Dalloz notes 116 to 113) which implicity recognises the power of the employer to enforce discipline by sanctions, is non academic... This term of the contract assumes that the employer has the power to impose discipline by sanctions."*

In United Bus Service v Gokool 1978 MR 1 Garrioch ACJ said: The employer has a power to suspend a worker for misconduct. This power is not based on an implied term in the contract, but on the inherent disciplinary power of the management" He further stated: "Les sanctions peuvent être prises par le chef d'entreprise en vertu soit du règlement d'atelié, soit des principes du droit commun"

Rycroft writes: "The discipline of workers has traditionally been regarded as being within the unilateral rule making power of management managerial prerogative." Between Employment and Dismissal: The Disciplinary Procedure (1985) 6 ILJ at 405.

Such arbitrary powers of the employers has been described by Freedland in 'The Contract of Employment' at 5 in a more uncompromising way: "The application of the general principles of contract law to the employer's right of dismissal...caused the dismissal to be seen as the assertion of an absolutely objective right analogous to the right of a merchant to reject unsatisfactory goods, or to load cargo in a different ship.

[3] *As H.Collins puts it "from a narrower legal perspective the power of the employer to regulate the conduct of an employee and to issue codes of conduct is primarily to be found in the implied common law duties of an employer.*

In United Bus Service v Gokool 1978 MR1 the court expressed its opinion. "L'employeur a un pouvoir disciplinaire inherent à sa qualité dont il a la faculté de faire usage sous la seule réserve du controle de l'autorité judicaire, même en l'absence des disposition contractuelles. L'employé en acceptant un contrat de travail accepte voluntairement d'entrer dans une institution sociale et le pouvoir disciplinaire découle de la nature de l'institution."

In Harel Frères Ltd v Veerasamy and Anor 1968 MR 218 it was stated: "An employer who wished to terminate his workers contract, if he has given adequate notice to the latter, did not have any reason to furnish for the termination. Even if it could be shown that he had no valid ground for such termination he was not considered to

have abused his contractual freedom and was not therefore liable to compensate his employee in that case for wrongful dismissal. Incompetence, misconduct and other like failings on the part of the employee entitled the employer summarily to dismiss him."

Identical views have been expressed in South Africa. Rycroft A in the article `Between Employment and Dismissal: The Disciplinary Procedure (1985) ILJ 6 (4) argues that in South Africa the discipline of workers has traditionally been unilateral and frequently arbitrary. In Horopane v Gilbeys Distillers and Vintners (Pty) Ltd and Another (1997) 8 (3) SALLR 133 (LC) the Labour Court stated: "The common law permits an employer to terminate the services of an employee either summarily, without notice or on notice. The decision of the employer to give notice is not subject to judicial scrutiny. The law is only concerned with the legality of the procedure followed to the extent that it inquires whether proper notice has been given." Thus "as long as contractual notice of termination is given, the employer is free to dismiss an employee for any reason he wished, with no obligation to reveal his reason for dismissal to the employee, much less to justify it" Anderman S.D, `The law of unfair dismissal 1985 London Butterworth at 3.

Fredman and Lee have also reiterated the same legal principle:

"...the fundamental right has not been available in an ordinary master-servant relationship nor in cases of offices held at pleasure. The former is justified on the basis that it is an implied term in the contract of employment that an employee may be dismissed for any or no reason provided the relevant notice is given...this argument assumes that it is unquestionable that no reasons are required to terminate a contract if the appropriate notice is given. Sandra Fredman and Simon Lee: `Natural justice for Employees: The unacceptable Faith or Proceduralism' (1986) 15 ILJ (1) At 26.

[4]*M. Brassey et al, `The New Labour Law', Strikes, Dismissal and Unfair Labour Practice in the South African Labour Law: 1988 Juta & Co at p5.*

[5]*Rycroft A and Jordaan B. `A Guide to South African Labour Law 1992 Juta & Co. p96.*

[6]*Meerholz v Norman (1916) TPD 332*

[7]*Grundling v Beyers (1967) 2 SA 131 (W) at 141*

[8]*Nchobaleng v Director of Education (TVL) & Another (1954) 1 SA 432 (T) at 438*

[9]*Mary Stokes in discussing the intrinsic value of procedural justice in the development of administrative law principle to constrain the abuse of executive power stated: "A dismissal will be quashed or declared void in public law, thereby effectively reinstating the employee and leaving all rights under the contract of employment intact. Since this is a superior remedy to financial compensation, which is the usual remedy for wrongful or unfair dismissal it provides one strong reason for an employee to invoke the public law procedure" (1985) 14 ILJ 117*

In Rampersad v BB Bread Ltd (1986) 7 ILJ 367 (IC), Bulbulia M said at 373: "It has been said once disciplinary procedures are established, the failure to abide by them will give an employee a prima facie right to reinstatement if he has been dismissed in disregard to the procedure." See also Matshoba & others v Fry's Metals (Pty) Ltd (1983) 4ILJ 107 (IC)

[10]*As per Sedley J in Stevenson's case (1977) I.C.R. 893: See pp 203-205 of Mr Justice Sedley's article `Public Law and Contractual Employment' (1994) 23 ILJ 201 at 205. The court was also of the opinion that "an unfettered discretion should be exercised according to the rules of reason and justice and not according to private opinion." Horn v Kroonstad Town Council 1948 (3) SA 861 (0)*

[11]*MAWU v Barlows Manufacturing Company (1983) 4 ILJ 383 (IC)*

[12]*In Medine Sugar Estate Co. Ltd v Wodally 1993 SCJ 173 at 320 the court relying on the case of Bundhoo v Mauritius Breweries Ltd 1981 MR 157 held that "although in certain circumstances an employer may be justified in terminating the employment of a worker whose conduct is suspect in some serious measure, nevertheless where no hearing is granted to the worker in order to give him an opportunity to dispel the suspicion, then there is a violation of Section 32 (2)"*

In J.C.Paul v Longtill (Mauritius) Ltd 1983 Record No.2/83 at 52 stated: "it is now settled that an employer who avers having lawfully dismissed a worker must prove not only that he had reasons to do so but that the dismissal was effected in compliance with Section 32(1) (b) of the Labour Act"

In South Africa the industrial court has formulated the principle that an employer who wishes to terminate the services of an employee on grounds of misconduct must be satisfied that there are sound substantive reasons for the dismissal, i.e legally justified, and must follow a fair procedure in arriving at that conclusion. The line of cases supporting this principle are National Automobile Workers Union v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369; NUM v Marievale Consolidated Mine (1986) ILJ 123 (IC) at 177 C; NUM v Durban Roodeport Deep (1987) 8 ILJ 156 (IC) at 165; Yichito Plastics (Pty) (1994) 15 ILJ 593 (LAC); Ndlovu v Transnet Ltd t/a Portnet (1997) 18 ILJ 1031 (LC)

[13]*NAAWU v Pretoria Precision Castings (1985) 6 ILJ 36a (IC) at 377 E-F*

[14]*Ntuli v Life Master Products (1985) 6 ILJ 508 (IC) at 518 G-H.*

[15]*NUM v Durban Roodeport Deep (1987) 8 ILJ 156 (IC) at 165; NUM v Western Areas Gold Mining Co.Ltd. (1985) 6 ILJ 380 (IC) at 386 C-D.*

[16]*(1986) AC 536 at 538*

[17]*In Mauritius following cases support the view that "before a decision to dismiss a worker should become effective his employer should have given him an opportunity to answer any charges laid against him": Harel Frères Ltd v Veerasamy and Anor 1968 MR 218; Cayeux Ltd v de Maroussem 1974 MR*

166; Harel Frères Ltd v Jeebodhun 1981 MR 189; The Medine Sugar Estate Co.Ltd. v I.Wodally (1993) Record No.4691; College Labourdonnais (Alliance Francaise) v P.J.H Seenyen (1992) Record No 4668; Retreaders Ltd v R.Marie (1989) Record No.376; Societé Union Saint Aubin v F. Sansfleur (1989) Record No.4355; G.Nadal v Longtill (Mauritius) Ltd 1984 Record No. 3377; Tirvengadum v Bata Shoe (Mts) Co. Ltd (1979) MR 136; Latour v Maurel of Cie (1967) MR 170; J.C.Paul v Longtill (Mauritius) Ltd (1983) Record No 2/83/

[18]*(1983) 4 ILJ 84 (IC) at 86-87*

[19]*Cameron et al, The New Labour Relations Act, 1989 Juta & Co at 145: "Fairness is a broad concept in any context...It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case...are considered."*

[20]*John Laws `Public Law and Employment Law: Abuse of Power', 1997 Public Law at 460'*

[21]*Hugh Corder `The content of the Audi Alteram Partem Rule in the South African Administrative Law' 1980 THRHR 43 quoting Tindall ACJ in Minister of the Interior Bechle 1948 (3) SA 490.*

[22]*Ridge v Baldwin (1964) A.C 40 per Lord Reid at 65 and Mallock v Aberdeen Corporation (1971) 2 ALL ER 1278.*

[23]*J.Laws `Public Law and Employment Law: Abuse of Power' 1997 Public Law 455 at 461. The Industrial Relations Act 1973 and the Labour Act 1975 of Mauritius, and the Labour Relations Act 1995 of South Africa.*

[24]*(1987) 1 ALL ER 974 as per Lord Mackay of Clashfern LC. At 981*

[25]*Ibid at 981; The same views are expressed in John v Rees (1969) 2 ALL ER 274. Megary J. said: "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Now are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the cause of events."*

[26]*Davies and Friedland, Labour Law: Texts and Materials 1984 Weidenfeld and Nicolson, 2nd Ed at 514.*

[27]*Meyer v Law Society, Tvl 1978 (2) SA 209 (t) at 212 H*

[28]*(1985) 6 ILJ 380 at 386 B-C*

[29]*Brassey et al, The New Labour Law 1987 Juta & Co P310-311; Grogan J, Workplace Law, 2000 Juta & Co. at 154, writes: "The requirements of*

procedural fairness were in fact developed by the Labour courts from the rules of natural justice and the common law to suit the employment arena."

[30]*(1987) 8 ILJ 714 (IC) at 716-717 See also Morali v President of the Industrial Court & others 1987 (1) SA 130 (C): (1986) 7 ILJ 690 (C) a matter in which Berman J declared at 133 C-D: "The Common Law...provides and it is indeed one of the cornerstones of the common law that a party be afforded a fair opportunity to present his case which is a facet of the Audi Alteram partem rule.*

[31]*Part viii of the Third Schedule of the Industrial Relations Act 1973 on Disciplinary Procedures (Mauritius) Section 32 of the Labour Act 1975 on `Unjustified Termination of Agreement' (Mauritius).*

[32]*Items 3 and 4 of schedule 8 of Labour Relations Act 1995 on Code of Good Practice, Dismissal (South Africa).*

[33]*1981 MR 157*

[34]*1993 Record No 4691 SCJ 173*

[35]*1983 Record No. 2/83 SCJ 52*

[36] *Professor Wiehann was the chairman of the Commission of Enquiry into Labour Legislation in 1979, the reports and recommendations of which gave rise to many of the key amendments to the statute in 1979, namely the deracialising of the LRA, the establishment of the concept of unfair labour practice to regulate both individual employment and collective labour relations.*

[37] *the task of defining the concept of unfair labour practice was left to the industrial court. By virtue of section 46(9) (C) of the Labour Relations Act 1956, the industrial court was entrusted with the task of "determining" disputes, concerning alleged unfair labour practices. "In determining the dispute the court must obviously decide whether the practice concerned is unfair or not (in terms of the statutory definition) and if it decides that it is unfair it must resolve the matter by making a determination akin to an arbitration award." This was the decision in SEAWUSA v Trident Steel (Pty) Ltd (1986) 7 ILJ 418 (IC) at 437 C-D.*

The Labour Relations Amendment Act of 1991 reintroduced an open-ended unfair labour practice and defined the concept as " a conduct by an employer which unfairly prejudices or jeopardises an employee's work security or employment opportunities or which creates or promotes labour unrest or which detrimentally affects the relationship between the employer and the employee." Although the new labour Relations Act 1995 contains no general 'open textured' definition of an unfair labour practice, it has, however, given a statutory effect by setting out some rules in item 4 schedule 8 on code of Good Practice which an employer must comply with in order to make a disciplinary dismissal fair.

Where there are no procedures the industrial court has itself laid down guidelines regrading the requirements of procedural fairness. The approach in Mahlangu v CIM Deltak; Gallant c CIM Deltak 1986 7 ILJ 364, which will be discussed later in the coming chapters, ha been considered as having formulated a new jurisprudence based on the doctrine of unfair labour practice.

[38] *Unilong Freight Distributors (Pty) Ltd v Muller (1998) 19 ILJ 552.*

[39] *Maropane v Gilbeys Distillers and Vintners (Pty) Ltd and Another (1997) 8 (3) SAUR 133 (LC)*

[40] *(1984) 5 ILJ 101 (IC)*

[41] *Quoting from Camerlynck, Traite du Travail ed. 1968 in Statford College v Mrs k. Jugessur 1990 Record No. 4483 as per Ahmed ACJ*

[42] *In Chamroo v Belle Vue Mauricia S-E (1980) MR 309 the appellate court held that "pleadings before court of summary jurisdiction being necessarily concise, where the worker alleges that he has been summarily dismissed. The employer who pleads dismissal for serious misconduct inevitably puts in issue the fat that the dismissal was in accordance with the requirements of the law." See also M.Lootfun v C.E.B (1984) SCJ 407: "Thus the substantive decision of the employer who summarily terminates the services of the employee, is liable to be scrutinized by the court only if such an action is not awful.*

Chapter 2

Definition, Meaning and Critical Examination of Concepts

Introduction

The area under research has three identifiable concepts that need to be defined, their meanings analysed and their implications critically examined. The concepts are namely, `dismissal', `misconduct' and `procedural fairness'. Although `procedural fairness' is the key concept, it is suggested that an attempt to define it will be made after defining `dismissal' and `misconduct'. The rationale of this presentation is to have an understanding and implications of `dismissal' and `misconduct' first and then see how they impact on the rules of procedural fairness.

Chapter 2 will, therefore be divided into three aspects under the following subheadings:

2.1 Dismissal: Definition, Meaning and Explanation.

2.2 Misconduct

2.2.1 Definition of Misconduct

2.2.2 Misconduct in the Social Perspective

2.2.3 Dismissible Misconducts

2.2.4 Illustrative list of Dismissible Misconduct.

2.3 Procedural Fairness

2.3.1 Meaning and Purpose of Procedural Fairness in relation with Dismissal due to Misconduct.

2.3.2 Scope of Procedural Fairness in relation with Dismissal due to Misconduct

2.3.3 Content and Form of Procedural Fairness in relation with Dismissal due to Misconduct.

2.1 Dismissal: Definition, Meaning and Explanation

There has been no specific definition of the term `dismissal' in the Mauritian Labour Act 1975 and the South African Labour Relations Act 1995. Those who drafted these legislations might have thought that the word is too simple and too well known to require any definition or they might also have thought that the words are too familiar to all classes of employees for whose protection it may be used. Whatever might be the intention of the drafters, it is important to construe its meaning according to the established rules of interpretation.

In the present instance, the meaning of the word `dismissal' has to be contextualised as it is not intended to look at its meaning from a broad perspective as provided in the South African Labour Relations Act 1995. It obviously means that dismissal due to redundancy, retrenchment, non-renewal of fixed term contract of employment, selective re-employment, refusal to resume work after taking maternity leave, absenteeism and constructive dismissal are not within the purview of this research. The meaning of the term `dismissal' will, therefore, be confined to situations where the services of an employee are terminated as a punishment on account of some misconduct committed by him during the course of employment. The conduct must have been unlawful and the relationship of trust and confidence must have irretrievably broken down.[1] It is therefore, within this context that the term `dismissal' will bear its meaning.

For lack of definition of `dismissal' in the Mauritian labour legislation, reference can thus be made to the South African Labour Relations Act 1995 which defines dismissal as follows in Section 186:

Dismissal means that -
(a) an employer has terminated a contract of employment with or without notice.

From this definition, `dismissal' refers to termination of the contract of employment at the initiative of the employer.[2] It is implied, as well, that the termination is as a result

of the conduct of an employee which has made the continuation of the employment relationship intolerable.[3]

The legal implication of dismissal is also explained in a more precise manner by the Calcutta High Court in *Union of India v Someswan Banerji*:[4]

> ***Dismissing a man is putting an end to his employment. He may be dismissed rightly or wrongly, but the act of dismissal is an act of terminating his employment. It matters not whether his employment is terminated because of dishonesty, corruption or bad health. In all three cases he has been dismissed...In all the cases, the services has been terminated..."***

Similarly, the British Employment Protection (Consolidation) Act 1978, has defined a dismissal as a termination of an "employee's contract of employment." The Employment Appeal Tribunal Rules 1980 has provided that "dismissal" means
(a) the termination by his employer of the employee's contract of employment with the employer, whether prior notice of the termination was or was not given to the employee.

These different jurisdictions mentioned above, have common points of understanding that dismissal takes place when the contract is terminated at the instance of the employer and entails the communication by it to the employee of the message that the contract has come to an end.

The Mauritian labour legislation being deficient of any definition has borrowed from the British Trade Union and Labour Relations Act 1974 which provides to the effect that an employee "shall be treated as dismissed by his employer if and only if –
(a) the contract under which he is employed by the employer is terminated by his employer, whether it is so terminated by notice or without notice;...[5]
This provision was quoted in *H.Periag v International Beverages Ltd*[6] where the Supreme Court of Mauritius has drawn a distinction between dismissal due to the conduct of an employee and a dismissal where the "termination of the relationship is

at the initiative of the employee but is triggered off by a breach of the contract of employment by the employer." Here also the Supreme Court has evaded the issue of defining `dismissal.' Instead, the Supreme Court has found it more convenient to give the requirements of a `justified dismissal' for misconduct. In *Société de Gérence de Mon Loisir v Ootim*[7] where Glover CJ stated:

> Section 32(1)(b) of Labour Act lay down three conditions that must be fulfilled before a worker is so dismissed namely that:
>
> (1) he is guilty of misconduct;
>
> (2) the dismissal is effected within a certain period, failing which the employer will be deemed to have waived his right; and
>
> (3) the employer cannot in good faith take any other course such as for example, to impose a lesser sanction or not to inflict one at all."

Although, from the above, the Court has not given a clear definition of `dismissal', it has nevertheless given an overview of the nature of dismissal due to misconduct at common law. In this respect the South African law of dismissal supported by the doctrine of unfair labour practice has been able to encapsulate quite significantly the meaning and implication of the term `dismissal'

2.1.1 The Nature of Dismissal due to Misconduct and the South African Common Law Principles.

At common-law, it should be noted that the employee's obedience to his employer's lawful orders is the cornerstone of the employment contract so far as the employee is obliged to obey those commands.[8]

The conduct of the employee towards his employer determines the relationship between the two parties. In *Leask v French*[9] it was held that subordination of the employee to the power of the employer is the hallmark of the employment relationship. In that sense, a transgression of a workplace rule by the employee is regarded as misconduct which may lead to the termination of the employment relationship at the initiative of the employer.

Before the 1979 amendments to the Labour Relations Act, dismissal for misconduct was regulated by the common law contract of service whereby the normal remedies of breach of contract were available to an employee who happened to face dismissal for misconduct.[10]

In terms of the common law, there are two kinds of dismissal on account of misconduct:
-Dismissal on notice and
-Summary dismissal

2.1.1.1. Dismissal On Notice

It has been seen that before the concept of unfair labour practice was introduced, employment contracts could generally be terminated at the will of either party by the giving of notice.

Bennett contends that it is no longer the position, as it is now necessary to have a good substantive reason for dismissing the employee. He states that the 1988 Amendments to the Labour Relations Act firmly entrenched the element of substantive fairness into the definition of an unfair labour practice by stipulating that dismissals by reason of disciplinary action must be for a valid and fair reason, if it is based on misconduct.[11]

The rules regulating employment would depend on the specific employment contract in terms of the disciplinary codes which were in existence at the time. Generally, absence from work is a misconduct which reaffirms the importance of having an enquiry to establish the reason for the absence of the employee. The court has been assuringly quick to come to the assistance of employees whose reasons for absence had been that their lives would have been endangered had they come to work. In the case of *Basontwa & Another v Homegas (Pty) Ltd*[12] the Court approved of the approach of the employers who had been particularly sensitive to the predicament of black employees caught in the cross-fire of unrest which has enveloped many black

residential areas. It was ruled that an absence from work in such circumstances would not be regarded as sufficient ground for terminating the services of the defaulting employees.

The concept of procedural fairness surfaces when an enquiry is being held to establish the reasons of the act of the misconduct and surrounding circumstances in regard to the warning given regarding the same misconduct. The Court will normally refuse to uphold employer's procedures where these do not comply with the standards of fairness the Court requires.[13]

A refusal to obey a lawful instruction normally justifies dismissal if the refusal is wilful and serious, provided the instruction forms part of an employee's contractual obligations and is legitimate and reasonable.[14] In terms of the common law contract, dismissal can only follow after a contractually agreed time period is given in notice or payment is given in lieu of notice. Such dismissal would be lawful if the employer has complied with the terms stipulated in the contract of employment.

In the case of *MAWU v Barlows Manufacturing Co.Ltd*[15] the question was whether the dismissal was fair, reasonable and justified in the circumstances and not whether it was lawful in terms of the common law. It was argued that where the required notice was given, dismissal cannot be said to be unfair. The Court ruled that a lawful dismissal, in terms of the common law, was unfair.

The principle has since been followed by a large number of the Industrial Court decisions and also has the blessing of the Supreme Court. The principle will be discussed more in detail in the coming chapters.

2.1.1.2 Summary Dismissal

This is a form of dismissal without notice, whereby the employer unilaterally cancels the contract of employment without giving notice to the affected employee on the basis of the alleged misconduct committed by that employee. Riekert is of the view

that misconduct must generally be of a serious nature to lead to summary dismissal of such employee. He goes further to say conduct which has been held to constitute a ground for summary dismissal includes dishonesty, drunkenness, gross negligence or incompetence, insubordination and absenteeism.[16] Besides these substantive procedures for instance, in the case of *Seloadi and others v Sun International (Bophuthatswana) Ltd*[17] an application for an order declaring that the summary dismissal of the applicants from their employment with the respondent was unlawful was instituted, on the ground that the respondent had not complied with the audi alteram partem rule.

Before discussing misconduct which leads to a dismissal, there must have been a contract of employment based on an agreement in terms of which the employee voluntarily undertakes to place his personal services at the disposal of the employer in return for a fixed or ascertainable wage.[18] It has been a controversial issue to establish the question whether the person claiming unfair dismissal was an employee as defined in the old Labour Relations Act.[19] In the case of *Liberty Life Association of Africa Ltd v Niselow*[20] the Court held that a person is an employee when that person puts his "productive capacity" at the disposal of another. This naturally entitles the employer to define the duties of the employee and to control the manner in which the employee discharges them.[21]

At common law, the employer is entitled to dismiss the employee summarily only if the employee's refusal to obey a lawful order is deliberate and of serious nature.[22] The seriousness of the disobedience is determined with reference to the circumstances, the question being whether the employee failed to perform the agreement or a vital part thereof.[23] This has been tested in a number of cases by the South African Courts to establish whether there has been a contract of employment before one can rightfully claim that there has been a dismissal. The Court applied the "dominant impression" test. In *Smit v WCC*[24] the Court held that one must establish whether the dominant impression gained from the relationship in question, is that it has features of a contract of employment.

Substantive fairness requires that an employee should only be dismissed for a valid reason. It is of vital importance that dismissal must be justified by good reasons for the termination of the contract of employment. This can only be achieved if fair procedures are obeyed and complied with.[25] In an English case of *Ferodo v Barnes*[26] the Court held that the Industrial Tribunal ought to ask itself a question that, had the employer at the time of the dismissal, reasonable grounds for believing that the offence put against the applicant was in fact committed?

This view was adopted in the case of *Lefu v Western Areas Gold Mining Co*[27] that all that is required is that the employer should at the time of the dismissal have had reasonable grounds for believing that the offence had been committed.

A dismissal will, in all probability, be regarded as substantively unfair if the dismissed employee was unaware of the rule broken by him. It is common cause that sometimes there is no clear legal reason for the dismissal in terms of the disciplinary code.[28]

2.1.2 Is Dismissal a fair and appropriate sanction for Misconduct?

Although the term `Misconduct' will be discussed in the next section of this chapter, it is useful to know, while considering the ultimate sanction of dismissal, whether or not misconduct can be a reason to make the dismissal fair and appropriate. This has given rise to tremendous debate and conflict in giving a proper meaning to `dismissal due to misconduct'.

From the very outset, it must be clear that not all types of misconduct do warrant dismissal. But there are cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of the dismissal, take the view that whatever explanation the employee may advance, it would make no difference. These types of misconduct will be discussed in the next section of the chapter. However, just to have a brief idea whether or not

dismissal is the fair and appropriate sanction for misconduct, reference can be made to a few cases.

In *Heathcote v PG Autoglass (Pty) Ltd*[29] the Court found that the question of fairness of the dismissal must be assessed by the Court objectively in the light of objective standards, norms and guidelines as applied to the circumstances of a particular case. This approach does not imply that the Court will substitute its own decision for that of the employer. What the Court must do is to consider whether the penalty of dismissal in the circumstances of the case was fair and appropriate, judged objectively in the light of prevailing industrial relations, standards and norms of the employer. The question is not whether the Court itself, in substitution of the employer, would have imposed the sanction of dismissal, but rather whether the employer, in imposing this sanction, was acting fairly, as judged by objective standards and guidelines.

In *SACCAWU & Suping v City Lodge Hotels (Pty) Ltd*[30] it was found that the Court must carefully consider the interest of both the employer and dismissed employee in assessing the fairness of the dismissal. The same view was expressed in *Mhlongo v SA Mutual Life Assoc Society*[31] where the Court found that the punishment must not be worse than the offence and that the interests of the employer must be counter-balanced against those of the dismissed employee.

In *Abrahams v Pick 'n Pay Supermarkets OFS*[32] it was said that the Court will hold that the dismissal was fair when the employee's misconduct resulted in the relationship of trust and confidence between employer and employee being broken down irretrievably. The Labour Appeal Court in *Scaw Metals Ltd v Vermeulen*[33] also echoed the view of Abrahams' case by stating that dismissal for misconduct is justified if the misconduct had the effect of destroying or seriously damaging the relationship of employer and employee so that a continuation thereof becomes intolerable. In *Hotel Liquor Commercial & Allied Workers Union of SA & Another v Fedics Group (Pty) Ltd t/a Fedics Food Services*[34] the Court set certain guidelines to determine whether the relationship of trust had irretrievably broken down. These are:

(a) Whether the conduct destroyed reasonable hope for the restoration of an employment relationship?

(b) Did the employee deserve protection in continuation of his employment having regard to his conduct?

(c) Had trust been fundamentally destroyed?

(d) Did conduct go beyond that which the employer in the circumstances could reasonably have been expected to tolerate?

In *EAWTUSA & Another v The Productions Casting Co (Pty) Ltd*[35] the Industrial Court stated:

> ***"As far as misconduct is concerned I believe that if the employer is of the bona fide view that as a result of the employee's conduct which has come to his attention and which he has investigated to such an extent that would exclude any grounds that he (the employer) acted arbitrarily, the relationship between him and the employee has become intolerable for commercial or public interest reason, he will be entitled to dismiss the employee. If an employer for instance mistrusts an employee for reasons which he must obviously justify (not according to any particular standard of proof), and he can show that such mistrust, as a result of certain conduct on the part of the employee, is counter-productive to his commercial activities or to the public interest (where appropriate), he would be entitled to terminate the relationship."***

In *Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union & Others*[36] Spoelstra J also said at 1037F-H:

> ***"In my view, a disregard by an employee of his employer's authority in the presence of other employees, amount to insubordination and it cannot be expected that an employer should tolerate such conduct. The relationship of trust, mutual confidence and respect which is the very essence of a master/servant relationship, cannot under these circumstances continue. In the absence of facts showing that this relationship was not detrimentally affected by the conduct of the employee, it is unreasonable to compel either of the parties to continue with the relations."***

In *Man Truck & Bus (SA) (Pty) Ltd v United African Motor & Allied Workers Union*[37] the following was said by the arbitrator, Mr Brassey, at 185G-I:

> ***"Conventional wisdom has it that there are three grounds of dismissal: dismissal for misconduct, for incompetence/incapacity (which I shall, for simplicity, call dismissal for incapacity) and for operational requirements. Three categories cover the field. In the first two there is work for the employee to do, but he cannot be trusted to do it properly; in the third he can do the work, but there is none for him to do. That they overlap is undeniable. Dismissal for theft, for example, is normally seen as dismissal for misconduct; but it can also be regarded as dismissal for incapacity, because the employee is revealed as someone who lacks one of the qualities - trustworthiness - necessary for the job and with effort, it can even be described as dismissal for operational reasons because an employer obviously cannot run a business with untrustworthy employees. The overlap illustrates that (absenting any improper motive, like victimisation or union bashing) we are ultimately asking a single question; did the dismissal make commercial sense in the circumstances?"***

Rycroft and Jordaan stated as follows:

> ***"As a general rule, misconduct (or accumulated instances thereof) will be sufficiently serious if it renders the continued relationship between employer and employee impossible. Relevant factors include the nature of the misconduct, possible prejudice to the employer, and the employee's state of mind. These are more or less the same considerations that are applied to determine the seriousness of an employee's misconduct for purposes of dismissal in terms of the common law. Thus it is not surprising that the industrial court often sought guidance from common law principles when considering whether an employee's misconduct had been sufficiently serious to warrant dismissal."***[38]

This view is also adopted by Le Roux and Van Niekerk where the authors stated as follows:

> ***"A theme expressed in many decisions is that dismissal is the `ultimate' sanction and should not be imposed automatically. The tests most often applied is an appropriate sanction ask the question (in various ways) whether the conduct of the employee has led to the employment relationship (which is often said to be based `on mutual trust and confidence') being seriously damaged or destroyed and/or whether its continuation is possible or tolerable for the employer. For example, it has been stated that dismissal is justified where the disciplinary offence committed by the employee has the effect of seriously damaging or destroying the relationship between employer and employee so that the continuance of that relationship could be regarded as intolerable; the relationship of trust, mutual confidence and respect cannot...continue; the relationship is irreparably harmed; or where the continuation of the relationship is `futile'***[39]

In the circumstances cited above, dismissal can be said to be a fair and appropriate sanction.

2.2 MISCONDUCT

2.2.1 INTRODUCTION

Neither the Mauritian Labour Act 1975 not the South African Labour Relations Acts of 1956 and 1995 have defined the term 'misconduct'. The rationale of this is obviously, to avoid a restrictive definition especially at a time when the law of master and servant is losing much of its rigour and some of the misconduct are no longer considered sufficient for dismissal of an employee, unless there are aggravating circumstances to justify such dismissals.

The brief introduction raises two important points, viz,

(a) the need for interpretation of 'misconduct' within the context of changing values affecting the law of master and servant.

(b) the need to distinguish between misconduct that are no longer considered sufficient for dismissal and misconduct with aggravating circumstances that justify dismissal.

Thus to understand the nature and meaning of a 'dismissible misconduct' it is essential

(i) to seek a proper definition of the term 'misconduct' as contemplated in the Labour Relations Acts of Mauritius and South Africa, and most importantly, in the judicial pronouncements of both countries; then

(ii) to discuss the multidimensional nature of 'misconduct' from the perspectives of the two issues raised above in (a) and (b).

2.2.2 DEFINITION AND MEANING

In the absence of any statutory definition, as mentioned earlier, the word 'misconduct' has to be understood in its ordinary dictionary meaning, and the meaning given during numerous adjudication in Mauritius and South Africa. For further clarifications and expositions reference will be made to other commonwealth jurisdictions.

The dictionary meaning of the word 'misconduct' is 'improper behaviour, intentional wrong doing or deliberate violation of the rule of standard behaviour." Black's Law Dictionary defines 'misconduct' within the context of employment, as "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 act."

It stems from this definition that where the employee is guilty of a misconduct, it should be such that the misconduct presents a "reel obstacle a la poursuite de l'exécution du fontionement de l'entreprise."[40] It is an all embracing concept "which includes every and any act arising from the conduct of the employee, other than incompetence or incapacity, which has negative effect on the business of the employer or employment discipline at the undertaking or outside the workplace."[41] Here discipline means "standardised organisational behaviour set up by rules and regulations of an industrial establishment at a particular time, deviation from that standard deliberately or negligently will be an act of indiscipline or an act subvertive of discipline." [42]

These decisions have given some guidelines for finding out the meaning of a particular act which can be deemed to be subversive of discipline resulting in dismissal in Mauritius and South Africa.

In *Nawosah v Mauritius Drug House Ltd*, Boolell P.M said, "Summary dismissal after an act of misconduct by the employee is justified if keeping the employee after his misconduct "est grave la faute susceptible d'apporter un trouble profond dans la

fonctionnement et la marche de l'entreprise de telle sorte que le maintien du salarier est l'impossible", [43] et "qui rend impossible le maintien du contrat du travail."[44] The opinions of the Industrial Court lay down the essentials that an employee is obliged not only to discharge the duties faithfully and sincerely but also to ensure that while doing so, he/she does not commit any act which is incompatible with the faithful discharge or performance of his/her duties. Thus if the employee does"...anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him."[45]

In South Africa, the court endorsed the principle that an employer is entitled to dismiss an employee who is in breach of trust in the form of conduct involving dishonesty and unlawful behaviour. There are abounding cases that have supported the view expressed in *Gerry Bouwer Motors (Pty) Ltd v Preller*:

> ***"I do not think it can be contended that where a servant is guilty of misconduct that is inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him."***[46]

Thus, even if the employee did not act dishonestly, but if his/her conduct "was of such type that it was inconsistent, in a grave way; incompatible with the employment in which he had been engaged as a "manager" the employer is entitled to dismiss him/her.[47]

With such elucidations from the numerous judicial decisions it is clear that the concept "misconduct", especially 'dismissible' misconduct, has greatly changed in recent years.

To understand this phenomenon in the law of dismissal due to misconduct, it is important to view employees misconduct in a broader modern social perspective.

2.2.3 'Dismissible Misconduct' in a Broader Modern Social Perspective.

In earlier days even for a minor misconduct (if it can be called even a serious lapse on the part of the employee), the employer was within his right to dismiss an employee summarily. The case of *Turner v Mason* [48] is an illustration in point. In that case, the employee was dismissed because she left the place of duty to see her dying mother after the leave she asked for was refused. It is a case of moral obligation owing to the ailing mother versus legal obligation to the master. The order of dismissal was upheld by the court on the ground that the servant had no sufficient ground to ignore her legal obligation to the employer.

How then were the rules of conduct interpreted in Mauritius and South Africa?
The pattern was, obviously, not different from the precedence set by *Turner v Mason.* In *Town Council of Beau Bassin and Rose Hill v Jennah*[49] the Supreme Court of Mauritius was of the view:

> ***There was a time when the dismissals of the employees for mere trifler was held by the court to be justified. Sometimes a single instance of insolence, negligence or insubordination was held sufficient to justify dismissal.***

In fact, both in Mauritius and South Africa, the state, far from ensuring equitable disciplinary procedures and practices, has endorsed the employer's discretion and authority in these matters and in many cases gone beyond tacit support to treating breach of employment contract as a criminal offence.[50] For instance, the Mauritian Ordinance No.16 of 1862 stated that unlawful absences should be punished according to the following penalties:

(1) Employers were liable to lawfully withhold the wages and allowances for the whole period of absences;

(2) The employee guilty of absence to be sentenced (this was at the option of the employer) by the stipiendary magistrate of the district for a period not

exceeding 14 (fourteen) days imprisonment or to a prolongation of his service for the said period of absence.[51]

Similarly, in South Africa, from 1911 until 1974 there was a body of law which aimed at controlling by criminal sanctions the conduct of black workers. The provisions of section 14 of the Native Labour Regulation Act 15 of 1911 was repealed by the Black Labour Act 67 of 1964 but the same provisions were found unaltered in section 15 of the later Act which made any person guilty of the offence:

(a) without lawful cause absents himself from his place of employment or fails to enter upon and carry out the terms of his contract of employment;

(b) wilfully and unlawfully does or omits to do anything the doing or omission thereof causes or likely to cause injury to persons or property;

(c) neglects to perform any work which it is his duty to perform or unfits himself for the proper performances of his work through the use of dagga or other habit-forming drugs or by having become or being intoxicated during working hours

(d) refuses to obey any lawful command of his employer or any person lawfully placed in authority over him or uses insulting or abusive language to his employer or any person lawfully placed in authority over him.

(e) after having entered into an agreement of service, whether oral or in writing with a labour agent or holder of an employee's recruiting licence and after having received an advance in respect thereof, accept another advance from another labour agent a holder of an employer's recruiting license in consideration of entering upon any other contract of service under the first mentioned agreement shall be liable on conviction to a fine not exceeding fifty rand or in default payment. to imprisonment for a period not exceeding three months.

Section 65 of the Labour Relations Act 28 of 1956 criminalises in specific circumstances the instigation of a strike or lockout, as well as the incitement to take part in a strike or lockout.

Startling as it may be. these statutory provision which favoured the employer, were far from being equitable and commensurating with the degree of misconduct. But now the harshness of the punitive law has much abated in the context that have been brought about by the concept of social justice and humanist trends of the modern society based on social welfare laws. A new jurisprudence in the law of industrial relations has. therefore, emerged with the growth of strong unionism and "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."[52] These social values have, as a result, enhanced the dignity of an employee at his/her workplace. Where previously no tribunal could interfere with the severity of punishment inflicted on an employee by his/her employer, now with the change in social outlook, the court is empowered with the unfair labour practice jurisdiction to protect the employee against any arbitrary or unreasonable disciplinary action. [53] Commenting on this legal phenomenon Cooper said:

> ***"Many of the nineteenth century cases should be read with caution for they rest upon a different social background and would probably be decided differently today."***[54]

In Mauritius as well as in South Africa an employee is now in his permissible right to organise. associate and practice labour relations[55] which would otherwise have been considered as a misconduct and liable to dismissal. Even to go on 'strike' is no longer a misconduct if it is lawful and justified,[56] and does not violate any statutory criteria. In Mauritius and South Africa strike action will be illegal if it does not comply with the statutory pre-strike procedure.[57] Although, absenteeism without notification has been considered to be a misconduct warranting dismissal, [58] the court has exercised great care in determining whether or not it is dismissible misconduct. In Mauritius this issue has been debated in the case of *Noel Furniture Ltd v Khoodeeram.*[59] The respondent was injured on his way to work and made several attempts to have his employer notified of his absence from work. In fact, the employer was not notified and the respondent was dismissed from his job. The appeal court held

(i) the obligation to notify the employer when a worker is ill, within the required time limit and to send a medical certificate in cases of prolonged illness is mandatory.

(ii) But failure to comply with such requirements will not necessarily result in dismissal. The provisions of the Labour Act regarding termination of employment must be borne in mind. There may be occasions where it can be shown that a worker has made efforts, albeit unsuccessful to notify the employer. In these cases, summary dismissed is not warranted.

Thus with the advent of the notion of social justice and fairness in the law of dismissal, disciplinary rules are no more "harshly administered, inconsistently applied and arbitrarily enforced."[60] *In Jupiter General Insurance Co. Ltd v Shroff*[61] the privy council gave some indication of the modern trend and of the principle by which courts are guided today:

> ***"Their Lordships recognise that the immediate dismissal of an employee is a strong measure….. On the one hand, it can be an exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence, on the other, the Lordships would be very loath to assent to the view that a single outbreak of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground for dismissal."***

Sir John Beaumont, C.J observed in the case, "one must apply the standards of men and not those of angels."[62] Thus this modern attitude of governance which reflects the principle of administrative justice, imposes on the employer a positive duty to meet the requirements of legality, fairness and reasonableness when deciding to impose disciplinary action against an employee for misconduct. To give effect to the guest for improved decision making, legislative as well as judicial interventions have become a strong feature in the law of discipline in Mauritius and South Africa.

In South Africa, certain conduct that may have once been viewed as misconduct by employers are now expressly permitted by the Act. Section 187 of the Labour Relations Act 1995 lists a series of reasons for which an employee may not be dismissed under any circumstances. Participation in lawful strike or refusing to do the work of a striker or to comply with a collective bargaining demand of the employer cannot now be treated as misconduct. Even a woman who left to have a baby was

largely at the mercy of her employer in the sense that her absence was treated as a reason for termination of the contract of employment. Now a woman may not be dismissed in any circumstances merely because she is pregnant.[63]

The South African Labour Law has also extended its unfair labour practice jurisdiction to view compassionately and flexibly those cases related to 'drunk on duty'. The case of *Molefe v Industrial Lead Works (Pty) Ltd*[64] is of singular significance in this area of law, as it does not view "drunkenness" as a misconduct personal to the employee, but as a problem known as 'dopstelsel' in farms which was introduced and encouraged by the employer to make the employees 'slaves of alcohol'. Thus, in determining termination of a farm worker's services as an appropriate sanction, the court had to look not only at the employer's contribution in furthering the abuse of alcohol, but also the age old institutional custom of encouraging alcohol dependence. The court further enjoined the agricultural section employer to demonstrate a sense of moral duty towards the farm worker who is guilty of alcohol abuse or related conduct so as "to develop a solution or sanction which realises the commercial goal of the employer, ensures relationship and is directed at rehabilitation." The court finally found that where the dismissal of a farm worker for an alcohol related offence unfair, "(it) may order that the farm worker be reinstated on a final written warning for such alcohol related offence to the effect that, in the event that such farm worker again abuses alcohol, he may be dismissed without further notice on the condition that the employer provides the farm worker support and assistance in his fight against alcohol abuse, such assistance also takes the form of active steps such as the withholding of the provision of drink to the farm worker and the provision to the farm worker of alcohol-rehabilitative medication."[65]

Thus, from the above instances, it is clear that the term misconduct has assumed a multidimensional facet which has to be flexibly interpreted according to the standard dictated by the economic interest and mores of the society, but its interpretation falls entirely "within the supervision and control of the courts... which may pronounces on the severity of the measure and if the measure was justified."[66] Considering the

principles laid down by the unfair labour practice jurisdiction, what would then be the court's formulated criteria to determine a dismissible misconduct?

2.2.4 Criteria set by the Court for determining Dismissable Misconduct

The Court has acted decisively to protect employees by enforcing a uniform and well developed set of guidelines for application or to cases of dismissal due to misconduct. *Deep River Beau Champ Ltd v Baidhanan Beegoo*[67] is a landmark case in point decided by the Supreme Court of Mauritius. The Court conceded the fact that the following principles should be taken into account when a conduct is considered as a sufficient reason for dismissal:

(i) not every misconduct justifies summary dismissal;

(ii) misconduct must be viewed in the specific context where it occurs and in the relevant nature of the relationship existing between the employee and employer.

(iii) where the misconduct would have a direct bearing on the employer-employee relationship to the extent that the worker brings about "un trouble profond dans le fonctionnement et la marche de l'entreprise" (Jurisclasseur Travail Fascicule 30 note 163) summary dismissal would be justified.

(iv) for misconduct to qualify under (iii) above, the employee must have damaged the trust which an employer should have in an employee beyond repair and they give the employer cause to worry;

(v) conviction on a criminal charge does not operate to give the employer an automatic licence to dismiss an employee summarily on the ground of misconduct.

In South Africa, several principles have also been enunciated to determine the sufficiency of the reasons for dismissal due to misconduct. In *Jefferies v President Steyn Mine*[68] and *Vermuth v Macsteel (Pty) Ltd*[69] the court has enlisted essential points to be considered when evaluating the justification of an employer to discipline the employee for misconduct. They are:

(i) The nature of the misconduct.[70]

(ii) The nature and the work performed by the employee.

(iii) The employee's state of mind. The employee knew he could be dismissed for his/her misconduct.

(iv) The employer's disciplinary code.

(v) The consistency of the employer's actions.

(vi) Prior warnings received by the employer.

(vii) The nature and size of the employer's workforce.

(viii) The impact of the misconduct on the workforce as a whole as well as on the relationship between the employer and the employee, and the capacity of the employee to perform his/her job.

(ix) The position which the employer occupies in the market place and the possible rejudice to it/him/her.

(x) Any mitigating factor to be considered by the employer in determining the appropriate sanction to be imposed for misconduct.

From these lists, noticeable points of similarities can be drawn on the criteria set by the courts in Mauritius and South Africa. Emphasis has mostly been placed on certain attributes that will make a misconduct justify dismissal. They are discussed under the following subheadings:

2.2.4.1 Misconduct must be 'gross' and 'wilful'

In *Mon Desert Alma Ltd v G. Charoux*[71] the Supreme Court of Mauritius has attempted to draw a distinction between 'faute legere' and 'faute lourde'. The respondent was publicly defying the authority of the General Manager who had, only a few days before, spared him a dismissal which he would have "richly deserved". Such conduct which was "susceptible d'apporter un trouble profond dans le Fonctionnement et la marche de l'entreprise de telle sorte que le maintien du salarie dans l'entreprise est impossible."

The merit of the above decision in Mauritius has also found support in the form of the South African Labour Relations Act 1995. Item 3(4) of schedule 8 states:

> ***"Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable."***

Both Mauritius and South Africa have used the terms "serious", "grave", "gross" and "wilful" as qualifiers when providing examples of the type of misconduct that may warrant dismissal. The use of such qualifiers appear to suggest that, for example dishonesty simpliciter as opposed to gross dishonesty, will not be sufficiently serious to warrant dismissal for a first commission of offence. This in turn, raises the debatable issue of when dishonesty, theft, assault, insubordination, damage to property, become gross or what factors must be present to make these misconduct 'gross'.

Item 3(4), referred earlier, has provided an illustrative list to the type of offence which may warrant dismissal for a first offence. It is noteworthy that in all the examples provided therein, the element of intention is expressed:

> ***"Examples of serious misconduct, subject on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination."***

Unlike the South African Labour Relations Act 1995, the Industrial Relations Act 1973 of Mauritius does not enumerate a list of gross or wilful misconduct that will warrant dismissal except that Section 12 states:

> ***"Where there has been misconduct, the disciplinary action to be taken will depend on the circumstances, including the nature of the misconduct."***

The provision has left the court with a wider ambit to decide on the rationale of a dismissal based on the merit of each case. In *Nanhuck v Ramlagun*[72] the Supreme Court of Mauritius went to a greater length to discuss the meaning of 'serious and wilful misconduct.' It gave an illustration from the case *Brooker v Warren*[73] where the facts were as follows:

> ***A workman was employed in a factory at a circular saw which was driven by machinery. His duty was to hold the wood and guide it when it was being sawn. He was told on several occasions both by his employer and by the factory inspector, to keep guard upon the saw when it was in use. The object of the guard was to prevent the wood which was being sawn, if it was jerked up from being caught by the teeth at the back of the saw and hurled about the workshop, to the danger of those at work there. The workman had worked for several years at circular saws before the guard was invented, and he had a great aversion to using a guard. Upon the day in question he intentionally did not place the guard upon the saw when using it and the piece of wood which was being sawn jerked up and was hurled by the saw against him, and he was killed. The Court of Appeal held that serious and wilful misconduct had been proved. The Master of the Rolls held that the worker was guilty of misconduct in deliberately and intentionally refusing to obey the order to note the guard, and the misconduct was wilful and that misconduct was serious because it produced a condition of danger to himself and others. He was therefore guilty of serious and wilful misconduct.***

In *Gobin v Ramruttun*[74] the issue of serious and wilful misconduct was discussed. When the matter relates to serious and wilful misconduct of the workman, the onus of proof is on the employer who has to show that the misconduct was both serious and wilful. On the facts of the case it was held that

> ***"it was through the applicant's gross negligence that the accident took place and that respondent is not liable under the Workmen's Compensation Ordinance, 1931"***

It was referred further to the provision to Section 2 of the Ordinance, as amended by the Workmen's Compensation (Amendment) Ordinance, 1947, the employer shall not be liable should:

(a) the accident proved to be attributable to the workman's own serious and wilful misconduct which shall include:

(i) being in any degree under the influence of drugs or intoxicating drink; or

(ii) a contravention of any law, regulation or order, whether statutory or otherwise, expressly made for the purpose of ensuring the safety or health of workmen, or of preventing accidents to workmen, if the contravention was committed deliberately or with a reckless disregard of the terms of such law, regulation or order; or

(iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen; or

(iv) any other act on omission, which the court may, having regard to all the circumstances of an accident, declare to be serious and wilful misconduct.

From the reasoning of the court, it is clear that the issue involved is not of negligence on the part of the employee, but something beyond it. The word 'wilful' imports that the misconduct was deliberate and not merely a thoughtless act on the spur of a moment. The word 'serious' in the context of the accident does not mean that the actual consequence was serious but that the misconduct itself had a serious bearing. In *Johnson v Marshall*[75] Sons and Co the Appeal Court explained that the word 'wilful' must not only mean a mere intentional breach of a rule, but it also means wilful with the intention to be guilty of misconduct.

Throughout the discussion, the general tenor lends support to the fact that misconduct can be described as 'gross' or 'serious' only if it satisfies the necessary requirement of intention. The case of *Nkomo v Pick n Pay Retailers*[76] contrasts squarely with the case of *Anglo American Farms t/a Boschendal Restaurant v M.Konjwayo.*[77] On the one

hand in Nkomo's case, the dismissal of a bakery assistant who had eaten part of a pie, the property of the employer, was held by the industrial court to be unfair; and on the other hand, in Anglo American Farms case the respondent was employed as a waiter and his duties necessarily entailed handling the appellant's stock-in-trade, including soft drinks. It was part of the respondent's job to fetch drinks which had been ordered by customers from the refrigerator in the office, carry them into the restaurant and serve them to the customers there. In the nature of things, this task could not practically be carried out without respondent's being placed in a position of trust, especially where the appellant's stock control system was not very sophisticated or effective and the cashier and other members of the appellant's restaurant management staff could not have been expected to play the role of policemen watching every move made by every waiter. However, the employee was dismissed for theft of one can of softdrink, even after serving for nine years.

The court distinguished the two cases after analysing the facts. In Nkomo's case there was no evidence of premeditation, and nothing to show that the employee had a thieving propensity which could cause his employer reasonably to conclude that the employee was no longer to be trusted. The court concluded at 943 G-H that:

> ***"The offence is in my opinion not such that it shows a degree of dishonest intent which would be unacceptable to an employer."***

Whereas, in the Anglo American Farms case, the court held that the respondent's theft or attempted theft of the Fanta was premeditated and executed over a considerable period of time by means of a surreptitious plan. Thring J, in conclusion held:

> ***"In my view it demonstrates a "thieving propensity on his part, and I cannot conceive that theft of this kind by a waiter could ever be acceptable to a self-respecting restaurateur."***[78]

It was thus a conduct of "such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant, such as would render the servant unfit for continuance in the master's employment."[79]

The approach adopted by the court is that where the dismissal is for dishonesty, it is not the value of the 'goods stolen' that is determinative of whether dismissal was the appropriate sanction for the dishonesty but rather the issue of whether dishonesty went to the root of the relationship of trust between the employer and the employee and rendered the continuation of the employment relationship intolerable.

This leads us to the next criterion for a dismissable misconduct: which is 'misconduct, breach of a vital term in the contract of employment'

2.2.4.2 Misconduct – Breach of a Vital Term in a Contract of Employment.

In Mauritius and South Africa a contract of employment has always been the basis on which the employer and employee relationship has been built.[80] Added to this common law principle, there is an impressive superstructure of statutory rights not to be unfairly dismissed in the form of the Mauritian Labour Act 1975 and the South African Labour Relations Act 1995.[81]

Once entered into, the relationship becomes more and more non-negotiable because of the incorporation of unagreed (implied) terms, and terms, which the employee has little choice but to agree. Rycroft and Jordaan illustrate the content of these implied duties in the following terms:

> ***"The core of common law implied terms are, on the employee's side, a duty of obedience to the employer's lawful and reasonable instructions, a duty of fidelity, a duty care and a duty of reasonable efficiency and competence."***[82]

They even extended these duties, with other ramifications to such cannons of conduct, which regulated the fiduciary relationship between the employer and the employee:

> ***"The employee is obliged to further the employer's business interests. The employee may also not use his or her employment to make a secret commission or***

profit, may not misappropriate the employer's property, may not divulge confidential information and trade secrets obtained in the course of employment."[83]

Failure, therefore, to carry out any of these implied duties would constitute a breach[84] of a vital term of the contract of employment[85] which may entitle the employer to dismiss the employee summarily.[86] To make the dismissal valid and fair [87] the employer must on balance of probabilities[88] and establish objectively[89] that the misconduct is of such nature that it constitutes a breach so material that it goes to the root of the contract.[90] In *Teka v Public works Department*[91], on review, the Supreme Court held:

"That the refusal of the labourers to take their turn as watchman every fortnight was a breach of the condition of their employment which justified the employer dismissing them... Their refusal to comply constituted a breach of contract justifying the defendant in rescinding the contract. The dismissal was therefore not wrongful."

The Supreme Court of Mauritius has gone further to make the dismissal of an employee of a constructive nature in the event of the employee wilfully and deliberately causing the contract to come to an end:

It is perhaps necessary to repeat that whenever an employee does, by his deliberate conduct render impossible the continuance of the contract of work it is in fact he, the employee who constructively puts an end to the contract although it is left to the employer to take the initiative of declaring the contract to be ended."[92]

From the above mentioned, in trying to establish the fair and valid reason for dismissal due to misconduct, the court has applied another test which is irretrievable breakdown of employer-employee relationship.

2.2.4.3 Misconduct – Violates trust and Destroys Employer-Employee Relationship.

To ascertain the validity of a dismissal due to misconduct, the court has invariably asked:

> ***Did the misconduct "have the effect of destroying or seriously damaging the relationship of the employer and employee...so that the continuation of that relationship could be regarded as intolerable?"***[93]

Two tests seem to emerge from this question, viz

(i) the misconduct must have had the effect of destroying or seriously damaging the relationship of the employer and the employee; and

(ii) the continuation of that relationship could be regarded as intolerable.

It is clearly established that there is implied in a contract of employment a term that an employee should not conduct himself/herself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee.[94] This view was supported in *Pearce v Foster*[95] where it was stated:

> ***"It is one of the fundamentals of the employment relationship that an employer should be able to place trust in an employee. A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it."***

These rules are implicit in the law of dismissal in both Mauritius and South Africa. In *Deep River Beau Champ SE v Sydney Paul Etowar*[96] the court held:

> ***"first, by his refusal to comply with a legitimate order, the respondent was guilty of misconduct and, secondly, showed by his subsequent attitude that***

he could no longer work in the appellant's enterprise because of the incompatibility with his superiors."

Therefore, the employer could not, "in good faith, take any other course", [97] but to dismiss the employee. In effect, it means that the employee has created such a situation through his/her misconduct, that it had a destructive and damaging impact on compatibility as well as the relationship of trust.

The Supreme Court adopted the same principle in *Dry Cleaning & Steam Laundry Ltd v J.W. Clarisse*[98] when the facts were particularised as follows: The plaintiff circulated a tract drafted and/or signed by the plaintiff which the defendant's company considered to be tantamount to causing disruption and/or severe disturbance to the defendant's running its industry. Further the nature of the tract was most illegal, defamatory and injurious in the circumstances. The court was satisfied:

"that the tract contains very serious allegations against the defendant company. To my mind they amount to a breach of trust. An employee owes loyalty to his employer. Once an employer cannot trust his worker there is no way to keep the agreement alive."

These cases are quite evident of the fact that the bond of trust and good working relationship are quite essential between an employer and employee, and any breach would compromise the necessary relationship and warrant dismissal.[97] Cases abound in the South African law of unfair dismissal which illustrate that an employer is entitled to dismiss an employee who is guilty of conduct that is inconsistent with good faith and dishonesty.[100] The remark made by Thring J is quite pertinent here:

"It seems to me that the relationship between such an employer and such an employee is of such nature that, for it to be healthy, the employer must, of necessity be confident that he can trust the employee not to steal his stock in trade. If that confidence is destroyed or substantially diminished by the realisation that the employee is a thief, the continuation can be expected to become intolerable, at least for the employer."[101]

However, in turning to the question of dishonesty leading to dismissal, the court held in *JD Group Ltd v De Beer* after holding that the breakdown of relationship is something that must be objectively established, even by inference, that conduct which does not amount to theft in the true sense or which is not characterised by serious dishonesty will not be readily assumed that the trust relationship has been destroyed.

2.2.2.4 Misconduct that is Repeated and lacks Mitigating Factor.

In *Damon v Printpak (Cape)*[102] the court considered that in determining the appropriate sanction to be imposed on an employee for misconduct, an employer must look at the possibility of any mitigating factor. In the present case the mitigating factors were:

1. the employee concerned has an unblemished disciplinary record;
2. the employee concerned has a long period of service with the employer;
3. the employee concerned has demonstrated sincere and extreme remorse and openly and repeatedly apologised for his misconduct;
4. the employer was still favourably disposed towards the employee;
5. the victim of the employee's misconduct was not averse to the employee's continued employment by the employer;
6. the employee's misconduct was totally uncharacteristic and consisted of an impulsive act during a fit of rage;
7. the employee's personal circumstances such as circumstances entailing the employee being the breadwinner of his family and the fact that, in an instance where the dismissal has been imposed and the court has to assess the fairness thereof, the employee had been unemployed since his dismissal.

The Court in *ECCAWUSA obo Gumede v Mr Price*[103] considered different factors that pleaded in mitigation of the criminal offence of theft. It was held that factors, that may indicate that a final warning rather than dismissal, should have been imposed for

the offence of theft in the form of removing cash from the employer's till, included the following:

(1) the accused employee had not been charged with the same offence before;
(2) it had been the employer's policy not to dismiss employees for a shortage of funds in the tills but, instead, to require them to refund the money;
(3) item 1 (i) of the schedule 8 (the code of good practice) states that each case is unique and departures from the norms established by this code may be justified in proper circumstances;
(4) the fact that the amount involved was only +- R300.00, seen in conjunction with the fact that the employer had a history of not dismissing employees for the offence (principle (2)) indicated that this not such good dishonesty as to warrant dismissal – this was a mitigating factor.

But there are cases where the court has adopted that a serious offence would justify dismissal without having regard to mitigating factors.[104] By way of contrast, however, the more generally accepted approach has been that for a dismissal not to constitute an unfair labour practice, it entails a clearly distinguishable two phase enquiry. In the first phase, regard has to be had to the issue of guilt while, in the second phase, factors including mitigating factors are examined to determine the appropriate sanction.[105] Midway between these two approaches is a type of combination approach to the effect that where the offence is of a serious nature, dismissal will generally be appropriate and that only very strong mitigating factors will have to be present before a higher sanction would be appropriate.[106]

So far, it seems, that an employer may be able to dismiss an employee for a single offence of whatever nature. But where the act of misconduct is not serious enough to justify instant dismissal, repetition may suffice to make dismissal legally and procedurally fair. For instance in *Madlala v Wynne and Tedder t/a Thorneville Engineering*[107] it was held that wilful, repeated disobedience shows a complete disregard of the condition essential to the contract of service, namely, the conditions

that servants must obey the proper orders of their masters and that unless they do so the relationship is struck at fundamentally.

2.2.5 Dismissable Misconduct

Unlike Item 3(4) of schedule 8 of the South African Labour Relations Act 1995, neither the Industrial Relations Act 1973 not the Labour 1975 of Mauritius have specified the types of misconduct that could be regarded as 'serious and of such gravity that it makes a continued employment relationship intolerable," and would subsequently warrant the dismissal of an employee.

However, numerous cases have been decided by the industrial court, which gave substance to the meaning of dismissal due to misconduct. The following may be cited as few examples: In the *Town Council of Beau-Bassin Rose Hill v Jennah*[108] where the worker used coarse and vulgar language "with an added element of abuse" and an unveiled threat of violent retaliation to the inspector of the Council; *Chellen v Mon Loisir SE*[109] where the employee was found to be connected with a gang of thieves who had stolen a "corbeille"; *Desmarais Bros.Co.Ltd v SE of Beau Vallon Ltd v Nilkomol*[110] where a supervisor had used his worknote book to write libellous and scurrilous abuse towards his employers generally.

Examples of other types of misconduct are, absenteeism,[111] assault,[112] insubordination,[113] attending the duty late and falsely recording the time of arrival,[114] larceny,[115] smuggling,[116] breach of trust,[117] deliberate and systematic flouting of internal regulations,[118] fraud,[119] negligence,[120] deception,[121] use of vulgar and brutal language,[122] immorality,[123] misappropriation of property,[124] embezzlement,[125] insolence,[126] abandonment of work,[127] assault.[128]

In South Africa, as already mentioned, Item3 (4) of the schedule 8 of the Labour Relations Act 1995 categorises serious misconduct as "gross dishonesty or wilful damage to the employer's property, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross

insubordination." Through an accumulation of judicial pronouncements these types of misconduct, under different subheadings, have created a huge volume of precedence in the case of a fair dismissals. These misconducts relate to:- breach of trust and confidentiality;[129] dishonest behaviour of various shades – fraud, theft and unauthorised possession of employer's property;[130] use of abusive language;[131] violent and threatening behaviour;[132] fighting, drunkenness and disorderly behaviour;[133] sabotage of employer's business or property;[134] insubordination[135] and disobedience of lawful and reasonable orders;[136] unauthorised absence from duty[137] and sleeping on duty[138] are but some aspects of misconduct.

2.3 Procedural Fairness

2.3.1 Introduction

Unlike Mauritius where the Industrial Relations Act 1973 and the Labour Act 1975 impliedly makes reference to procedural fairness[139] with regard to dismissal due to misconduct, the South African Labour Relations Act 83 of 1988 specifically refers to disciplinary dismissal "without a valid and fair reason and not in compliance with a fair procedure."[140] What constitutes a fair procedure is not laid down by any of the statutes.

However, over the years industrial courts of both countries have formulated the principle that an employer who wishes to terminate the services of an employee on grounds of misconduct must be satisfied that there are sound substantive reasons for the dismissal, i.e legally justified , and must follow a fair procedure in arriving at that conclusion.[141] What it means is that "not only did the employer have to establish objectively and honestly that there was a `just cause' for the dismissal, the employee had to be afforded a fair and reasonable opportunity of speaking in rebuttal or in mitigation of the complaint.[142]

Having established that the term `procedural fairness' has come to be accepted in the jurisprudence regarding dismissal for misconduct in Mauritius and South Africa, it needs to be discussed what does the obligation to act in a procedurally fair manner involve? To answer this question it is proposed to look at the concept of procedural fairness from three different perspectives namely:

1. Meaning and purpose of `procedural fairness'.
2. Scope of Procedural fairness.
3. Content and form of Procedural fairness.

2.3.2 Meaning of Procedural Fairness

Various attempts have been made to devise criteria of relative precision to determine the bounds of procedural fairness. The court's attitude has been that `fairness' cannot be objectively determined as it "is an elusive concept."[143] Thus, to understand the meaning of `procedural fairness', one should not focus on the meaning of the concept as such, but what it implies. In *National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* remarked that fairness "implies a general duty to act fairly and in accordance with equitable justice;"[144] and what constitutes the `duty to act fairly' has been elucidated by various legal writers and judicial decisions.

Baxter in his seminal work describes the `duty to act fairly' as being nothing other than the "duty to observe the principles of natural justice in more fundamental terms."[145] Brassey also submits that "where the procedural fairness of the dismissal has been at issue, the court has sometimes had regard to the administrative law principles, in particular the rules of natural justice."[146] De Smith is of the opinion that the `duty to act fairly', which is a key element of procedural propriety, is increasingly replacing the term `natural justice'.[147]

From the viewpoints expressed by the legal writers, it is evidently clear that the public law jurisprudence has in the area where a decision-maker has wrongly or unreasonably exercised his discretion and caused injustice and unfairness on whom he has official governance, has, therefore, found remedies in the administrative law principles in the form of the concept called a `duty to act fairly',[148] which in substance means "acting in accordance with the rules of natural justice"[149]

The thought that underlines the above statements rests on the fact that procedural fairness, which is an essential component of the `duty to act fairly', derives its essential base from the rules of natural justice.[150] In the context of law of dismissal, in particular, the industrial court's growing institutionalisation of guiding standards has developed the requirements of the `duty to act fairly' or more precisely `procedural fairness', from the rules of natural justice of the common law to suit the employment

arena.[151] Thus from the readings of numerous other reported decisions of the industrial court the essential principles of natural justice are emanated which are the basis to the notion of `duty to act fairly' and subsequently to procedural fairness as well. In *Twala v ABC* Fabricus A.M said:

> ***"There are three basic requirements of natural justice which have to be complied with during a disciplinary enquiry: firstly that the affected person should know of the nature of the accusation against him; secondly, that he should be given an opportunity to state his case; and thirdly, that the tribunal should act in good faith..."***[152]

Similarly, in *Ndlovu v Transnet Ltd t/a Portnet*, the court found that:

> ***"It is for the employer to decide whether or not an employee has committed any disciplinary infraction and in order to do this in accordance with the rules of natural justice, the employer is obliged to hold a disciplinary enquiry."***[153]

So high a value have the Labour Courts placed on procedural fairness that in many cases employees have been given relief because of improper pre-dismissal procedures, even though the courts were satisfied that the dismissal was substantively fair. In *Medine Sugar Estate Co. Ltd v Wodally*, the Supreme Court of Mauritius held:

> ***Proof of gross misconduct is a necessary prerequisite to dismissal, whether at an informal hearing conducted under Section 32 (2) (a) of the Labour Act or a more formal hearing before the Industrial Court. It is an essential ingredient of that hearing, more particularly at the hearing before the court, that it should be fair. The element of fairness is lacking when evidence of material facts is led by a person who conducted an enquiry from others...without those other persons being heard so as to give an opportunity to the alleged offender to confront them and cross examine them."***[154]

Similarly in South Africa, the industrial court has consistently required that an employee who faces dismissal for alleged misconduct should be given the opportunity to state his/her case in relation to the charges brought against him/her, and to bring mitigating circumstances to the employer's notice.[155]

Thus in the employment context, the `duty to act fairly', as a standard procedure, imposes the duty on the decision maker "to go through procedures designed to ensure that all the relevant information, options, theories and values have been brought to his attention, and that in appropriate cases the decision maker is unbiased."[156]

From the reading of the above explanation, it is evident that the concept `procedural fairness' is a fundamental rule of justice which denotes "a process or series of actions which must be performed or followed to give effect to the principles of substantive law."[157] This definition, therefore, attends to two important criteria, i.e substantive and procedural, to make a disciplinary action by an employer fair. In developing and applying the notion of unfair dismissal, the court has applied both criteria:

> ***Where an employee whose dismissal was justified substantively, under section 46 (a) for want of hearing it need scarcely be repeated that doing what is right may still result in unfairness if it is done in an inequitable manner."***[158]

The essence of this formulation by the court is to develop a firm guideline and to test the justification of an action of dismissal or practice effected by an employer in disciplinary matters. The issue central to each case is whether the termination of service of an employee is reasonable,[159] just[160] and fair.[161] The normative standards that are applicable to disciplinary proceedings must not only be fair, but they also have to be applied fairly with due consideration of the employee's rights.[162] This principle was reiterated in *Yichito Plastics and SA Clothing & Textile Workers Union*[163] where it was stated:

> ***"It is well accepted that a dismissal will generally be fair only where a fair procedure was applied in arriving at the decision to dismiss and the decision itself was a fair one in the circumstances."***

By this statement the court has laid down an important juridical foundation which Brassey describes in the following way:

> ***It is a fundamental notion that a person should have the chance to state his case before a decision is taken that may adversely affect him. What is essential then to procedural fairness is that the employer should take steps to verify the truth of the allegations by way of an investigation and give the employee an opportunity to state his case."***[164]

Having dealt with the meaning of `procedural fairness' in relation with dismissal for misconduct, it is essential to know what do the courts aim to achieve by imposing procedural constraints on employers during a predismissal hearing?

2.3.3. Purpose of Procedural Fairness

The benefits flowing from fair proceedings during a disciplinary hearing has been articulated by both legal writers as well as the industrial court on a number of occassions.

As discussed earlier, the employer has an absolute discretionary power under the common law to dismiss an employee on notice for any reason, for no reason at all, and without giving the employee a fair hearing before taking the decision. This aspect of the law of dismissal raised concern in the mind of jurists such as Wade and Forsyth who asked:

> ***"...after what would be the sense of procedural protection if the employer was able to dismiss for any reason at all no matter how absurd or fair?"***[165]

But now since the perceived weakness of the common law has found remedy in the administrative law principles of natural justice, which embodies the concept of procedural fairness, fair proceedings have become a constituent element of a legal and democratic process which treats individuals with dignity and respect.

Giving due importance to human dignity in the entire process of a predismissal hearing, Megary J said:

> ***"Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feeling of resentment of those who find that a decision against them has been made without their being afforded an opportunity to influence the course of events."***[166]

Thus the very process has a value, at least to the employee, as

> ***"It meets the expectation of the person who stands accused that he will be given a hearing; it recognises the worth of a human being and gives him the satisfaction of knowing that he has said what he can in his defence. A person who is not heard, feels aggrieved however guilty he may be."***[167]

This is, in fact, a fundamental improvement in the conceptual approach to the nature and role of an unfair labour practice jurisdiction in labour relations. It focuses more on the relationship rather than the acts of the parties.

Thus guided by these principle underlying the concept `procedural fairness' the courts have held 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,[168] and the person investigating the alleged misconduct should act in good faith.[169]

An application of these principles become greatly significant where there is always room for a cynical manipulation of procedural forms on the part of the employer who has no intention to be persuaded and whose mind is closed from thinking openly,

fairly and impartially.[170] In this situation, the rules of procedural fairness aim at making the decision making process meaningful and not merely ritualistic.[171] Thus in *Plaschem (Pty) Ltd v Chemical Workers and Industrial Union*[172] the court developed firm guidelines to show the merit of procedural fairness:

> (a) when considering the question of dismissal, it is important that an employer does not act over hastily;
>
> (b) that he must give fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow;
>
> (c) both parties must have sufficient time to cool off so that the effect of anger on their decision is eliminated or limited.

Considering these guidelines, it could be seen that procedural fairness as a concept has "an intrinsic value"[173]and "an end in itself with no further need for justification."[174] It aims at improving the quality of decision making by requiring the employer to amass and take into account of all relevant information and to exclude irrelevant considerations. Basson states the benefits of a decision that is procedurally fair. It enhances

> (a) Improved decision-making;
> (b) the provision of a democratic safeguard against arbitrariness; and
> (c) a greater readiness on the part of the public to accept administrative decisions.[175]

These challenges fit into the pattern of a requirement that the employer's disciplinary power be exercised rationally that is without bias or regard to irrelevant considerations. A further aim of procedural fairness in this respect is, therefore, to restrain the unfettered discretion of an employer to dismiss at will under the common law doctrine.[176] *Slagment (Pty) Ltd v BCAWU, Nkadimeng and Mnqutheni*[177]illustrates that it would be unfair for the employees:

(a) to be called upon to face a disciplinary hearing on 45 minutes notice and even before the charges against them had been formulated;

(b) to be denied the opportunity of taking counsel, or reflecting on their conduct and possibly of having second thoughts;

(c) not to be informed that dismissal was an option which might be exercised.

From the ruling of the court it is clear that there has been complete absence and departure from the essential principles of procedural fairness, which made the decision by the employer devoid of any legal efficacy. In *General Medical Council v Spackman*[178] the court held that:

> ***"If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at... The decision must be declared to be no decision."***

In this respect a decision taken with due consideration of the principles evocative of procedural fairness would be upheld in a court of law as a valid administrative action.[179]

The other purpose which is a compelling reason to observe procedural fairness during pre-dismissal hearing is stated in *Mwasa & Others v The Argus Printing and Publishing Co.Ltd*:[180]

> ***"...a prevailing system of procedures is not a unilateral protection afforded solely to employees, but serves as a bilateral mechanism affording protection to the employer as well."***

Fair proceedings are, therefore, important to an employer as well before he decides to dismiss an employee. In *NUM v Western Areas Gold Mining Co.*[181] the court said that an enquiry is necessary:

> ***"...because if properly and honestly held, it places the employer in a position to judge the merits of the conduct of the employee after all the relevant facts and considerations have been investigated and the employer's version has been stated. It also enables the employer should he be reasonably satisfied that the alleged infraction has taken place, to decide on appropriate disciplinary action."***

Finally, due regard on non-compliance of procedural fairness may have a positive or detrimental effect on the employer-employee relationship. The fact that observing fair procedure in itself upholds democratic values and leaves any decision affecting the lives of an employee to scrutiny, it forms a strong base for harmonious relationship between the employer and employee. In *Bissessor v Bestores t/a Game Discount World*[182] it is said that

> ***"It is conducive to fair and equitable labour relations and it is in accordance with the principle that before an employee is dismissed for an alleged misconduct the employer should hold a full and proper enquiry into the circumstances of the alleged misconduct as possible."***

The Industrial Relations Act 1975 of Mauritius and the Labour Relations Act 1995 of South Africa, have to a great extent given content to the concept of procedural fairness and made dismissal without a hearing an unfair labour practice and, more significantly, injurious to industrial harmony and serenity.[183]

Thus the purpose of the concept of `procedural fairness' in pre-dismissal hearings is to prevent miscarriage of justice and operate as checks on the unfettered discretion of the employer. In most cases in Mauritius and South Africa, the non-observance of procedural fairness has invalidated the exercise of an employer's wide and arbitrary powers to dismiss at will.

2.3.2 Scope of Application of Procedural Fairness During Predismissal Hearings for Misconduct

The area selected for research in this thesis is procedural fairness in relation to dismissal for misconduct. It is important then to demarcate the limits of this research so as to give a proper focus on the subject. These limits, commonly known as the scope, may either be express or implied.

The express limits are laid down in statutory norms. In the present context the main references will be the Industrial Relations Act 1973 and Labour Act 1975 of Mauritius and The Public Service Commission Regulations 1967 (Mauritius). In the South African context references will be made to the Labour Relations Act 1995, the Constitution of the Republic of South Africa Act 108 of 1996, the Promotion of Administrative Justice Act 3 of 2000, and the Public Service Act 103 of 1994.

The implied limits are derived by the courts through the interpretative process. As the express limits do not provide substantive content to procedural fairness the courts of Mauritius and South Africa have evolved guidelines and areas where procedural fairness is required the most, especially where the abuse of vast discretionary powers of an employer to dismiss at will is concerned. In delineating the scope of procedural fairness, it is proposed to adopt the following layout:

1.Procedural Fairness and the Contract of Employment: Extent of Application to Private and Public Sector Employees.

2.Application of Procedural Fairness to other distinct areas of the law of unfair dismissal.

(a)The unfair labour practice doctrine.

(b)Summary Dismissals and Dismissals on notice.

(c)Quasi-judicial and Administrative decisions.

(d)The doctrine of Legitimate Expectations.

2.3.2.1 Procedural Fairness and Contract of Employment: Extent of Application to Private and Public Sector Employees.

Wade distinguishes between an office which gives its holder a status that is specifically protected by statutory law, and another type of employment that is regulated by the principles of a contract of service.[184] The distinction between the two is that both persons are employed, one through a particular statute and the other in terms of pure principles of contract. Common between them is the contract of employment and the difference is the source of employment. The tenure of office between the two types of employment effectively imparts on the application of administrative law principles of procedural fairness. At first, let us discuss the application of procedural fairness with regard to private sector employees whose employment is regulated by the common law principles.

2.3.2.1.1 Private Sector Employee

In terms of the common law contract of service, an employer is entitled to dismiss summarily only when an employee has committed a breach of certain material terms of his/her contract of service, in this particular context, commonly known as misconduct.[185] Even in the case of infinite period contracts, he is free to terminate for any reason or no reason, provided the requisite notice is given.[186] In neither case is the employer obliged to observe the principles of procedural fairness, especially the audi alteram partem rule. In *Embling v Headmaster, St Andrew's College (Grahamstown) & Another* it was stated:

> ***"The rules of natural justice-succintly expressed in the maxim audi alteram partem - have no application in the field of contract...As the applicant's employment was terminated in accordance with the terms of the contract he was not entitled to a hearing prior to the termination of the agreement."***[187]

The question that is presently of academic importance is whether the courts will read into a contract of employment an implied term that the employee will not be dismissed with a good reason but without being given a hearing or, more broadly, whether statutory developments in dismissal law will be deemed to form part of all contracts of employment thus holding that there is an implied duty to follow the rules of procedural fairness during a predismissal hearing for misconduct.

Mauritian case law has not made any substantial contribution towards evolving a jurisprudence that will address the above stated problem. Expressing its inability to operate beyond the confines of the express provisions of a contract, the court stated:

> ***"From the employee's point of view, there is no need for the courts to give legal protection and security of tenure which the worker is entitled to in return for his labour "***[188]

But the court has conceded that statutory protection in the form of Labour Relations Acts has enhanced the position of the employees against dismissals effected in an unprocedural manner:

> ***"The rights of the worker derive their legal basis not only from his contract of employment and also from further statutory means which superceded the terms of the contract itself."***[189]

Thus the reading of the court's decision brings into focus two significant points. Firstly, although in a pure master and servant relationship there is no inherent obligation on the employer to observe fair procedures, unless specifically provided into a contract of employment,[190] the disciplines of fair procedures have, however, been largely injected into the law of contractual employment by statute in the form of the Labour Act 1975 in Mauritius and the Labour Relations Act 1995, in South Africa. Secondly, by stating that the employee derives his rights "also from statutory means which supercede the terms of the contract itself," it expressly recognises the overriding powers of section 32 (2) (a) and (b) of the Labour Act 1975 and Schedule 8 of the Labour Relations Act 1995 of Mauritius and South Africa respectively, in

remedying the procedural constraints unattended by the common law contract of employment. These statutory provisions adequately supplement the lacunae left by common law and provide the source of important guidelines which employers are enjoined to follow in implementing disciplinary action against their employees.

In *Tayab Ghoorum v A.G.Nabee & Co.*[191], the plaintiff averred that he was dismissed without any notice or justification. The defence argued that the plaintiff had broken his contract of employment by absenting himself from work on more than two consecutive days without lawful excuse or justification. Alternatively, it was also stated "that there had been a dismissal, it was for serious misconduct and that the employer (defendant) could not reasonably be expected to keep the plaintiff in his employment and that such dismissal was justified in the circumstances." Counsel for the plaintiff was not given an opportunity to answer the charge since the company had completed its enquiries thereby showing that the explanation which was asked to the plaintiff was nothing but a preliminary investigation. In summary, it meant that the plaintiff was denied of proper hearing.

The Supreme Court of Mauritius was of the view that "proof of gross misconduct is a necessary pre-requisite to dismissal whether at an informal meeting conducted under Section 32 (2) (a) or a more formal hearing before the court."[192] Thus Section 32 (2) (a) of the Mauritian Labour Act has substantially supplemented the common law position of an employee facing disciplinary action of dismissal and extended to him public law protection by making pre-dismissal hearing a mandatory procedure. He has, therefore, found protection over and above the pure contractual remedies available in a master and servant situation.

Thus with the statute `superceding' the terms of the contract itself as stated in the Raman Ismael's case, the implication of the Supreme Court's view is that the application of the `audi alteram partem rule' should not depend on whether or not such application has been made, expressly or by necessary implication, a term of the contract between an employer and employee; that it is also on the relevant statutory provision, in the form of Section 32 (2) (a) of the Labour Act 1975 which constitute

an express legislative recognition, to protect an employee against dismissal due to unprocedural disciplinary action. This illustrates the point that the scope of application of procedural fairness is greatly enhanced as it has made considerable inroads into private sector employment relationship. Now the general notion that pervades the law of unfair dismissal is:

> ***"The fact that by law of contract an indisputable right may have accrued to an employer to dismiss an employee does not for the purposes of administrative law mean that the requirements of natural justice have no application in relation to actual exercise of such right."***[193]

This view has been canvassed extensively in the South African Law of Unfair dismissal.

2.3.2.1.2 Common Law Employees in South Africa and their Rights to Procedural Fairness during Pre-dismissal Hearings for Misconduct

Contracts of employment in South Africa was from the very outset, until the advent of the concept of unfair labour practice and the codification of the rules of procedural justice in the Code of Good Practice, Item 4 Schedule 8 of the Labour Relations Act 1995, entirely influenced by the common law principles which concerned itself with whether a dismissal was lawful, that is, whether the required notice was given in the case of an infinite period contract, or whether there was a lawful cause for dispensing with it.[194] Procedural Fairness was applicable only to public sector employees since such dismissals were seen to be an exercise of statutory power[195] and were implemented in a case where there was specific provision in the contract of employment for the establishment of an adjudicating body or tribunal.[196] Thus, being constrained by the common law principles of contract inter partes, the principles of administrative law including those of natural justice have no part to play.[197] Broom J.P clearly emphasised this legal principle in *Thandroyen v Sister Annucia & Another*:[198]

The principle of natural justice including the right to be heard have no place in realm of contract. If one party to a contract complains that the other has committed a breach the courts will grant him relief on proof of the breach and will not ordinarily be interested in the principles of natural justice or in whether B has given him an opportunity of being heard."

According to him, the principles of natural justice will only apply if the parties have imported them into their contract. To give effect to this provision in a contract, the parties should have provided specifically something in the nature of a tribunal to decide matter affecting their relationship. If the contract has no such provision then the affected party (the employee on dismissal) will have no recourse to any public law remedy.[199]

Thus unless the parties have specifically agreed upon setting a tribunal to discuss predismissal issues there is no obligation on the employer to warn the employee before finally dismissing him or her or to conduct an enquiry before dismissal; or to grant the employee an opportunity to improve his or her conduct or performance, or to provide reasons for dismissal.[200] It is explicit, in fact, that the common law contract of employment offers little, if any, assistance in eliminating the arbitrariness of the employer, and at the same time offering relief to an aggrieved employee who has been deprived of his right to be heard before his dismissal.

But as pointed out earlier, with the advent of the unfair labour practice jurisdiction and the codification of the concept `procedural justice' in Schedule 8 of the Labour Relations Act 1995, the industrial court created a new jurisprudence based on the principles of equity and fairness within the employment context which mitigated the harshness of the common law principles. The modern proposition is that "common law employees whose conditions of service are not regulated by statute, can now claim similar protection."[201]

The benefit flowing from such an opportunity have been articulated by the industrial court on a number of occasions by virtue of its statutory powers.[202] As a result, it has reinstated employees who have been dismissed due to the violation of the principles of natural justice.[203]

2.3.2.1.3 Public Sector Employees

Today most of the public sector employees in Mauritius and South Africa hold office in terms of legislation containing detailed provisions, setting out the ground upon which they can be dismissed and the procedures which must be followed before such a decision is taken.

For instance, in Mauritius, officers[204] are appointed in the public service in terms of various acts that govern the service commissions.[205] It means that the exercise of power between the public sector employer and the public servant is governed not exclusively by common law principles of contract but also by statute. Similarly, in South Africa the Public Service Act 1994 regulate the appointment and tenure of office of the public servants.

In the event of a public officer being charged for misconduct and prior to his/her dismissal, Section 10 (1)[206] of the Republic Constitution of Mauritius and the regulations[207] governing the public service have laid down elaborate disciplinary procedures which give the officer every possible opportunity to speak against the charge or plead in mitigation. In South Africa, if a public servant is found guilty of a misconduct disciplinary action is taken in terms of Section 21 of the Public Service Act. Thus, be it the parent statute or regulations that govern the employment conditions of public servants in Mauritius and South Africa, they confer the right to dismiss a public servant for misconduct.

The question that is of immediate academic interest, is whether the provisions in the Public Service Act and Regulations empower the public sector employers, as exercised under common law principles, to dismiss on notice for any reason, or

indeed, for no reason at all and without giving the employee a fair hearing before taking the decision?

Section 30, Part iv of the Mauritius Public Service Commission Regulations 1967 in no uncertain terms state:

> ***The Commission shall not exercise its powers in connection with the dismissal, the disciplinary punishment or the termination of appointment otherwise than by way of dismissal of any officer in the public service except in accordance with these regulations or such other regulations as may be made by the commission."***

The finer details of procedures are listed in Section 37 (1):

> ***where a responsible officer considers it necessary to institute disciplinary proceedings against a public officer on grounds of misconduct which, if proved, would justify his dismissal from the public service, he shall...forward the officer a statement of the charge or charges preferred against him together with a brief statement of the allegations...and call upon such officer to state in writing...any grounds on which he relies to exculpate himself."***

If the officer does not furnish a reply to any charge under paragraph 37 (1) and upon consideration of the responsible officer's report, the commission shall appoint a committee to inquire into the matter.[208] The committee shall inform the accused officer that on a specified day the charges made against him will be investigated and that he will be required to appear before it to defend himself.[209]

Throughout these legislative provisions, it is conspicuous that no mention has been made specifically, of `fairness' or the `duty to act fairly.' Nevertheless, what is implied is that the regulations make it mandatory for the commission to adhere to the rules of procedural fairness before finally deciding to dismiss a public servant.

In South Africa, the question asked earlier i.e. do such provisions in the statutes or regulations grant the public institution the power enjoyed by employers under the common law to dismiss or notice for any reason, or for no reason at all, and without giving the employee a fair hearing before taking the decision, has been dealt with its intensive ramifications.

The answer depends on whether dismissal in terms of such contract is regarded as the exercise of a contractual right or an administrative power. The distinction is of great importance:

> ***"for if public sector employers can contractually reserve for themselves an unfettered power to dismiss or notice, they can in effect, nullify legislative attempts to protect their employees against unfair dismissal - and the courts capacity to ensure that such legislation is adhered to - by simply giving notice required by contract."***[210]

Thus, where a statutory body enters into an employment contract with an employee, it reserves the right to either act administratively against the employee or to use its contractual capacity as a common law employer.[211] If it decides to act in an administrative capacity the dismissal is subject to review in terms of the requirements applicable to any administrative action which affects the rights of a private individual. It means that "the general requirements of the natural justice that are in the circumstances postulated, the public official or body concerned must act fairly".[212] If however, it acts as a common law employer, the legality of its actions must be determined by recourse to the express and implied provision of the service contract alone, which, as a result, gives the employer an absolute discretion to dismiss at will.[213]

Now, as it stands, there is a complete deviation from this common law rule and the court, in numerous cases, has strongly affirmed that since summary dismissal affected the legal right of the workers concerned, the responsible official was, therefore, obliged to adhere to the audi alteram partem rule before exercising his discretion to dismiss.[214]

In *Myburgh v Danielskuil Municipaliteit*[215] the applicant had been dismissed for disciplinary reasons without an opportunity to state her case. The court appears to have accepted that if the respondent acted in terms of the contract between it and the applicant, it would have had the right to dismiss any time with the requisite notice.[216] The official concerned had chosen instead to rely on a section of the ordinance which gave him a discretion to dismiss on certain grounds. The question was, therefore, whether this made the dismissal an administrative action, or whether the respondent had nevertheless acted as an ordinary employer. It was argued that the discretion was acquired by respondent in its capacity as an employer and not as a statutory body clothed with quasi-judicial powers over officials in its service.[217] Accordingly the Section 88 of the Ordinance constituted not more than a part of the service contract between the applicant and the respondent.[218] But the court rejected this line of argument,[219] and also held in *Rossouw v S.A. Mediese Navorsingsraad*[220] that although the respondent was empowered by regulation to end the contract of service of its employees on one month's notice, it was bound by regulation to give its officials a hearing before summarily dismissing them for disciplinary reasons. The respondent could not rely on its common law right to dismiss on notice exempting itself from the duty to observe the principles of natural justice.

Similarly in *Van Collier v Administration Transvaal*[221] the applicant had been dismissed in terms of a regulation providing for termination on notice. (Applicant had been given notice after refusing transfer). It was argued that the regulation conferring the power to transfer was purely a service condition and should accordingly be interpreted as "a common law master and servant rule in which there was no room for the operation of the audi alteram partem rule.[222] Mr Van Collier's conditions of service were, however, regulated entirely by statute (The Transvaal Education Ordinance 29 of 1953). This raised the question whether a provision in a statute which gave the department a power of dismissal akin to that which any employer enjoyed under the common law (e.g the right to dismiss on notice) should be interpreted as if it were merely part of a common law service contract. The court answered in the negative.

There are few other cases decided by the court in South Africa which have put a seal of affirmation to the notion that to every dismissal of employees for alleged breach of contract in the public sector be it on notice, or otherwise, the public sector employer is obliged to adhere to the audi principle.

In *Tshabalala v Minister of Health*[223] Goldstone J while stressing that strike action by nurses was particularly grave disciplinary offence and constituted a material breach of contract, nevertheless held that they could not be dismissed in terms of the applicable section of the Nursing Act unless they were first given a hearing.

This conclusion emanates from the premise that strikes are a form of misconduct and that the applicable service codes on regulations impliedly compelled the authorities to adhere to the principle of procedural fairness before dismissing for that reason. Goldstone J. explained:

> ***"The chief Superintendent is obliged to give a careful and bonafide consideration to the case of each individual in respect of when he is considering dismissal...He must give each such person that right to be heard. He exercises a discretion, having regard to all the facts at his disposal, and in particular also whether such person made himself or herself guilty of unsatisfactory misconduct, meriting summary dismissal. He must certainly have regard to whether the facts established that the individual participated in unlawful strike action. In the case of students who did strike, he may wish to have regard to the degree of their participation. In individual cases it may have been of a short duration, or some other mitigating factor may have been urged upon him."***

In *Zenzile v Administrator of the Transvaal*[224] Coetzee J gave a stronger reason for rejecting the respondent's claim that it was entitled to dismiss on notice in terms of the agreement without following the rules of natural justice. It was argued that the contractual relationship between the administration and the respondent was simply one of master and servant governed exclusively by the common law contract. Since the appellants participated in work stoppage it amounted to an unlawful repudiation of

their contractual obligation to work, which entitled the employer to dismiss summarily. The rule of natural justice, therefore, did not apply.[225] Hoexter J.A's response was that the employment relationship was "not...merely employment under a contract of service between two private individuals but ...a form of employment which invests the employee with a particular status which the law will protect."[226] His Lordship therefore, concluded:

> ***The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purpose of administrative law mean that the requirements of natural justice can have no application in relation to the actual exercise of such right. And when, as here, the exercise of the right to dismiss is disciplinary the requirements of natural justice are clamant.***

After the decision in Zenzile there is no room now for the argument that, workers in the public sector where the power to dismiss on notice or the power to dismiss summarily flow from the statutory code, have no right to a hearing because they have no right to continue in employment beyond the date that the contract is terminated by due notice or dismissal is effected due to gross misconduct. The point worth noting is that it seems `Zenzile' has also eradicated the contractual dimension from the public sector employment relationship and located it in the domain of administrative law which leaves no reservation that the distinction between public and public sector employees is immaterial when it comes to the application of procedural fairness in cases of dismissal from employment due to misconduct or otherwise.

2.3.3 Application of Procedural Fairness to other Distinct Areas of the Law of Unfair Dismissal

South African labour jurisprudence has certain distinct features, which have not yet been thoroughly researched and applied with rigour in Mauritius. They are still considered grey areas in the Mauritian Labour Law, especially in the law of unfair dismissal. South Africa has gone a long way to restructure the, law of unfair

dismissal. This is, no doubt, a high point of development in the South African law of unfair dismissal which, as compared with the Mauritian labour jurisprudence, has four unique characteristics.

2.3.3.1 The Unfair Labour Practice Jurisdiction

Mauritian labour jurisprudence has not specifically created an unfair labour practice jurisdiction to deal with matters which "has the effect of suspending the common law and law of contract consequences."[227] Within the South African labour law perspective the legislature introduced the concept of unfair labour practice "as a recognised device, scheme or action adopted in labour field"[228] to effect "the general duty to act fairly."[229] The elements of the duty to act fairly, the industrial court has held, include the right of the employee to a hearing prior to the termination of his employment and challenge any action that is detrimental to credibility and integrity.[230] The court has also held that where the employer "unreasonably or unjustifiably failed to hold such an enquiry or where his decision is not fair and reasonable in the circumstances, such failure may amount to an unfair labour practice."[231]

A number of reasons which have been put forward for not observing procedures or not holding an enquiry before dismissals have been found to be unacceptable and an unfair labour practice. These are the following:

(a) Relying solely on the provisions of a contract, the common law, or even statutory authority. However, the employer's right to "dismiss an employee, whether summarily or upon notice, does not in any way curtail an employee's right to a disciplinary hearing, prior to his dismissal."[232] The fact that the dismissal may be lawful does not necessarily imply that it is fair.[233]

(b) Labour unrest per se does not justify not holding a hearing, particularly when the individual employees who have participated in the unrest have not been identified; collective guilt cannot justify dispensing with the holding of a hearing.[234]

(c) Alleging that it will be impractical to hold hearings where some 348 employees were on strike and involved in disturbance, does not mean that the employer is absolved from holding an enquiry. Although the court has not formulated any guidelines as to the procedure the employer should adopt during strike and labour unrest, there is no reason why the employer could not have arranged for any suitable procedure, appropriate in the circumstances, whereby it could have put charges to those whom it intended dismissing.[235]

These decisions, no doubt, gave a fresh impetus to the court a stronger foundation to the newly formulated jurisprudence based on the doctrine of unfair labour practice. *De Klerk in Miksh v Edgars Retail Trading (Pty) Ltd*[236] said:

> ***The fact that the applicant eventually conceded her guilt and the fact that her dismissal was substantively fair is my view altogether irrelevant when considering this aspect of the case. The end result was that she had no time for reflection, no time to prepare her case to obtain advice and she had lost out on the opportunity to be represented at the disciplinary hearing. The fact that she co-operated and was a willing participant in her own undoing is in the circumstances of minor consequence. I am satisfied that the respondent had in this regard committed an unfair labour practice against the applicant."***

By categorising these formulations under the jurisdiction of unfair labour practice it is possible to judge the merits of each conduct of an employee and subsequently enable the employer to decide on the appropriate disciplinary action. It is, no doubt, a direction that the Mauritian labour jurisprudence should look at.

2.3.3.2 Summary Dismissals and Dismissals on Notice

It has become a matter of debate and academic concern whether or not procedural fairness should be observed in cases where there is substantive reason warranting summary dismissal. The Mauritian labour law has not given a clear direction on this issue. In South Africa, the position taken by the court is a way forward as it has

categorically "collapsed the distinction drawn in the common law between summary dismissal and dismissal on notice, and rendered all dismissals subject to judicial scrutiny."[237]

Therefore, in *Maropane v Gilbeys Distillers and Vintners (Pty) Ltd & Another*[238] it was stated:

> ***The common law permits an employer to terminate the services of an employee either summarily, without notice, or on notice. The decision of the employer to give notice is not subject to judicial scrutiny. The law is only concerned with the legality of the procedure followed to the extent that it inquires whether proper notice has been given. On the other hand , the substantive decision of the employer, who summarily terminates the services of an employee is liable to be scrutinised by a court of law although no procedural steps are required."***

Beyond these judicial protections, chapter 8 of the Labour Relations Act 1995 is by far the most meaningful protection extended to employees whose employment is terminated arbitrarily and without proper procedure. According to Section 185 employees have a right not to be unfairly dismissed. This wide protection does not differentiate between a summary dismissal and dismissal on notice. Thus applying the provisions of the Labour Relations Act, the court in *Chemical Workers Industrial Union & Another v Algorax (Pty) Ltd*[239]found that there was insufficient evidence to show that the applicant employee had been guilty of theft or an accomplice to theft for which he had been summarily dismissed. The court also found certain procedural irregularities at his disciplinary hearing and accordingly determined the applicant's dismissal to be unfair and reinstated him with full benefits, retrospectively.

2.3.3.3 Scope of Application of Procedural Fairness with regard to Quasi-judicial and Administrative Decision of the Employer

It has always been a contentions issue whether the disciplinary power of the employer is based on quasi-judicial or administrative character, because, till very recently it was the opinion of the courts that unless the authority concerned was required by the law

under which it functioned to act judicially there was no room for the application of the rules of natural justice.[240] Thus in the early stages of development, the rules of natural justice had application only to a quasi-judicial proceeding in which the authority concerned was required by law under which it was functioning to act judicially.[241]

While the exercise of judicial and quasi judicial functions was in accordance with the rules of natural justice, a body or tribunal which exercised "purely administrative" powers needed only to act "fairly" in making its decisions. As Megarry J puts in *Bates v Lord Hailsham & St. Maryleborne*:

> ***"...in the sphere of so called quasi-judicial the rules of natural justice run and that in administrative or executive field there is a general duty of fairness"***[242]

Thus the rules of natural justice were held not to apply in situations where the administrative body was acting in a purely administrative capacity, but with the development of the duty to act fairly it has become irrelevant whether or not the administrative power concerned is labelled `judicial' `quasi-judicial' or `purely administrative'. Irrespective of the labels procedural fairness is to be applied in all situations.

In an employment situation, the power of the employer may be described as quasi-judicial or administrative in character, and in either case, if the dismissal affects the employee adversely, he must be given a fair hearing. In South Africa, this view finds authority in *Administrator, Transvaal and others v Traub and others*[243] in which Corbett C.J rejected the classification approach which held that the rules of natural justice applied only to judicial and quasi-judicial decisions and not to those that are purely administrative.[244] In his landmark decision Corbett CJ has questioned the validity of such a classification. This is, no doubt, a favourable approach to the application of procedural fairness because the purpose of the rules of natural justice is to prevent miscarriage of justice and fails to see why those rules should be made inapplicable to administrative decisions. Again, if the observance of fair procedure is the test of applicability of the doctrine of natural justice, then there can be no

distinction between quasi-judicial function and administrative function[245]since arriving at a just decision is the aim of both judicial enquiries as well as administrative enquiries.[246]

Thus the dividing line between a quasi-judicial power and an administrative power having been perceptibly mitigated, it enjoins an employer who is legally competent to determine questions affecting the rights of the employees to act judicially.[247] In *Holgate v Minister of Justice*[248] *Froneman J* stated:

> ***"I am of the view that since the decision in Administrator, Transvaal & Others v Traub and Others 1989 (4) SA 731 (A), the emphasis has rightly been placed on the duty of an administrative decision maker to act fairly and rationally when exercising public power whenever a decision is made to determine what a person's rights are."***

The position of the court is clear that an employer has to conform to the norms of procedural fairness whether or not he is acting in a quasi-judicial or administrative capacity. Thus the shift from the traditional approach that principles of natural justice are applicable only to judicial and quasi-judicial functions is quite evident as

> ***"...it is now well settled that a statutory body which is entrusted with a discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other, or what you will, still it must act fairly. It must in a proper case give a party a chance to be heard."***[249]

Within this developed doctrine, the scope of the application of procedural fairness in a decision making process has widened greatly to accommodate flexibly to every situation which would require an aggrieved party a fair and adequate opportunity to present his/her case and challenge prejudicial information against him/her.

2.3.3.4 Procedural Fairness and its Application to cases dealing with Legitimate Expectations.

The doctrine of legitimate expectation is a recent addition to the administrative law principles of natural justice. By this doctrine the scope of application of procedural fairness to dismissal due to misconduct has considerably been widened. It is recognised as a "new right."[250]

In the past English courts, where the doctrine of legitimate expectation originated,[251] drew a distinction between the action that involved deprivation of rights and action that had the effect of merely depriving or refusing a privilege.[252] And as a result of the conceptual approach to natural justice, the court extended the duty to afford hearing before an adverse decision is made in cases where privileges were involved.[253]

But it is now well established that the courts have broken away from the anachronistic right-privilege dichotomy in administrative decision making towards a more flexible and satisfactory approach to the application of the rules of natural justice.[254]

Thus the audi alteram partem rule which was traditionally enforced in cases where the individual was prejudicially affected in his or her liberty, property or existing rights, was extended to cases where the so-called legitimate expectations of a person were affected, that is, in a case where a person's claim fell short of a legal right but the interest at stake rose to the level of legitimate expectation.[255] And, Lord Diplock stated that, for a legitimate expectation to arise, the decision:

> ***"must affect the other person... by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.***[256]

Thus the representation made by the decision maker (whether express or implied from past practice) entitles the party to whom it is addressed to expect, legitimately, one of the two things:

(1) that a hearing or other appropriate procedures will be afforded before a decision is made; or

(2) that a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not substantially varied.

In either case, procedural fairness dictates that the expectation of a hearing should be fulfilled, and that the recipient of a benefit should at least be permitted to argue for its fulfilment.[257]

This right is articulated in Section 33 of the Constitution of the Republic of South Africa, 1996 and Section 3 of the Promotion of Administrative Justice Act No.3 of 2000. Both statutes have created a powerful legislative structure to compel the decision maker to comply to procedural fairness if his administrative action materially and adversely affects the rights or legitimate expectation of an individual. (These provisions will be discussed in more detail in the next chapter).

What are then the effects of the doctrine of legitimate expectation in an employment contract, especially when an employer has decided to dismiss an employee due to misconduct?

Mauritius Labour jurisprudence has not yet availed itself of the use of this doctrine to reach out and assist the employees who are prejudicially affected by the employer's decision to dismiss. As mentioned earlier, the Mauritius law of dismissal is strictly interpreted in terms of the common law principles of contract and provisions in the labour legislation, which are both effectively silent about extending the public law remedy (legitimate expectation) to affected employees, both in the public and private sector. With reference to the earlier cases already discussed, it showed that employees who sought to impugn their dismissals on the basis that they had not been given hearings were, invariably and conclusively, confronted with the argument that

neither their summary dismissals nor dismissals on notice attracted natural justice for the employee had no right to remain in employment beyond the time the employer chose to exercise his right to terminate the contract.[258]

In South Africa, in an endeavour to uphold industrial justice, the Appellate Division introduced the doctrine of legitimate expectation by its decision in *Administrator, Transvaal & Others v Traub & Others*[259] and extended the public law remedies to employees who were dismissed without following a proper procedure.

Before Traub, courts minded to come to the aid of dismissed employees searched for rights ancilliary to the employment which were affected by the termination of the employment contract. For instance, where the dismissal on notice meant that the employee ceased to be a member of a pension fund, the courts held that his rights were affected sufficiently to require him to be heard.[260] In *Administrator, Transvaal, & Others v Zenzile & Others*[261] Hoexter JA acutely separated rights under the contract of employment from the administrative decision to exercise of those rights. He said:

> ***"one is concerned here with two separate and logically discrete inquiries. The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purposes of administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of such right."***

The effect of this opened the way to the use of rights quite unconnected with the contract of employment, but affected by the decision to dismiss, to engage the rules of natural justice. This view finds authority in *Administrator, Natal & Another v Sibiya & Another*[262] where temporary full time employees were dismissed on notice without a hearing. They were held to be entitled to a hearing, because their dismissal caused economic loss to them: that economic loss was comprised within the concept of `property' and the audi alteram partem principle was engaged.[263]

Therefore, the decision in Traub's case, in an unequivocal term, establishes the view that all employees covered by the Labour Relations Act including common law

employees must be afforded the benefit of a fair hearing before being dismissed or any decision prejudicial to them is taken if they have a legitimate expectation to be heard under the circumstances.

This view was vehemently canvassed in the case of *Embling v Headmaster St.Andrews College (Grahamstown) & Another*[264] which concerned dismissal on notice of a school teacher. The applicant conceded that the school had complied with the provisions of the contract when it terminated his services, but complained that he had not been given a fair hearing before being dismissed. The applicant then launched review proceedings on the ground that the headmaster's decision and its subsequent confirmation by the council were invalid for non-compliance with the audi alteram partem rule.[265] This contention was based in part on the employment contract, and in part on the wider proposition that "the duty to afford a hearing must be respected by any domestic tribunal charged with quasi-judicial functions except to the extent that it is expressly excluded by the contract",[266] and that the applicant had "acquired a right, interest or legitimate expectation"[267] by virtue of eight years' employment which rendered it unfair for him to be deprived of employment without an opportunity to respond to the allegations against him.

All these points were rejected by the court. The essence of its reasoning is contained in the following extracts:

> ***There is nothing in the wording of clause 27 from which it can be inferred that when the council acts in accordance with the provisions of clause 27, it functions as a public body subject to administrative law... Second respondent (the council) is a private body. It is thus inappropriate and misleading to describe the second respondent a public body subject to the audi alteram partem rule, a rule which is not applicable to ordinary master and servant contract...The rules of natural justice, succinctly expressed in the maxim audi alteram partem, have no application in the field of contract. Contractual rights and obligations are governed by the law of contract...As the applicant's employment was terminated in accordance with the terms of the contract he was not entitled to a hearing prior to the terminating of the agreement."***[268]

It is respectfully submitted, that this view is anachronistic and does not reflect the contemporary attitudes of the doctrine of unfair labour practice and the new South African Labour Relations Act. The decision has failed to look at comments elicited by Hoexter JA in *Administration, Transvaal & Others v Zenzile & Others* where it was stated: "In my view it is logically unsound and wrong in principle to postulate that the audi principle has no application to a pure contractual relations.[269] It also failed to consider the point made by Baxter that it is a general principle that "any private institution which exercises powers over individuals is obliged to observe common law requirements which do not differ in principle from those applied to public bodies."[270] Wiechers is also of the view that the courts have often insisted that bodies are obliged to observe natural justice even though their powers spring from contract.[271]

Development in the case law has also lent support to Embling's plea that he was entitled to a hearing before being dismissed. The judgment in the appeal against Zenzile, which was decided before Embling but apparently was not brought to the attention of the court, appears to affirm the approach that the fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purposes of administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of such right.[272]

The question, therefore, remains do the developments outlined in the foregoing paragraphs sustain the proposition that every employer is bound to observe the principles of natural justice before terminating the employment agreement? After the decision in Traub, the rights of individual employees have been significantly extended by the unfair labour practice regime of the Labour Relations Act under which the court invariably requires employers to afford workers hearings before they are dismissed, irrespective of what their individual service contracts might say. In effect, the court insists that employers should comply with the requirements of procedural fairness before considering the dismissal of an employee.[273]

Against this background, it might well be arguable that the current labour relations practice in South Africa has developed to the point where an employee can legitimately claim an expectation to be heard before he is deprived of his livelihood,[274] either by notice or not. The notion of an unfettered right to dismiss has, therefore, been undermined by the statutory and judicial developments already outlined above. In fact Pretorius and Pitman have cogently argued that the implied terms of the common contract of service offer sufficient scope for the courts to limit the employer's powers to dismiss for unacceptable or inadequate reasons.[275] Thus the employee's expectation on entering into an employment contract that the employer will not terminate without good reason, must surely be regarded as sufficient weight to justify his expectation to be heard before being dismissed.

2.3.4 Conclusion

In this chapter, with a view to determine the scope of the application of `procedural fairness' in cases of dismissal due to misconduct it was imperative to look at areas and contextualise the use of administrative powers, more particularly the disciplinary power of the employer.

In Mauritius, the concept `procedural fairness' is provided for in the Industrial Relations Act 1973 and the Labour Act 1975. By these statutory provisions the common law employees enjoy great relief from the harshness of the employer's decision to dismiss either summarily or on notice. Similarly, under the Mauritian Public Service Commission Regulations 1967, the state has to follow fair procedures before finally deciding to terminate the services of a public servant. However, in spite of these statutory provisions and numerous judicial decisions the notion of the application of the concept, procedural fairness, has not been adequately explored and researched.

The South African law of unfair dismissal has, unlike Mauritius, certain distinct features which have successfully enhanced the scope of the application of procedural fairness. Firstly, because of the doctrine of unfair labour practice, the concept has an

expanded and a more pervasive application. The South African labour jurisprudence does not make any distinction between a private sector or a public sector employee, or between a summary dismissal or dismissal on notice, when the matter relates to the application of procedural fairness. The landmark decision in Traub has closed the debate concerning the legal capacity of an employer who does not have to exercise judicial, quasi-judicial or administrative power when effecting the dismissal of an employee. It is well established in the South African Administrative law that when an individual is prejudicially affected in his existing rights, liberty or property the decision maker has to engage the audi alteram partem principle.[276] Secondly, South Africa has infused the notion of legitimate expectation as a unique feature into its law of unfair dismissal. This addition into the procedural justice has not only widened the scope of procedural fairness, it has also strengthened the position of employees who are constantly exposed to the employer's rash decision to dismiss at will or on notice.

These unique features are quite consistent with the modern approach to workplace governance which can effectively benefit and enrich the Mauritian law of `unjustified dismissal.' It is suggested, in fact, that the common law contract of employment is ripe for development as time has arrived for a fresh conceptual approach to the employment relationship.

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[1]*Hutchinson C. stated in ECCAWUSA obo Nkosi and Vilakazi v Wimpy Kempton City (1996) 7 (12) SALLR 12 (CCMA), "As a result of the assault, he is emphatic that the relationship of trust and confidence has irretrievably broken down...This is especially in view of the fact that the misdemeanor was an unlawful personal attack on dignity and bodily integrity of the employer. Undoubtedly it was a humiliating deed worthy of censure and deserving expeditious treatment."*

[2]*Cameron et al, The New Labour Relations Act 1988, Juta & Co. p143*

[3]*Supra Note 1*

[4]*AIR 1954 Cal.399*

[5]*Paragraph 5 of Schedule 1 of the Trade Union and Labour Relations Act 1974*

[6]*1983 SCJ Record No.3267*

[7]*1991 SCJ 161*

[8]*Riekert, J Basic Employment Law (1987) Juta & Co. Ltd, P34*

[9]*1949 (4) SA 887 (C)*

[10]*IDEC Labour Relations Consultants by J.A. van der Walt & J.Goldberg, 1989.*

[11]*Bennett.C (1992) A Guide to the Law of Unfair Dismissal in South Africa, (Lexicon Publishers) Johannesburg. p28*

[12]*(1986) 7 ILJ 411 at 417B-C*

[13]*MAWU v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd (1988) 9 ILJ 696 (IC)*

[14]*Bennett.C (Supra) p41*

[15]*(1984) 5 ILJ 35*

[16]*Supra note 8,. p35*

[17]*1993 (2) SA 174 BGD at 74 C-E*

[18]*Supra note 8, p8*

[19]*Cheadle et.al (1997) Current Labour Law 1996, Juta & Co Ltd, Johannesburg p27*

[20]*NH 11/2/18909 (1996)*

[21] *Supra note 8, p8*

[22] *Moonian v Balmoral Hotel 1925 NPD 215 at 219*

[23] *Strachan v Prinsloo 1925 TPD 709*

[24] *1979 (1) SA 51 (A)*

[25] *Bennett C (1992) A Guide to the Law of Unfair Dismissal In South Africa, Lexicon Publishers, Johannesburg.p8*

[26] *(1976) IRLR 302-3*

[27] *(1985) 6 ILJ 307 (IC)*

[28] *Nel PS (1997) South African Industrial Relations (J.L Schaik) Pretoria pp222 - 223.*

[29] *(1993) 4 (9) SALLR 42 (IC)*

[30] *(1993) 4 (7) SALLR 1 (IC)*

[31] *(1993) 4 (9) SALLR 33 (IC)*

[32] *(1993) 14 ILJ 729 (IC)*

[33] *(1993) 14 ILJ 672 (LAC)*

[34] *(1993) 4 (3) SALLR 6 (IC)*

[35] *(1998) 9 ILJ 102 (IC)*

[36] *(1991) 12 ILJ 103 2 (LAC)*

[37] *(1991) 12 ILJ 181 (ARB); See also Clicks Organisation (Pty) Ltd (1997) 2 BLLR 164 (IC); Motsenyane v Rockface Promotions (1997) 2 BLLR 217 (CCMA)*

[38] *Rycroft A & Jordaan B, A Guide to SA Labour Law, Juta & Co at 200*

[39] *PAK Le Roux & A Van Niekerk, The South African Law of Unfair Dismissal, Juta & Co. P112.*

[40] *– Fokkan D, Introduction au Droit du Travail Mauricien P3. Similar opinions have been expressed in D.Kowlessur v United Basalt Product Ltd 1988 Record No. 3736. "..... the company could in the circumstances of the case, reasonably say that "le maintien du salarie dans l'entreprise est impossible" and that it was therefore justified in putting an end to his conduct.*

Since there is a close similarity between the labour law in France and Mauritius, and of the fact that Mauritian Law of contract is based on French laws it is useful to quote from Camerlynck, Traite de Droit du Travail, Contrat de Travail pp 416-418: En dehors de toute faute e-tablie a l'encontre du salarie, il suffit que les circonstances rendent sa presence indesirable dans l'entreprise ..... il suffit que les agissements du salarie entament la confiance que l'employe doit avoir en son collaborateur, qu'il existe un doute concernant son integrite, meme si sa culpabilite n'est pas prouvee.

[41] – SACTWU v HC Lee Co. (Pty) Ltd (1997) 18 ILJ 1120 (CCMA); Saimann & Anor v Beers consolidated Mines (Finsch Mine) (1995) 16 ILJ 1551 (IC)

[42] – Chakravarti K.P., Domestic Enquiry and Punishment, 1992 Eastern Law House 2nd Ed. p33.

[43] – 1984 (IC); L.E. Venchard & A.H. Angelo, Labour Laws of Mauritius 2nd Ed. at 633.

[44] – Jacques Lapierre v Longtill (MTS) Ltd 1986 (IC)

[45] – Pearce v Foster & Others (1886) QB 356 at 359

[46] – 1940 TPD 130 at 133: see also Central News Agency (Pty) Ltd v Commercial Catering and Allied Workers Union and Miriam Maile (1991) 12 ILJ 340 (LAC) at 344 F-I; Anglo American Farms t/a Boschendal Restaurant v M.Konjwayo (1992) 13 ILJ 573 (LAC) at 389 B-E and at 592 A-E; Khoza v Crypsum Industries Ltd (1996) 7 (5) SALLR 1 (LAC); Lahee Park Club v Garrat (1996) 7 (a) SALLR 13 (LAC)

[47] – Sinclair v Neighbour (1966) 3 ALLER 988 at 989 E-F

[48] – (1845) 14 M & W 112

[49] – (1969) MR 18 at 29

[50] – Rycroft A, 'Between Employment and Dismissal: The Disciplinary procedure. (1986) 6 ILJ at 405

[51] – Napal D. 'British Mauritius 1810-1948, 1984 Hart Printing

[52] – Preamble of the United Nations Universal Declaration of Human Rights. (1948) of which both Mauritius and South Africa are signatories.

[53] – By virtue of S46 (9) (C) of the Labour Relations Act of 1956, the industrial court was entrusted with the task of 'determining' disputes concerning alleged unfair labour practices.

[54] – *Cooper M and Wood J.C, Outlines of Industrial law, 1966 Butterworths 5 ed. at 84.*

[55] – *Section 49 of the Mauritian Industrial Relations Act 1973 provides:*
49 (1) Every employee shall, as between himself and his employer, have the right –

(a) to be a member of a trade union ……..
(b) to take part ……. In the activities of a trade union of which he is a member.

Section 4 of the South African Labour Relations Act 1995 also provides:
4 (1) Every employee has the right:

(a) to participate in forming a trade union or federation of trade unions; and
(b) join a trade union, subject to its constitution.

4 (2) Every member of a trade union has the right, subject to the constitution of that trade union:

(a) to participate in its lawful activities.

[56] – *Section a2 of the Mauritian Industrial Relations Act 1973.*
Section 187 of the South African Labour Relations Act 1995.

[57] – *In Rakgomo & others v Janks Martin Investments (Pty) Ltd t/a waste dynamics (1997) 2 BLLR 152 (IC) the applicants were dismissed after engaging in an illegal two-day strike. The court held that it was apparent that the applicants had in the past relied upon strike action whenever they felt aggrieved. Before the strike in question, they had not even informed the respondents of its demands. Their action was not of last resort, and there were no circumstances of an exceptional nature which justified the strike action. Furthermore the applicants union had made no effort to persuade them to return to work, even though it knew that clear and proper ultimatums had been issued.*

[58] – *Ramoly v Hosseny 1986 MR 79; Reega v Labourdonnais S.E 1980 MR 200; Rosebelle SE Board v Sarachi and ors 1981 MR 162; Carosin v Rogers and Co. Ltd 1985 MR 74*

[59] – *1985 MR 12; Reference can be made to Section 30(4) of the Mauritian Labour Act which provides that an agreement (i.e a contract of employment) is broken by a worker where he is absent from work without good and sufficient cause for more than 2 consecutive days. "Good and sufficient cause" is defined in Section 2 of the Act as including illness or injury which is certified by a medical practitioner. "It is now well settled that a worker who is absent for more than 2 consecutive days can only avail himself of the "good and sufficient cause" exception on the ground of illness if he has notified the employer of his to illness as soon as reasonably possible. (Carosin v Roger and Co. Ltd. 1985 MR 74)*

[60] – *D Farnham & F. Pimlott, 'Understanding Industrial Relations, 320.*

[61] – *(1937) 3 ALLER 67 at 69*

[62] – *I Bid at 74*

[63] – *Hunt c ICC Car Importers Services Co (Pty) Ltd (1999) 20 ILJ 364 (IC)*

[64] – *1995 6 (3) SALLR 17 (IC)*

[65] – *I Bid*

In England the Court has gone quite in detail to discuss the changed concept of drunkenness. In Kuch v Bell (1944 SLT 31) the court analysed the 'drunkeness' with the the 'state of intoxication.' The terms 'drunk' or 'drunken' or under the influence of liquor are noted in describing various stages of or condition of inebriation. On the other hand "state of intoxication" prima facie suggests a condition graver and more extreme than that which is suggested by the words, 'drunk' or 'drunken' or 'under the influence of liquor'. "Thus in view of the changed concept of drunkenness is directly associated with the discharge of the employee's duty.

[66] – *Ravindra Appadoo v Societe de Gerance de Mon Loisir 1992 Case No. 435/91.*

[67] – *1988 SCJ Record No. 3998 at 432*

[68] – *(1994) 5 (10) SALLR IJ (IC)*

[69] – *(1997) 8 (4) SALLR 1 (CCMA) at 7*

[70] – *The various types of misconduct recognised at common law in England and acted upon by judicial authorities are enumerated by Smith in 'law of master and servant' (6 Ed. at p.79), as under:*

(i) *The act on conduct of the servant which is prejudicial or likely to be prejudicial in the interest of the master or the reputation of the master;*

(ii) *The act on conduct of the servant which is inconsistent or incompatible with the due or peaceful discharge of his duty to his master;*

(iii) *The act or conduct of a servant which makes it unsafe for the master to retain him in service.*

(iv) *The act or conduct of the servant is so grossly immoral that all reasonable men will say that the servant cannot be trusted;*

(v) *The act or conduct of the servant is such that the master cannot rely on the faithfulness of his servant.*

(vi) *The act or conduct of the servant is such as to open before him temptations for not discharging his duties properly;*

(vii) *The servant is abusive or disturbs the peace at the place of employment;*

(viii) *The servant is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant:*

(ix) *The servant is habitually negligent in respect of the duties for which he is engaged; and*

(x) *The neglect of the servant, though isolated tend to cause serious consequences.*

[71] – *1990 SCJ Record No. 4521 at 343*

[72] – *1956 MR 484.*

[73] – *(1906) 23 TLR 201-202*

[74] – *1955 MR 453*

[75] – *(1906) AC 409*

[76] – *(1989) 10 ILJ 937 (IC)*

[77] – *(1992) 13 ILJ 573 (LAC)*

[78] – *I Bid at 391*

[79] – *Sinclair v Neighbour (1967) 2 Q.B at 990 as per Davis L.J*

[80] – *Nawosah v Mauritius Drug House Ltd 1984 (IC) "It is elementary principle of employer and employee relationship that both parties have rights and obligations by virtue of a contract of employment."*

A Rycroft and B. Jordaan are also of the view that in South Africa, the common law contract of employment constitutes the broad foundation of the employment relationship." (A Guide to South African Labour Law 1992 Juta & Co at 44)

[81] – *In Harel Freres Ltd v N. Veerasamy and Anor 1968 MR 218 and Cayeux Ltd v de Maroussen 1974 MR 166 it was stated: with the Termination of the Contracts of Service Ordinance 1963, the former common law right of the employer of his worker has ceased to exist. He must have a valid reason for doing so. The reason must be connected with the capacity or conduct of the worker or founded on the operational requirements of the industry, establishment or service. (it is to be noted here that the Termination of the Contracts of Ordinance 1963 has been repeated and most of its provisions have been incorporated into the Labour Act 1975).*

In Raman Ismael v U.B.S. 1986 MR 182 endorsed the view expressed in Harel Freres v N. Veerasamy. It stated: from the employee's point of view there is no need for the courts to give legal protection and security of tenure which the worker is entitled to in return for his labour. These rights of the worker derive their legal basis primarily not only from his contract of employment but also

from the further statutory means of protection which supercede the terms of the contract itself."

[82] – *Rycroft A. and Jordaan B. supra note 3a at 46.*

[83] – *I bid at 49.*

Even at the nascent stage of the development of industrial law, nearly a hundred years ago, the English courts, in Robb v Green (1895) 2 Q.B.1) found that:
"In the absence of any stipulation to the contrary, there in involved in every contract of service an implied obligation, call it by what name you will, or the servant that he shall perform his duty, specially in these essential respects, namely, that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in the matters pertaining to his service and that he shall, by all reasonable means in his powers, protect his master's interest in respect of matters confided to him in the cause of his service."

[84] – *In De Beer v Walker No.1948 (1) SA 340 T at 660 Millin J said: "..... a breach or termination by him or the contract of employment – means some act done by the employer which results eventually in the termination of the contract and 'termination' meaning a termination which is lawful.*

[85] – *Grogan J, Basic Employment Law, 1992 Juta & Co at 100*

[86] – *This right is affirmed by Section 37 (6) (b) of the South African Basic Conditions of Employment Act 75 of 1997, which provides that its provisions regarding notice do not affect the right of either employer or employee to terminate without notice for any cause recognised by law.*

In Council for Scientific & Industrial Research v Fijen (1996) 17 ILJ 18 (A) where the employee has breached the contract of employment by conduct which amounts to repudiation of some fundamental term, the employer is not only entitled to terminate the contract summarily, but can also sue the employee for losses occasioned by the breach.

Whether dismissal is justified for a single act of misconduct or whether dismissal would only be justified in respect of an act of misconduct perpetrated by an employee already warned against such misconduct has received various answers in different decisions. In Miss A. Griffiths v Mauritius Touring Co.Ltd 1984 Record No. 3408 in answer to the question whether a single act of misconduct (abandonment of duties) was sufficient to warrant the summary dismissal of an employee with no less than 28 years service, the court held that the 'misconduct' reproached was in our view certainly not the sort of misconduct which may leave the employer with good faith with "no other course" than summarily dismissing the employee. But in Plastic Industry Ltd v O. Koobarawa 1988 Record No 4164 because of "multiples absences irregulieres et retards;" and "l'intemperance" the court

upheld the employer's plea that he could not in 'good faith' do otherwise than to dismiss for misconduct certain employees who were in the habit of turning up for four days' work in every week.

In South African this issue has been debated in greater length and the court has held that where an employee repeatedly refuses to carry out a particular lawful instruction, that is issued to him several times, this alone may justify his immediate dismissal even in the absence of any prior offence or warnings. (National Education Health and Allied Worker's Union Obo Mthembu v University of Witwatersrand (1994) 5 (3) SALLR 1 (IC):

In Alexandrakis v Rennies Ltd (1993) 4(7) SALLR 17 (IC) it was held that conduct that amounts to gross insubordination is so serious that dismissal without warning is justified, the employee should be put on his guard that a further act of insubordination might lead to his dismissal before insubordination becomes a fair and valid reason to dismiss.

However, outright dismissal is not an option that is approved by the court. The Supreme Court of Mauritius has laid three requirements to determine a summary dismissal to be fair and reasonable. In Societe de Gerance de Mon Loisir v Ootim 1991 SCJ 161 it was held:

(1) *Outright dismissal, even in a case of misconduct, is unjustified if it is outside the prescribed time limits or the court is not satisfied that the employer in good faith could not have taken any other course;*

(2) *The degree of misconduct is a factor to take into account to determine whether the employer can be expected to lighten or forego the punishment.*

(3) *Where the misconduct is serious, a combination of strong mitigating circumstances, and not merely long and good service, is needed to conclude that a worker does not deserve to be summarily dismissed.*

[87] – Under the 1956 Labour Relations Act, the term 'valid' and 'fair' in respect of dismissal was used, to indicate that the employee has correctly been found guilty of the misconduct in question–valid reason for the dismissal and that dismissal was the appropriate sanction in such a case there was said to be a fair reason for the dismissal.

Cameron et al. In 'The New LRA', the law after the 1958 Amendments, 1989 Juta & Co at 111 explained: 'valid' means that the disciplinary reason for the dismissal must apply in the case of the particular employee. There must be sufficient proof as a matter of objective fact that the employee charged committed the misconduct alleged.

In ATASA and De Coning v Free State Consolidated Mines (1997) 8 (10) SALLR 1 (LAC) at 7, the labour appeal court held that "the mine had a valid reason to dismiss de Coning" given that what had been in issue was not the

appropriateness of the sanction (that is, the fairness of the dismissal) but whether or not the employee was guilty of the offence concerned (that is, the validity of the dismissal).

[88] *– Grogan J, 'Workplace law' 2000 (5ed) Juta & Co. at 133 it is stated: It is generally accepted that the employer need only prove the commission of the offence on a balance of probabilities i.e the inference that the employee committed the conduct alleged must be more likely than that he or she did not. Refer to Moorghen v Britannia S.E 1982 SCJ Record No.3177 at 27; moletsane v Ascot Diamonds (Pty) Ltd (1993) 4 (8) SALLR 15 (IC); Fee Yam Hing Kwong 1975 SCJ No. 154.*

[89] *– General Industrial Union of South Africa & Sebase v V.M. Construction (1991) 5 (12) SALLR 1 (IC).*

[90] *– Ngongomo v Minister of Education and Culture (1992) 13 ILJ 329 D at 335 A-B*

[91] *– 1954 MR at 6; Reega v Labourdonnais S.E 1980 MR at 200; Rosebelle S.E VS Sarachi & 5 ors 1985 SCJ Record No. 3026.*

[92] *– Alliance Spinners V J.Carpen 1989 SCJ Record No.4287 at a4.*
In Encyclopedie Dalloz – Travail Vol.1 contra du Travail a duree indeterminee at 194 the consequence of a serious misconduct is explained: la fante grave n'est elle pas, suivant la definition meme de la cour de cassation, celle qui rend impossible to maintien des relations contractuelles?

[93] *– Anglo American Farms t/a Boschendal Restaurant v Konjwayo (1992) 13 ILJ 573 (LAC) at 589 G-H*

[94] *– Robinson v Crompton Parkinson Ltd 1978 ICR 401. See also D – Anderman 'The law of Unfair Dismissal (2 ed 1985) chap.3 at 48-106 and R.W Rideout 'Rideout's Principles of Labour law (4 ed 1983) at 185-92.*

[95] *– (1886) Q B 356 at 359*

[96] *– 1987 SCJ Record No. 3723 at 223*

[97] *– The Labour Act 1975 has a singular provision which makes dismissal for alleged misconduct as an action of last resort. Section 32 (1) (b) states:*

1. No employer shall dismiss a worker - .....
(a) for alleged misconduct unless –
(i) he cannot in good faith take any other course.

In Medine Sugar Estate Co. Ltd v I. Wodally 1993 SCJ Record No. 4691 the Supreme Court observed that section 32 of the Labour Act permits summary dismissal on the ground of misconduct only where, inter alia, the employer cannot in good faith take any other course. See also Plastic Industry Ltd v O.

Koobarwa 1988 SCJ Record No.4164 at 460; Societe Union Saint Aubin v F.Sansfleur 1989 SCJ Record No. 4355 at 258; v Jugat v CIE Sucrerie de Bel Ombre Ltee 1983 Record No.3318; M.C. Tanny v Belle Vue Mauricia S.E 1981 SCJ Record No.3094.

[98] *– 1992 SCJ Record No.4021 at 89: See also The Mauritius Tuna Fishing & Canning Entreprises Ltd v J.M Manne 1989 SCJ Record No. 4501 at 190; Desmarais Brothers Co.Ltd v G. Sundanun 1979 SCJ Record No. 2828 at 160.*

[99] *– Le Roux & Van Niekerk, "The S.A Law of Unfair Dismissal (1994) Juta & Co at 131, the following is stated:*
"Any form of dishonest conduct compromises the necessary relationship of trust between the employer and employee and will generally warrant dismissal." See also Societe Malesherbes v Jamajaye Beelur 1990 SCJ Record No. 4438 at 145.

[100] *– Central News Agency (Pty) Ltd v Commercial Catering and Allied Workers Union and Miram Maile (1991) 12 ILJ 340 (LAC) at 344 F-I; Anglo American Farms t/a Boschendal Restaurant v M. Konjwayo (1992) 13 ILJ 373 (LAC) at 389 B-E and at 592 A-I; Khoza v Gypsum Industries Ltd (1996) 7 (5) SALLR 1 (LAC); Lahee Park Club v Garrat (1996) 7(9) SALLR 13 (LAC)*

[101] *– Anglo American Farms t/a Boschendal Restaurant v M. Konjwayo (1992) 13ILJ 373 (LAC) at 590 G-591A.*

[102] *– (1994) 5 (3) SALLR 13 (IC) at 17*

[103] *– (1997) 8 (3) SALLR 1 (CCMA) at 11*

[104] *– Food and Allied Workers Union v S.A Breweries Ltd (1991) 2 (7) SALLR 3 (IC); Malinga v The Cold Chain (1991) 2 (1) SALLR 1 (IC); National Union of Metal Workers and Simelane v National Rnagers (Pty) Ltd (1991) 2 (7) SALLR 11 (IC) and Food & Allied Workers Union and Sehlodi v S.A Breweries (Ltd) (Denver) (1991) 2(8) SALLR 9 (IC).*

[105] *– SACCAWU, Jan Hanyane and 18 others v Van Rhyn Building Supplies (Pty) Ltd (1991) 2 (2) SALLR 6 (IC); ACTWASA obo E Majubane v Amarose Lingerie cc (1991) 2 (3) SALLR 13 (IC) and M Ratisane v Joshua Doore (1991) 2 (4) SALLR 1 (IC).*

[106] *– S.A Breweries Ltd (Alrode) v Food and Allied Workers Union, Stanley Selepe and Petros Bulekiswe (1991) 2 (9) SALLR 1 (LAC); Pitches & Rhoode Assisted by Western Cape Omnibus & SSU v Golden Arrow Bus Services (Pty) Ltd (1994) 5 (7) SALLR 7 (IC) at 15.*

[107] *– (1990) 1 ILJ 304 (IC) at 395 F-H.*

[108] *– 1969 MR 18*

[109] – *1971 MR 180*

[110] – *1979 MR 2JU*

[111] – *Reega v Labourdonnais SE (1981) SCJ 235; Noel Furniture Ltd v S.Khoodeeram (1985) SCJ 44; C.Hozary v The Union S.E Co.1977 SCJ Record No. 2732; A.Rayapoulle v Taylor Smith & Co. Ltd. 1988 SCJ Record No. 4028; United Bus Service Co. Ltd v Toofail 1975 Mr at 41; Gaetan Eric Rene v General Construction Co. Ltd 1993 Case No. 223/92.*

[112] – *V.Jugut v CIE Sucrerie de Bel Ombre Ltee 1983 SCJ Record No. 3318.*

[113] – *Alliance Spinners v J.Carpen; Deep River Beau Champ S.E v Sydney Paul Etowar 1987 SCJ Record No. 3723; Teka v The Public Works Department 1954 Mr at 6.*

[114] – *M. Nayeck v The Local Government Service Commission 1990. SCJ Record No. 388883.*

[115] – *The Mauritius Tuna Fishing & Canning Enterprises Ltd v J.M Manne 1989 Record No. 4501.*

[116] – *Desmarais Brothers Co.Ltd v G.Sundanun 1979 Record No. 2828*

[117] – *Dry Cleaning & Steam Laundry Ltd v J.M Clarisse 1992 Record No. 4021*

[118] – *Rosehill Transport Ltd v I. Teelucksing 1989 Record No. 4413*

[119] – *Mauritius Meat Authority v B. Mungroo 1991 SCJ Record No. 4608; The Medine Sugar Estate Co.Ltd v I.Wodally 1993 SCJ Record No. 4691; V. Moorgen v Britannia S.E 1982 SCJ Record No. 3177.*

[120] – *The Beau Plan S.E Co.Ltd v R.Kisto 1988 Scj Record no. 4003; A. Bouton v Companhia Colonial do Buzi 1934 Mr at 282.*

[121] – *College Labourdonnais v P.J.H. Seenyen 1992 Record No. 4668 Gungah v I.Ayban 1976 SCJ Record No. 201; Abbadoo v Mon Desert Alma 1977 SCJ Record No. 245; RoseBelle S.E Board v S.Sarachi & Sons 1981 SCJ Record No. 3026; Hazary v The Union S.E (1977) MR 21.*

[122] – *M.C.Tanny v Belle Vue Mauricia S.E 1981 Record No. 3094*

[123] – *The Willoughby College v C.Chukooree 1989 Record No. 4465*

[124] – *Mrs R. Thomas v Hotel Des Isles Ltee 1984 Record No. 3451*

[125] – *L.Mouton v A. Bonieux & Co.Ltd 1984 Record No. 3443*

[126] – *C.R Constat v Permanent Secretary, Ministry of Labour & Industrial Relations 1980 SCJ Record No. 2913*

[127] – *B. Savrimootoo v Mon Desert Alma Ltd 1983 Record No. 3/83*

[128] – *Soobrayen v Cie Suc. De Mon Choisy Ltee (1975) SCJ No.79.*

[129] – *Council for Science & Industrial Research v Fijen (1996) 17 ILJ 18 (A) 26D-E; Sappi Novoboard 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 & Ors v Lee Service Centre t/a Leeson Motors (1998) 19 ILJ 1441 (LAC);Nel v Ndaba & Ors (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).*

[130] – *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 & Ors (1998) 6 BLLR 622 (LC); Toyota SA Manufacturing (Pty) Ltd v Radebe & Ors (1998) 10 BLLR 1082 (LC); Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & Anor (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 Mogolomo v Southern Cross Industries (1998) 11 BALR 1447 (CCMA).*

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

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

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

[134] – *Chauke & Ors v Lee Service Centre CC t/a Leeson Motors (1998) 19 ILJ 1441 (LAC).*

[135] – *Air Products (Pty) Ltd v CWIU & Anor (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).*

[136] – *It was held in Ellerines Holdings v CCMA & Ors (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 Ntsinande v Union Carriage & Wagon Co. (Pty) Ltd (1993) 14 ILJ 1566 (IC) that the instruction given to the employee of 32 year service to deliver goods to an area he was not familiar with was unreasonable and he was entitled to disobey it.*

[137] – *NUM obo Bogo 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).*

[138] – *On this see Boardman Brothers (Natal) (Pty) Ltd (1998) 19 ILJ 517 (SCA).*

[139]*Section 109 Part viii of the Industrial Relations Act 1973 which reads: Management shall ensure that fair and effective arrangements exist in dealing with disciplinary matters."*

Section 32 (2) (a) reads:
"No employer shall dismiss a worker unless he has afforded the worker an opportunity to answer any charges made against him and any dismissal made in contravention of this paragraph shall be deemed to be an unjustified dismissal

[140]*The Labour Relations Act 83 of 1988 introduced an entirely new definition of `unfair labour practice' and amended the statutory procedures for the adjudication of unfair labour practice disputes. It also for the first time provided statutory recognition for the concept of unfair dismissal.*

Paragraph (a) of the definition provided that termination of employment for disciplinary reasons had to be founded on a valid and fair reason and had to be executed in compliance with a fair procedure.

[141]*National Automobile Workers Union v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369*

[142]*NUM v Durban Roodeport Deep (1987) 8 ILJ 156 (IC) at 165.*

[143]*W.G. Davey (Pty) Ltd v NUMSA (1999) 20 ILJ 2017 at 2023 B as per Melunsky AJA*
In Administrator of Transvaal v Theletsane 1991 (2) SA 192 (4) stated that : "Fairness is an elusive concept: to determine its existence within a given set of circumstances is not always an easy task. No specific all-encompassing test can be laid down for determining whether a hearing is fair - everything will depend upon the circumstances of the particular case."

[144](1985) 6 ILJ 369 (IC) at 369; In Holgate v Minister of Justice (1995) 16 ILJ 1426 (E) Franman J stated: "I am of the view that since the decision of Administrator Transvaal & others v Traub & Others 1989 (4) SA 731 (A), the emphasis has rightly been placed on the duty of an administrative decision maker to act fairly and rationally when exercising public power whenever a decision is made which determines what a person's rights are."

[145]Baxter L, Administrative Law, 1984 Juta & Co. 538-540
The question as to whether it is possible for an appellate tribunal to correct an administrative decision which is impeachable on the grounds of unfairness, is also discussed by Baxter at 588-589, where he states that in the first place, a complainant is entitled to fairness at all stages of the decision making process and he quotes from the judgement of Megary J in Leary v National Union of Vehicle Builders (1971) ch.34, 49 "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?

[146]Brassey et al The New Labour Law, 1987 Juta & Co at 310-311

[147]De Smith et al Judicial Review of Administrative Action 1987 Sweet & Maxwell p401

[148]L.G. Baxter, Fairness and Natural Justice in English and South African Law 1979 SALJ at 607

[149]As per Lawton LJ in Maxwell v Department of Trade and Industry (1974) 2 ALLER 122 (CA)

[150]In Mohinder Singh Gill v The Chief Election Commissioner AIR 1978 SC 851 at 870, Krishna Iyer J considers `natural justice' as a pervasive facet of secular law when a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life." Again, in Maneka Gandhi v Union of India (1978) 1 SCC 248, the court considers natural justice as "a great humanising principle intended to vest law with fairness and secure justice."

In Administrator Natal v Sibiya (1992) 4 SA 532 (A) it was held "At common law the rules of natural justice are aimed at achieving a minimum standard for fair administrative hearings. As such, they ensure that the administrative body applies its mind to the matter by adhering to certain procedural requirements, by acting fairly, by giving the individual an opportunity to be heard and so on."

[151]Grogan J. Workplace Law, 2000 Juta & Co p154.

[152](1997) 18 ILJ 1031 (LC) at 1032

[153]1993 SCJ 173: In Bundhoo v Mauritius Breweries Ltd 1981 MR 157 the Supreme Court held that "although, in certain circumstances, an employer

may be justified in terminating the employment of a worker whose conduct is suspect in some serious measure, nevertheless where no hearing is granted to the worker in order to give him an opportunity to dispel the suspicion, then there is a violation of Section 32 (2) (a) of the Labour Act justifying the grant of severance allowance at the punitive rate."

[154]*NAAWU v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369 (IC) at 378 E-F; See also Bissessor v Bestores (Pty) Ltd (1986) 7 ILJ 334 (IC) at 337 H-I*

[155]*Seidman, Constitution in Independent Anglophonic Subsaharan Africa 1969 Wisconsin Law Review Vol.83 at 113.*

In Administrator Natal v Sibiya (1992) 4 SA 532 (A) the court held "as such the procedures ensure that the administrative body applies its mind to the matter by adhering to certain procedural requirements, by acting fairly, by giving the individual an opportunity to be heard and so on"

The same opinion was expressed by Bulbulia M in Moahlodi v East Rand Gold and Uranium Co. Ltd (1988) 9 ILJ 597 (IC); "It is the tacit duty of every person who is entrusted with the responsibility of having to mete out punishment to obtain all relevant information about an employee's personal circumstances as well as his service record and if need be to lean over backwards in an effort to find other extenuating circumstances in the employee's favour. The reason for this is that it enables the person who has to be handed down the punishment to evaluate the case in its proper perspective by taking the interests of the employee into account and thereby to consider alternative penalties appropriate to the circumstances of the case."

[156]*Van Wyk et al ED. `The New South African Legal Order' chapter on Procedural Rights by John Milton et al Juta & Co at 401*

[157]*NAAWU v Pretoria Precision Castings (1985) 6 ILJ 369 (IC) at 377F*

[158]*`Reasonableness' in the sense of objective reasonableness inherently incorporates an effective approach to fairness. The court is obliged in the light of all relevant factors, to consider whether it was objectively reasonable for the employer to bring about the consequences he did. The test formulated by Fabricus AM in NUM & Others v Vaal Reefs Exploration & Mining Co. Ltd (1987) 8 ILJ 776 (IC) perhaps comes closest to the test of reasonableness in the sense - a test of the prevailing circumstances and social conditions, plus the good judgment of the workplace. In Davis & Sons Ltd v Atkins (1977) 1RLR 314, it was stated "a determination of reasonableness requires a tribunal to evaluate the actions of the employer not in terms of whatever the tribunal thinks it was reasonable but in terms of whether an employer would think it was."*

The famous judgement of Lord Greene MR in Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1KB 228 gives a better understanding towards understanding what is reasonable, "it is true that discretion must be exercised reasonably. Now what does that mean?...Unreasonableness has frequently been used and is frequently used as a general description of the things that must be done, for instance, a person entrusted with a discretion must, so to speak direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from consideration matters which are irrelevant to what he has to consider if he does not obey those rules, he may, truly be said, and often, is said to be acting `unreasonably'. Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority... In another sense unreasonableness is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith." In FAWU & Others v C.G.Smith Sugar Ltd, Noodsberg (1989) 10 ILJ 907 (IC) the court adopted that the evidence available to the employer at the date of dismissal must be shown on balance of probabilities that the disciplinary offence was committed. If this is established, the employer must have a bonafide belief that the employee committed the offence.

[159]*"The just", Aristotle says, "is the lawful and the fair...we call those acts just that tend to produce and preserve happiness and its component for the political society...Justice, alone of the virtues is thought to be another's good because it is related to one neighbour."*

Aquinas writes: "justice alone, of all the virtues implies the notion of duty. Doing good to others and not injuring them, when undertaken as a matter of strict justice, goes no further than the discharge of debt which each man owes every other (Quotes taken from Britannica Great Books, The Great Ideas - A Syntopicon Great Books of the Western World, Robert Maynard Hutchins Ltd Ed. p604)

Lord Haldene said in Local Government Board v Arlidge 1915 AC 120 at 132: "those whose duty it is to decide must act judicially...The decision must uphold the spiritual sense of responsibility of a tribunal whose duty is to mete out justice." He then stated: "They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made.

Justice William Douglas of the US Supreme Court once put it"...the constitutional concept of justice is about procedural safeguards...it is procedure that spells much of the difference between rule by law and rule by whim or caprice. (Joint Anti-facist Refugee Committee v McGrath 341 vs 123 (1951)

In Charanlal Sahu v Union of India (1990) 1 SCC 613 it was observed: "Justice is a psychological yearning in which men seek acceptance of their

viewpoint before the forum or authority enjoined or obliged to take a decision before affecting their right."

[160]The dictionary meaning of the word `fair' is reasonable; honest; upright. In common usage the word conveys some idea of justice or equity; impartial; free from suspicion or bias.

The Frank Report in England has spelt out in broad terms the meaning of `fairness'. Fairness means "the adoption of a clear procedure which enables parties to know their rights, to present their case which they have to meet (Wraith R.E & Hutchinson P.G., Royal Institute of Public Administration, 1973 (George Allen & Unwin Ltd p131) In UAMAWU v Fudens SA (1983) 4 ILJ 212 (IC) at 225 it was said: "in as far as fairness is applicable all relevant matters surrounding the specific case in the framework that reasonably belongs to the actual supposition are to be taken into account and the deciding criteria are to be uncovered, evaluated and weighed."

Within the context of procedural fairness, the industrial court has recognised that a fair predismissal procedure requires a fair hearing prior to dismissal. In NAAWU v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369 at 378 F it was stated." this concept of fairness or equity in as much as it relates to the fundamental right to be heard in the field of labour relations implies that a separate decision as to guilt and sanction should be made and that an employee must be heard on both aspects." Also see Twala v ABC Shoe Store (1987) 8 ILJ 714 (IC) at 715 G. See Cameron, `The Right to a hearing before Dismissal' 1986 7 ILJ 183 at 193-195.

In Ngobeni & Others v Vetsak (Co-op) Ltd (1984) 5 ILJ 205 (IC) at 212 E-F the court stated: "The fairness, equitableness or reasonableness of the employee's dismissal must in the opinion of the court be tested with reference to the procedure that was followed in the dismissal..., and the reason or reasons which led to the dismissal."

Cameron also writes in his article, `The Right to a Fair Hearing before Dismissal: Problems and Puzzles: (1988) 9 ILJ 147 part II at 164: Dismissals are perceived as unfair when they occur, run counter to the objects of the LRA because they tend to encourage conflict and this is particularly so with those dismissals which seem precipitated or ill considered - and virtually all dismissals not preceded by a proper enquiry almost fall within this category.

Baxter in his article, `Fairness and Natural Justice in English and South African Law 1979 SALJ 607 at 634 writes: "In the legal context, the meaning of fairness will automatically come of its own if we are aware of both the particular function of the administrative organ in question and the purpose of the requirement of the procedural safeguards - more especially the requirements of procedural fairness.

[161]*NUM v Western Areas Gold Mining Co.Ltd (1985) 6 ILJ 380 (IC) at 386 C-D*

[162]*(1991) 12 ILJ 1395 (Arb)*

[163]*Brassey et al. The New Labour Law; Strikes, Dismissals and ULP in South African Law, Juta & Co p78*

[164]*Wade H.W.R & Forsyth CF, Administrative Law 7 ed p340*

[165]*John Rees (1970) ...345*

[166]*NAAWU v Pretoria Precision Castings (1985) 6 ILJ 369 (IC) at 378*

[167]*Ntsibande v Union Carriage (1993) 14 ILJ 1566 (IC)*

[168]*Mondi Timber Products v Tope (1997) 18 ILJ 149 (LAC) at 152 H-I; Metro Cash & Carry v Tshela (1996) 17 ILJ 1126 (LAC) at 1130.*

[169]*The Frank Report in England describes openness, fairness and impartiality in the following way: In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying decisions; fairness to require adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; impartiality to require the freedom of tribunals from the influence, real as apparent, of departments concerned with the subject matter of their decisions. (Quoted from Wraith R.E & Hutchesson P.G. Royal Institute of Public Administration, George Allen & Unwin Ltd 1973, at 131)*

[170]*De Smith et al, Judicial Review of Administrative Action, 1987 Sweet & Maxwell p376*

[171]*(1993) 4 (7) SALLR 18 (LAC)*

[172]*(1993) 4 (7) SALLR 18 (LAC)*

[173]*Sibiya v NUM (1996) 6 BLLR 794 (IC)*

[174]*Fredman S & Lee Simon, `Natural Justice for Employees: The Unacceptable Faith of Proceduralism. (1986) 15 (1) ILJ p15 at 25.*

[175]*Basson D., South Africa's Interim Constitution, 1994 Juta & Co. p35*

[176]*In Horn v Kroonstad Town Council 1948 (3) SA 861 (0) the court stated: "An unfettered discretion should be exercised according to the rules of reason and justice and not according to private opinion. The discretion must be exercised within the limits to what an honest man, competent to the discharge of his office ought to confine himself."*

[177](1994) 5 (6) SALLR 16 (A) at 29.

[178](1943) AC 627 (H4) 644-5 as per Lord Wright.

[179]Cameron et al, The New Labour Relations Act, 1989 Juta & Co. 111-112.

[180](1984) 5 ILJ 16 (IC) at 23 F

[181](1985) 6 ILJ 380 (IC) at 386 B-C

[182](1986) 7 ILJ 334 (IC) at 337 G-H

[183]BAWU v Prestige Hotels cc t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC)

[184]Wade. Administrative Law. 6 Ed 1988 Oxford Press at 562

[185]Council for Scientific & Industrial Research v Fijen (1996) 17 ILJ 18 (A)

[186]In Martin v Murray (1995) 16 ILJ it was stated: "What the employer has right to do, namely, to terminate the relationship by simply giving appropriate notice of termination, without the need for any prior consultation with his or her counterpart..."

Mauritius Steam Navigation Co Ltd v Ronsetty 1977 MR 25; Cayeux Ltd v Maroussen 1974 MR 166; See Also Anderman, The Law of Unfair Dismissal, 1985 Butterworths. p35 where it is stated: "as long as contractual notice of termination was given, the employer was free to dismiss an employee for any reason he wished, with no obligation to reveal his reason for dismissal to the employee, much less justify it."

Paul Pretorius in his article `Status Quo Relief and the Industrial Court: The Sacred Cow Tethered', 1983 4ILJ 167 at 171 states: "Provided that the prerequisite notice is given, the common law allows the employer to dismiss the employee, to suspend the employment contract, and to change the terms and conditions in almost any manner he wishes."

[187]Embling v Headmaster St Andrew's College (Grahamstown) & Another 1991 (4) SA 403 (IC)

[188]Raman Ismael v U.B.S 1986 MR 182

[189]Ibid

[190]In Lace v Diack and Others (1992) 13 ILJ 860 (w) the court stated: "Where the employment agreement empowers the employer to appoint a tribunal or adjudicative body which is charged with a duty to decide, the principles relating to fundamental fairness must be observed by the individual or body making the decision."

[191]Case decided on 16 May 1984 (No Reference Nr)

[192]*Medine Sugar Estate Co.Ltd v I Wodally, 1993, Record No.4691: See also Tirvengadun v Bata Shoe (Mauritius) 1979 MR 135; Harel Frères Ltd v Veerasamy and Anor 1968 MR 218; Dunlallsingh v C.E.B 1979 MR 191; Société Union Saint Aubin 1989, Record No.4355; Nadal v Longtill (Mauritius) Ltd 1984 SCJ No.23.*

[193]*As per Hoexter JA in Administrator Transvaal & Others v Zenzile and others 1991 (1) SA 21 at 36 H-I*

[194]*Grogan J, Workplace Law, 2000 Juta & Co. p102*

[195]*Administrator Transvaal & Others v Zenzile & Others 1991 (1) SA 21; Administrator, Natal & Another v Sibiya & Another 1992 (4) SA at 532*

[196]*In Damsell v Southern Life Association Ltd (1992) 13 ILJ 533 (c) Deventer AJ stated: It was common cause in argument that the principles of administrative law had no application in this matter, that the relationship in .....was governed solely by the terms of the contract between them and the applicable principles of the common law and the principles of natural justice or fundamental fairness more particularly the audi alteram partem could only come into play in the field of contract where an adjudicating body or tribunal was contractually created. It was again stated in Lace v Diack and others (1992) 13 ILJ 860 (w) that where the employment agreement empowers the employer to appoint a tribunal or adjudicative body which is charged with the duty to decide the principles relating to fundamental fairness must be observed by the individual or body making the decision*

[197]*As per Lord Wilberforce in Malloch v Aberdeen Corporation (1971) 1 WLR 1578 (H L Dc) at 1595 H - 1596B, who stated: One may accept that there are relationships in which all requirements of the observance of the rules of natural justice are excluded... these must be confined to what I have called `pure master and servant cases', which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of the elements exist, then...whatever the terminology used, and even though in some inter partes aspects, the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared void.*

[198]*1959 (4) SA 632 (n) at 639 F-640 B; This approach was also followed in Nchabaleng v Director of Education (Transvaal) 1954 (1) SA 432 (T) at 438 H-439 A in which a teacher had been dismissed in terms of a regulation empowering the department to terminate on written notice for reasons `considered good and sufficient' and approved by a more senior official. The court found that the provision conferred a common law right to dismiss without giving reasons, observing that "to require a hearing by the Director in every case in which the employing organisation wished to terminate the employment of one of its teachers would involve too great an inroad upon the common law freedom of action of the employer.*

[199]*But although the civil courts have been reluctant to hold that there is an implied duty to act fairly, the High Court recently came close to holding that such a term will almost invariably be applied. In Key Delta v Marriner (1996) 6 BLLR 647 (IC) a magistrate had granted the respondent damages equivalent to the remuneration he would have received in 3 months after he was summarily dismissed without a hearing and for no apparently sound reasons. On appeal, the employer argued that in terms of the common law, it was bound only to pay the respondent what he would have received had the contract been lawfully terminated i.e. one month notice. The court noted that generally employers and employees were aware of the fact that under the LRA arbitrary dismissals amounted to unfair labour practice. Considering whether parties had contemplated a term to this effect in the contract of employment, the court took into account the status of the employee (he was relatively of a senior status) and the size of the employer. It ruled that the parties must have understood that the employee could not be arbitrarily dismissed.*

[200]*A Rycroft and B. Jordaan, A Guide to South African Labour Law, Juta & Co. p96.*

[201]*J Grogan, Natural Justice and Employment Contract. A Rearguard Action, 1992 SALJ 109 at 120; Section 193 (2) of the Labour Relations Act 1995 provides: The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless...*

> *(d)the dismissal is unfair only because the employer did not follow a fair procedure.*

[202]*Section 43 and 46 (a) of the Labour Relations Act 28 of 1956 and Sections 115 on CCMA, Section 158 on Labour Court and Section 174 on the Labour Appeal Court. These Statutory provisions have now replaced entirely the common law doctrine of termination at will.*

[203]*For review of the industrial courts approach to procedural fairness, see E.Cameron `The Right to a Hearing Before Dismissal - Part I (1986) 7 ILJ 183 where he noted that the right to a hearing was developed by the industrial court by virtue of its statutory powers in terms of Section 43 and 46 (a) of the Labour Relations Act 28 of 1956 to reinstate dismissed employees and to make determinations on unfair labour practice disputes.*

[204]*Section 2 of the Public Service Protection Act `Public Officer' is defined as `any government servant and any officer of the municipal council'. In G.T.A v The Roman Catholic Education Authority and Others 1987 SCJ 211 the Mauritian Supreme Court held that a public officer is someone who (a) holds a post in the service of the government in Mauritius as his employer and (b) is required by that fact to be appointed and is appointed by the appropriate service commission.*

The President of the Republic of Mauritius in establishing a post in the public service pursuant to Section 64 (1) of the Constitution of the Minister charged with the responsibility for public service and also in accordance with the

provisions of the Civil Establishment Act (Section 3), is empowered to establish by regulations known as Civil Establishment Orders, offices in the public service of Mauritius.

[205]*Such Service Commissions are, for example, Public Service Ordinance 23 of 1953; Public Service Commission of 1959 and Judicial and Legal Service Commission of 1964. In Yerriah v P.S.C 1974 MR 22 it was held that these regulations are enforceable in a court of law.*

[206]*Section 10 (1) States:*
Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by court.

[207]*Part iv of Public Service Commission Regulations RL 1/129, 1967 ON `Discipline.'*

[208]*Ibid Section 37 (2) and Section 37 (3) (a)*

[209]*Ibid Section 37 (4); Reference can be made to I. Basco v The Local Government Service Commission and The Municipal Council of Port Louis 1989 SCJ 320 for illustration of the provisions mentioned.*

[210]*Grogan J. Unfair Dismissal of Contractual Public Sector Employees, (1990) 11 ILJ (4) at 656*

[211]*Monckten v British South Africa Co,. 1920 AD 324*

[212]*Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A) at 231 F-G; See also South African Roads Transport v Johannesburg City Council 1991 (4) SA 1 (A) at 10 G-I*

[213]*Nchabaleng v Director of Education (Transvaal) 19JU (1) SA 432 (T) in which a teacher had been dismissed in terms of a regulation empowering the department to terminate on written notice for reasons `considered good and sufficient' and approved by a more senior official. The court found that the provision conferred by a common -law right to dismiss without giving reasons, observing that to require a hearing by the Director in every case in which the employing organisation wished to terminate the employment of one of its teachers would involve too great an inroad upon the common law freedom of action of the employer: at 438 H - 439 A*

[214]*Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A), it was long held that a person was entitled to a hearing only when the action or threatened action of a public authority have deprived or would potentially deprive him of same existing right.*

In Mokoena v Administrator Transvaal (1988) 4 SA 912 (T) Goldstone J was of the view that the workers concerned had a right to at least a legitimate expectation of a hearing because the termination of their contracts deprived them of the pension benefits to which they would have been entitled had the contracts run their course.

In R, v Ngwevela 1954 (1) SA 123 (A) at 127 f Centlivres CJ said unreservedly that: when a statute empowers a public official to give a decision prejudicially affecting the property or liberty of an individual that individual has a right to be heard before action is taken against him."

M.Wiechers, Administrative law 1985 at 68-69: "It is the function of administrative law to ensure that powers which adversely affect the rights and liberties of individuals are exercised fairly and rationally."

But where the state is the employer enters into a contract of service with an employee `as equal parties', and dismisses the employee in accordance with the applicable service code, then the common law applies rather than the principle of administrative law, in particular the audi alteram partem rule. (staatsdiensliga v Minister van Waterwese (1990 (2) SA 440 (NC) at 448 B-C. In this case as well the court acknowledged that there is a growing tendency to treat public sector employment contracts from public law perspective (at 448D)

[215] *1985 (3) SA 335 (NC)*

[216] *Ibid at 341 D-E*

[217] *Ibid at 341 H*

[218] *Ibid at 341 F*

[219] *Ibid at 341 F*

[220] *CPD 15 August 1986 case no.3641/86 unreported.*

[221] *1960 (1) SA 110 (T) at 115 A-D*

[222] *Ibid at 115 A-B*

[223] *1987 (1) SA 313 (W); Similarly in Langeni v Minister of Health and Welfare 1988 (4) SA 93 (W), the court spent much time justifying its view that dismissal for misconduct could be impugned on public law principle where the employer failed to comply with essential procedural requirements which included fair hearing. His Lordship held that since the applicants were in the service of the public authority and their dismissal flowed from a decision of a public service official. (100H)*

Again in Administrator Orange Free State v Mokopande 1990 (3) SA 780 (A) the Appellate Division was called on to decide the legal rights of public sector employees purportedly dismissed for taking part in industrial action. The facts were that the applicants were among a number of hospital workers who had refused to work until their trade union had been recognised by the hospital authorities. The court a quo held that the administration should have accorded the applicants a hearing before dismissing them.

[224]*(1989) 10 ILJ 34 (W)*

[225]*Ibid at 33J-34B*

[226]*Ibid at 34B - C*

[227]*National Union of Mine Workers v East Rand Gold and Uranium Co. Ltd (1991) 12 ILJ 1221*

[228]*Marievale Consolidated Mines Ltd v The President of the Industrial Court & Others 1986 (2) SA 485 (T).*

[229]*National Union of Mineworkers & Another v East Rand Proprietary Mines Ltd (1987) 8 ILJ 315 (IC) 321 D-322E.*

[230]*National Automibile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369 (IC) at 378 H-I*

[231]*Larcombe v Natal Nylon Industries (Pty) Ltd, Pietermaritzburg (1987) 7 ILJ 326 (IC) at 330 A-C.*

[232]*National Union of Mineworkers & Others v Durban Roodeport Deep Ltd (1987) 8 ILJ 156 (IC) 163 (C); Administrator, Transvaal & Others v Zenzile & Others (1991) 1 SA at 36; Administrator, Natal v Sibiya & Another (1992) 4, SA at 532 (A)*

[233]*Poolman T, Equity, thye Court and Labour Relations, 1988 Butterworth p159*

[234]*Supra note 26 at 163 F-J*

[235]*Ibid at 164 E-G*

[236]*(1995) 16 ILJ 1575 (IC)*

[237]*Clarke v Niman & Lester (Pty) Ltd (1988) 9 ILJ 651 (IC)*

[238]*(1997) 8 (3) SALLR 133 (LC)*

[239]*(1995) 16 ILJ 933 (IC)*

[240]*Rex Electricity Commissioners (1924) 1 KB 171 at p205; Rex v Legislative Committee of the Church Assembly's (1927) ALL CR Rep. 696*

[241]*As per Das J in Province of Bombay v Kushaldas S. Advani AIR 1950 SC222 observed that if a statute empowers an authority not being court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie, and in the absence of anything in the statute to the contrary it is the duty of the authority to act judically and the decision of the authority is a quasi-judicial act.*

[242]*(1972) 1 W.L.R 1373*

[243]*1989 (4) SA 731 (A)*

[244]*C.Forsyth `Audi Alteram Partem since Administrator, Transvaal v Traub in the Quest for Justice, ed, E.Kahn, 1995 Juta & Co. p189.*

[245]*In Board of Education v Rice 1962 AC 322 the court pointed out that an administrative agency acting judicially should always give a fair opportunity to those who are parties on the controversy for correcting or contradicting any relevant statement prejudicial to their view.*

[246]*In A.K. Kraipak v Union of India the court applied its mind to answer whether the procedure followed was fair in all circumstances (quasi-judicial and administrative). The court held that if the rule of national justice is calculated to secure justice, or put it negatively to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicail enquiry and not to administrative enquiry. It must logically apply to both. On what principle can distinction be made between one and the other? Can it be said that the requirement of `fair play' in action is anyway less in an administrative enquiry than in quasi judicial one?*

In NAAWU v Pretoria Precision Castings (1985) 6 ILJ 369 (IC) at 378 (G) it was stated that the employer has to act judicially before imposing a disciplinary penalty on an employee and their effect has been to eliminate arbitrary and rash action against the employees.

[247]*In Abbott v Sullivan (1952) 1 ALLER 226 the court while discussing the rights of an employee exemplified that the right of a man to work is just as important to him, if not more important, as his right to property. Termination of his services may mean the destruction of his livelihood. Thus in making any adverse decision against an employee he should have an opportunity to show cause, unless the words of the statute deny it.*

In Ridge v Baldwin (1964) AC 40 the court has given a unclear scope to the application of procedural fairness: "The duty to afford procedural fairness is not however limited to the protection of legal rights in the strict sense, it also

applies to more general interests of which the interest in pursuing a livelihood and in personal reputation have received particular recognition.

[248]*(1995) 16 ILJ 1426 (L)*

[249]*Breen v Amalgamated Engineering Union (1971) 1 ALLER 1148*

[250]*Naglev Fielden (1966) 2 QB 633 (CA); In Salemi v Mackellar (1977) 137 CLR 396 Jacobs J said, a legitimate expectation "does not mean that the expectation is itself a right. The right is the right to natural justice in certain circumstances and `legitimate expectation' is one of those circumstances." But as Wade points out "the absence of a right in legitimate expectation is not a convincing reason for not enforcing the .....of natural justice, since for purposes of natural justice the question which matters is not whether the claimant has some legal right but whether legal power is being exercised to his disadvantage. (Wade, Administrative law at 465), it means that according to the legitimate expectation lest the pre-existing rights of the complainant are not essential for the purposes of natural justice it follows that even persons who have no antecedant rights that are affected by intended administrative order or decision are entitled to be heard. Thus the concept extends locus standi to cover the types of persons that have previously been regarded as having no right to be heard. (See Everett v Minister of the Interior. 1981 (2) SA 453 (C)*

[251]*The concept of legitimate expectation was first applied by Lord Denning MR in Schmidt and another v Secretary of State for Home Affairs (1969) 2 ch 149 (CA). In that case, alien students of scientology were refused extensions to their entry permits without a hearing. They sought an order quashing the decision of the Home Secretary on the ground of breach of natural justice. Lord Denning MR in his judgement suggested that natural justice did not merely protect rights but any "legitimate expectation(s) of which it would not be fair to deprive him without hearing what he has to say. (at 170).*

[252]*In R. v Electricity Commissioners (1924) KB 171, at 205 Atkin LJ declared that prerogative writs of extionari and prohibitian would issue to "anybody of persons housing legal authority to determine questions affecting the rights of subjects and having the duty to act judicially." Lord Atkins dictum was interpreted to mean that a decision was only "judicial" or "quasi-judicial" if it affected vested "rights" and not if it was concerned with the grant or withdrawal of mere privileges. The courts drew a distinction between the action that involved deprivation of a right and action that had the effect of merely depriving or refusing a `privilege'. In the case of the latter there was no duty to comply with the rules of natural justice before making an adverse decision.*

[253]*Nakkuda Ali v Jayaratne (1951) AC 66 at 78*

[254]*In Salemi v Mackellar 2 (1977) 137 CLR 396 at 404, it was held that "well founded expectations should be accorded the same protection of natural justice as the person's rights or interests. C. Forsyth in his article `A Harbinger of a Renaissance in Administrative law', 1990 (10) SALJ 387, stated "Now it has been plain for decades that making the application of natural justice depend upon the existence of rights is inacceptable..., given the complexities of modern administration, given the range of boon and benefite distributed by the state to which the citizen has no right but which may be crucial to livelihood, simple justice and common sense, as well as a desire to see good administration, call with ample eloquence for the rules of natural justice to be applied, flexibly as always, in circumstances where the person involved has no pre-existing rights."*

[255]*D.Basson, South Africa's Interim Constitution, 1994, Juta & Co Ltd, p34.*

[256]*O'Reilly v Mackman (1983) 2 AC 237 at 408-9.*

[257]*De Smith et al, Judicial Review of Administrative Action, 1995 Sweet & Maxwell, p421*

[258]*United Bus Service Co.Ltd v Toofail MR 1975; C.Hazary v The Union S.E Co. MR 1977; General Construction Co.Ltd. v M.Ramnaik 1981 Record No. 3048, Compagnie de Beau Vallon v L.Jacquette 1981 Record No.3111; R. Maheerally v The P.A.S, Ministry of Labour Acting on Behalf of H.S.Oomar 1983 Record No.3066; Tayab Ghoorun v A.G.Nabee & Co. 1984; Noël Furniture Ltd v S.Khoodeeram 1985 Record No.3521; A Rayapoulé v Taylor Smith & Co.Ltd 1988 Record No.4028; Beau Plan S.E. Co. Ltd v R.Kisto 1988 Record No.4003; Société Malesherbes v Jamajaye Beelur 1990 Record No.4438; Getan Eric Rene v General Construction Co.Ltd 1993 Case No.223/92*

[259]*This view finds authority in Administrator, Transvaal and others v Traub and others 1989 (4) SA 731(A). The facts were that the six respondents were serving their internships at Baragwanath Hospital. They had applied for appointment as Senior House Officers of the hospital. Their applications were turned down. It was contended that for decades the Director of Hospital Services had, as a matter of course, appointed these positions to those interns recommended by the heads of the relevant departments. However, on this occasion some of the recommended doctors were not appointed. The only reason advanced to explain this was that they (with some senior doctors) had written a letter to the South African Medical Journal which was critical of the hospital's grave shortcomings. Appointment as senior house doctor was important, if quite lowly, rung on the career ladder of able doctors; such appointments were essential if the doctor was to climb to the status of registrar and specialist. Thus, the doctors turned to law to salvage their careers. Corbett JA showed that since for decades the "recommendations of the departmental head, regarding senior house officers, had invariably, as a matter of mere formality been granted by the Director of Hospital Services...each of the respondents had a legitimate expectation that, once his*

or her application for the past of SHO (Senior House Officer) had been recommended by the departmental head concerned, the Director of Hospital Services' approval of the appointment would follow as a matter of course; and...that in the event of the Director's contemplating a departure from past practice, in the form of a refusal to make the appointment for a particular reason - especially where that reason related to suitability - he would give the respondent a fair hearing before he took his decision." (at 761J-762D) Corbett CJ also stated that the classic formulation of the principle refer to decisions prejudicially affecting an individual in his liberty, property or existing rights. But even where a person claiming some benefit or privilege which he has no legal right to, ...he may have a legitimate expectation of receiving the benefit or privilege and if so, the courts will protect his expectations by judicial review as a matter of public law.(Ibid).

For further reference on the effects of the doctrine of legitimate expectation on the South African Administrative law refer to J.Grogan's articles `when is the "Expectation" of a hearing "legitimate"? (1990) 6 SAJHR 36-47; Unfair Dismissal of "Contractual" Public Sector Employees' (1990) 11 ILJ 655-8; `Strike Dismissals in the Public Sector (1991) 12 ILJ 1-14; `Contract v Administrative Law: Dismissals in the Public Sector' (1991) 108 SALJ 599-606; `Natural Justice and Employment Contracts' A Rearguard Action; (1992) 109 SALJ 186-95; Dismissal of Public Sector Employees: The Final Piece in the Puzzle? (1993) 110 SALJ 422-30; Also refer to C.Forsyth, `A Harbinger of a Renaissance in Administrative Law, (1990) 107 SALJ 387.

[260]*Mokoena & Others v Administrator, Transvaal 1988 (4) SA 912 (W): See also Langeni & Others v Minister of Health and Welfare & Others 1988 (4) SA as (W)*

[261]*1991 (1) SA 21 (A) at 36 H-I*

[262]*1992 (4) SA 532 (A)*

[263]*Ibid at 539 A-B. Potential economic loss was also held to be a property right that engaged the audi alteram partem principle in Gemi v Minister of Justice, Transkei 1993 (2) SA 276 (TK) at 285 C-F*

[264]*1991 (4) SA 458 (E)*

[265]*Ibid at 466 I- 467 A*

[266]*Ibid at 463 J - 464 B*

[267]*Ibid at 466 E-F*

[268]*Ibid at 467 E - 468 B*

[269]*Supra note 78 at 35H-36B*

[270]*L.Baxter Administrative Law, 1984 Juta & Co., p101*

[271] *M.Wiechers Administrative Law, 1985 Butterworths p77*

[272] *Supra note 78 at 36H-I; See also Langeni & Others v Minister of Health and Welfare & Others 1988 (4) SA 93 w; Mokoena & Others v Administrator, Transvaal 1988 (4) SA 912 (w).*

[273] *E.Cameron `The Right to a Hearing Before Dismissal - Part 1 (1986) 7 ILJ 183*

[274] *In Embling v Headmaster St.Andrews College (Grahamstown) & Another 1991 (4) SA 458 (E), it entailed not only a setback to the professional reputation of the applicant but also a loss of accrued pension rights and other benefits, including free schooling for his young children.*

[275] *P.J. Pretorius & DJM Pitman, `Good Cause for Dismissal: The Unprotected Employee and Unfair Dismissal, 1990 Acta Juridica at 133.*

[276] *Ntenteni c Chairman, Ciskei Council of state & another 1993 (4) SA 546 (CK)*

CHAPTER 3

Constitutionalisation and Codification of Procedural Fairness in Mauritius and South Africa.

3.1 Introduction

With the increasing violation of an employee's right to a fair hearing before he/she is dismissed for misconduct, Mauritian and South African administrative law principles, through statutory provisions, have provided safeguards against dismissals that are procedurally unfair.

In Mauritius such statutory provisions are section 10 (though related to criminal offence, is equally applicable to civil cases) of the Constitution of the Republic of Mauritius and Section III of the Code of Good Practice in the Industrial Relations Act 1973. In South Africa similar provisions have been made in section 24 of the Bill of Rights in chapter 3 of the Interim Constitution No.200 of 1993 and Section 33 of the Constitution of the Republic of South Africa 1996 which have enshrined the right to administrative justice of equal importance are Section 3 of the Promotion of Administrative Justice Act 3 of 2000 and the Schedule 8 on Code of Good Practice in the Labour Relations Act 1995 which have codified procedural fairness.

It is noted that neither, unlike the statutory provisions in South Africa, the Mauritian legislation has provided specifically the "right to fair labour practices" (Section 27 of the Interim Constitution and Section 33 of the Republican Constitution of South Africa), nor expressly stated that "administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. (Section 3 of the Promotion of Administrative Justice Act). Even the Code of Good Practice in the Mauritian Industrial Relations Act has not provided in detail the specific requirements that form the content of procedural fairness, as stated in item 4 of Schedule 8 of the Code of Good Practice in the Labour Relations Act 1995 in South Africa.

These major lacunae in the Mauritian legal system make the comparative study significant. This chapter will, therefore examine the enabling acts on procedural fairness as stated in the following sub headings:

(i) Constitutionalisation and Codification of Procedural Fairness in Mauritius.
   (a) Section 10 of the Constitution.
   (b) Section 119 of the Industrial Relations Act 1973.
   (c) Section 32 (2) (b) of the Labour Act 1975.

(i) Constitutionalisation and Codification of Procedural Fairness in South Africa.
   (a) Section 24 of the Interim Constitution 1993.
   (b) Section 33 of the Constitution of the Republic of South Africa 1996.
   (c) Section 3 of the Promotion of Administrative Justice Act 3 of 2000.
   (d) Item 4 of Schedule 8 of the Labour Relations Act 1995.

3.2 Constitutionalisation and Codification of Procedural Fairness in Mauritius

Initially, the concept of procedural fairness did not have a statutory base but was inherited from Britain well before Mauritius achieved its independence in 1968. It was held in *Central Dock v Colonial Dock*: [1]

> ***"Our courts would be guided by the practice of English Courts concerning the review of administrative decisions."***

The Supreme Court of Mauritius has, on numerous occassions fallen back on the English legal system for assistance. In *Forget v C.E.B. Association*[2] the court stated:

> ***"We have practically no rules of our own regulating certiorari and must turn to English rules of court for guidance."***

Again, in *Augustave v Mauritius Sugar Terminal Corporation*[3] it was submitted by counsel for the respondent that this court originally decided to assume jurisdiction in these matters on the basis that it could exercise all the powers of the English High

Court and in the absence of any local statute or role of court governing judicial review, the court would follow the principles evolved in the English law.

In areas where the law is silent the judges have followed the English rules of court. In *Berenger and others v Goburdhun*[4] Glover AC C.J then was stated:

> ***"Where our rules of procedure are silent, we will follow English practice or be guided by it."***

It is also of common knowledge that the British Government in accordance with Article 63 of the European Convention of Human Rights, decided to extend the application of the Convention to a number of overseas territories for whose international relations it was responsible, and that later when those territories attained independence, the continuity of such protection was ensured by incorporating in their new constitutions, guarantees of human rights based on the provisions of the Convention, with the necessary variations to suit local conditions.[5]

Mauritius has not only followed precedent set by the English courts, it has also sought guidance and interpretation of procedural fairness from Article 6 (1) of the European Convention of Human Rights. Mauritius recognised this article which states:

> ***"In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."***

The court remarked in *Hossen v Dhuny*:[6]

> ***"This court on which it is incumbent to interpret the constitution may look for guidance where applicable in the pronouncements and enforcement of the clauses of the convention, namely the European Commission of Human Rights and the European Courts of Human Rights."***

Thus it is clear that the source of the concept of procedural fairness in Mauritius can be attributed to English case law and Article 6 (1) of the European Convention on Human Rights. The concept of procedural fairness, imbibed in the Mauritian Legislation, regulations and administrative directives. The main instrument that gave a constitutional dimension to procedural fairness is Section 10 (8) of the Constitution of the Republic of Mauritius, which codified as well the basic principles of natural justice. It states:

> ***Any court or authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial and where proceedings for such a determination are instituted by any person before such a court or authority, the case shall be given a hearing within a reasonable time.***

Hence with the advent of Section 10 (8) the rules of natural justice in particular, the rules affecting procedural fairness acquired a constitutional status. The right to fair hearing is, therefore, no longer merely an implied right to be granted in the absence of any express words.

Section 10 of the Constitution enumerates the rules of procedural fairness as follows:

Section 10 (1) deals with the requirement of fair hearing.

Section 10 (2) (a) secures the principle of presumption of innocence.

Section 10 (2) (b) deals with notice of the hearing.

Section 10 (2) (d) provides for legal representation and assistance.

Section 10 (2) (e) deals with confrontation and calling of witnesses.

Section 10 (2) (f) permits the assistance of an interpreter if the person charged with the offence cannot understand the language used at the trial.

Section 10 (9) states the requirements of a public hearing.

It is important at this point to consider whether the content of the concept of faire hearing as provided in Section 10 (2) and Section 10 (9) is restricted only to person charged with criminal offence or does it also apply to Section 10 (8) in relation to civil matters. The Supreme Court analysed this problem in *Ramkhelawon v PSSA*[7] and stated:

"...the lordships although dealing mainly with criminal trials had laid down..., so it would appear a general and fundamental proposition of law applicable to both criminal and civil case in view of the similarity in the wordings of the sub-sections (1) and (8) of section 10 relating to the requirements of a fair hearing ....."

This decision of the court reinforces the view held in *Bawreek v P.S.C*[8] where it was stated that:

".....the basic idea in common law natural justice remain in each case that due notice be given to matters to be taken into account or the charges against the citizen and an adequate opportunity to be afforded to the citizen to make representations prior to the final decision or action being taken.... Thus at one end of the spectrum they may approximate to the judicial procedures associated with the courts of law, e.g clear advance notice of charges or the case to be met, all evidence upon which the decision is to be based openly available to affect parties; opportunities to produce witnesses and to cross-examine witnesses provided by the other side; no hearing of one side or the absence of the other possibly, the opportunity to be represented by a lawyer."

This quote to a greater extent, summarises the various procedural safeguards that are available under the Mauritian Constitution. The vital fact is that section 10 of the constitution constitutes a constitutional guarantee rather than a mere statutory prescription, which provides for minimum basic entitlements to administrative justice.

The question which has to be determined is whether these procedural requirements are mandatory or directory and how they impact on decisions made by adjudicative authorities? So far as the public sector employees are concerned, the Public Service Commission are enjoined to follow fair procedures when deciding to apply the ultimate sanction of dismissing them.[9] It is submitted, therefore, that it is mandatory for the commissions to grant a hearing to an aggrieved party, and any decision taken in violation of the prescribed disciplinary procedures is subject to review by the Supreme Court according to Section 119 of the Constitution which states:

"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any

functions under this constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question, whether that person or authority has performed those functions in accordance with this constitution or any other law or should not perform those functions."

The Supreme Court has thus the power to intervene in the decision making process of the service commissions, and the failure to observe the natural justice become a reasonable ground for quashing either because they have performed a function which is not authorised or because they have exercised their functions in contravention to any law.

There are various cases where the Supreme Court had to intervene so as to evoke procedural justice. In *Bawreek v P.S.C*[10] the court was of the opinion that:

"the P.S.C did not comply with the procedure of natural justice by abolishing a hearing. The decision of the appellant was quashed because he was denied a fair hearing."

In *Sookia v Police Service Commission*[11] the court quoting from *Unuth v Police Service Commission*[12] said that:

"this court may intervene to quash a decision made by a service commission, if it does something it had no right to do like bringing an officer to task and punishing him without a hearing."

In *Descelles v P.S.C*[13] in the exercise of its power had been acting in conformity with the provisions of the P.S.C regulations and has not infringed the element of natural justice and right safeguarded by the Constitution of Mauritius.

These cases substantiate to a greater extent Section 10 of the Constitution and suggest beyond any doubt that although the decisions of the Commissions might have been correct in the given circumstances, nevertheless, they were unfair as the disciplinary authorities did not afford the aggrieved parties an opportunity to present their case and to challenge prejudicial allegations against them. These decisions were, therefore, in

breach of the principle of natural justice and were liable to be set aside by the trite law that where natural justice is violated, it is no justification that the decision was in fact correct.

The Supreme Court has, again, taken different view when the Public Service Commission did not follow all the fair procedures to reach a decision to dismiss an employee. In *H.Ramdin v The Public Service Commission*[14] following disciplinary proceedings taken against the applicant pursuant to regulation 37 of its regulations, the respondent decided to dismiss him from the public service. On certiorari proceedings the Supreme Court decided to quash the decision on the ground that the record thereof was so scanty that it was not possible to say that the service commission had given the necessary consideration to the material at which it should have looked, namely the report of the committee appointed to investigate the charges.

But when the Commission eventually reconsidered the matter and the record then showed that it had taken into account all the relevant facts in arriving at a similar decision to dismiss the applicant from service, the court,

> ***"found no cause to say that, in reaching those conclusions, the Commission acted perversely or that no reasonable person could have reached the decision arrived at. It is trite law that we need not and could not take that matter further. We hold that there is no warrant for interfering with decision."***

These decisions by the Supreme Court clearly put into perspective the force of recognition of procedural fairness at constitutional level, and a statutory basis to the Mauritian law of "unjustified dismissal."

Section 10 of the Constitution has, therefore, provided a reasonably comprehensive format to codify procedural fairness in Section 111 of the Industrial Relations Act 1973 which states:

> The procedure shall be in writing and shall –
>
> (a) specify who has authority to take various forms of disciplinary action , and ensure that supervisors do not have the power to dismiss without reference to more senior management.

(b) Give the employee the opportunity to state his case and the right to be accompanied by an officer of his trade union;

(c) Provide for a right of appeal, wherever practicable, to a level of management not previously involved; and

(d) Provide for independent arbitration of the parties to the procedure with it.

Similarly Section 32 (2) of the Labour Act 1975 reinforces what has already been codified in the Labour Relations Act. Section 32 (2) (a) states:

> ***"No employer shall dismiss a worker unless he has afforded the worker an opportunity to answer any charges made against him and any dismissal made in contravention of this paragraph shall be deemed to be an unjustified dismissal."***

Section 32 (2) (b) states:

> ***"The worker may for the purpose of paragraph (a), have the assistance of a representative of his trade union, if any, of an officer or of his legal representative."***

These provisions in the Industrial Relations Act and Labour Act do not create completely any new approach to the requirements of procedural fairness as already provided in Section 10 of the Constitution. Instead they have codified the essential elements of procedural fairness on which the industrial court has built the format and substance of an "unjustified dismissal" jurisprudence. They have simply stated the requirement that dismissals by reason of any disciplinary act by the employer had to be preceded by a fair procedure. What was to constitute a fair procedure has not been laid down by these statutes. For guidance in this regard one may have to refer to the formulation provided in Section 10 of the Constitution which embodies the criteria for testing the fairness of an action or practice.

Although the labour statutes have not explicitly stated what was required, they, nevertheless, influenced immensely the interpretation and application of procedural fairness in all future cases, and through its various decisions allowed the Industrial

Court to develop rules or requirements for procedural fairness to the case at hand. These requirements will be discussed in much detail in the next chapter.

It is now proposed to examine the constitutionalisation and codification of procedural fairness in South Africa. Four important statutes will form the basis of discussion namely:

1. Sections 24 and 27 of the Interim Constitution 1993.
2. Section 33 of the Constitution of the Republic of South Africa 1996.
3. Section 3 of the Promotion of Administrative Justice Act 3 of 2000.
4. Item 4 of Schedule 8 of the Code of Good Practice, Labour Relations Act 1995.

It may be noted at the very first glance of these statutes that, unlike Mauritius. South Africa has established rigorous mechanisms to keep a check on the abuse of administrative power and unfettered use of discretion on the one hand, and to set the norms and standards for the exercise of all administrative actions on the other. From the points of comparison the following features of the South African statutes stand quite distinct with the Mauritian statutes:

1. The right to procedural fairness as entrenched in the Constitution and The Promotion of Administrative Justice Act.
2. The Code of Good Practice: its legal status.
3. The interpretation of the Code by the CCMA and the Labour Courts.

3.3 Constitutionalisation and Codification of Procedural Fairness in South Africa

3.3.1 Procedural Fairness and The Constitution of South Africa

Procedural fairness, a concept basic to administrative justice[15] clause, has been enshrined in Section 24 of chapter 3 of the Interim Constitution No. 200 of 1993, and Section 33 of chapter 2 of the Constitution of the Republic of South Africa, Act 108

of 1996. These provisions have embodied a legal revolution to secure an accountable administration as well as justification for the acts and decisions of administrative functionaries. Section 24 of the Interim Constitution States:

> Every person shall have the right to
>
> (a) a lawful administrative action where any of his or rights or interests are affected or threatened;
>
> (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
>
> (c) .....
>
> (d) .....

Section 33 (1) of the Constitution of the Republic of South Africa 1996 also provides:

> Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

These articles impose a positive duty on the public administration to comply with the requirements of legality, fairness and reasonableness in its actions. They define the parameters within which the administration must function and the manner in which it must perform its functions.

3.3.2 The Promotion of Administrative Justice Act

However, while both constitutions embody a consensus on the right to administrative action that is lawful, reasonable and procedurally fair, they have not spelt out what this right actually means in practice. Thus to give effect to this right as contemplated in Section 24 of the Interim Constitution and Section 33 of the Final Constitution, and to create a culture of accountability, openness and transparency in the public administration or in the exercise of public power or the performance of a public function, the Promotion of Administrative Justice Act No.4 of 2000 was enacted.

According to section 3 of this Act, procedural fairness is firmly secured as it gives to individuals the full measure of the fundamental rights referred to in the Bill of Rights. Section 3 reads as follows:

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(a) adequate notice of the nature and purpose of the proposed administrative action;

(b) a reasonable opportunity to make representations;

(c) a clear statement of the administrative action;

(d) adequate notice of any right of review or internal appeal, where applicable; and

(e) adequate notice of the right to request reasons in terms of section 5.

3. In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to –

(a) obtain assistance and, in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person.

4.(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

It is to be noted that these rights are recognised in the Bill of Rights and they are now extended to persons whose mere interests[16] or legitimate expectations are threatened or affected.[17] Thus, the Promotion of Administrative Justice Act along with the Interim Constitution and Final Constitution have triggered the right to procedural fairness as a core clause to protect individuals whose interests or legitimate expectations are adversely affected by the decision of an adjudicating authority. For instance, in Administrator, Transvaal and others v Traub and others[18] a quasi-right or quasi-benefit, although not well defined, was expressed as some substantive benefit, advantage or privilege which a person concerned could reasonably expect to acquire or retain and which would be unfair to deny without a hearing.

In other cases as well a denial of fair procedure has been considered a fatal irregularity and invalidates the administrative action. In *Ramburan v Minister of Housing (House of Delegates)*[19] the court found that audi alteram partem was not complied with as the applicant had not been given an opportunity to defend himself. This amounted to an irregularity and the board's decisions were set aside. Similarly, among a host of other cases, in *Maharaj v Chairman, Liquor Board*[20] Nicholson J held that "procedurally fair administrative action is more than just the application of audi alteram partem and nemo index in sua causa rules and that it involves the principles and procedures which are right and just and fair in the particular situation or set of circumstances."

The coherent principle that has emanated from these decisions is that for an administrative act to be fair, it has to comply with all the rules of procedural justice. Thus from the promulgation of the Interim Constitution 1993 and the final Constitution 1996 which have paved the way for the constitutionalisation of procedural fairness embodied in section 3 of the Promotion of Administrative Justice Act. This provision has become a rich source of guidance towards giving

effectiveness to the realisation of the rights to administrative justice and promotion of an efficient administration.

Having codified the administrative procedures in Section 3, it is still to be seen in which type of adjudicatory models the provision fits in. Does one have to follow the strict procedures enumerated in Section 3 during a full scale formal hearing, or are the procedures to be followed even during an informal hearing?

It seems by codifying the rules of procedural fairness, Section 3 has established a uniform code of procedure that is applicable to all the authorities charged with the responsibility of conducting administrative adjudication.

There are divergent views about this approach. G.S. Orr is of the view that is neither possible nor practical.[21] The Franks Committee Report or Administrative Tribunal and Inquiries in England rejecting the idea of a general code for all tribunals observed:

> ***"We think that there is a case for greater procedural differentiation and prefer that the detailed procedure for each type of tribunal should be designed to meet its particular circumstances."***[22]

From this observation, it may not be a wrong assumption that Section 3 has laid down a very strict and rigid procedure so as to effect administrative justice. The reason for such strict requirements may be that, as Yvonne Burns puts it, the constitutionally entrenched right to procedural justice is

> ***"...a product of our history and is based on a deep mistrust of executive and administrative power and the recognition of the need to control administrative power, including discretionary power, to avoid a recurrence of the injustices of the past"***[23]

It may be for this reason that Section 3 has defined strict parameters within which the administration must function and the manner in which it must perform its functions. But, it cannot be overlooked that South Africa has set its march towards the

promotion of the constitutional values of an open and democratic society based on freedom and equality. It may be, therefore, hazardous if not detrimental to the interest of parties to follow a uniformly strict code of procedure in every administrative adjudication. What is therefore, required, without dampening the importance of the Promotion of Administrative Justice Act, is to make provisions for flexibility since dilatory and formal procedure like that of a court of law may not serve the real purpose of the legislation in each and every situation.

Two views have been expressed in favour of this approach. Peter Knoll observes:

> ***"A significant movement has taken place in American Administrative law to shorten or eliminate altogether formal hearings required by statutes or regulations through the utilisation of informal negotiation."***[24]

And, commenting on the problem of procedure in connection with the administration of Workmen's Compensation Act in India, J.N.Mallick writes:

> ***"A summary and informal method of procedure could alone execute the policy of the legislation for prompt and certain relief. In England, the National Insurance (Industrial Injuries) Act 1946 abolished the costly and contentious procedure for settling disputes and provided for National Insurance Commissioner for administering the Act."***

Such an approach in the nature of an informal summary trial may be useful for expediency and which relates to issues which are less technical in nature such as a disciplinary hearing. But as South Africa is committed to socialism and welfare of those who have a legacy of the grim past, administrative adjudication cannot be left to a haphazard approach. Hence, just like the civil and criminal courts have a uniform pattern of administering justice and centuries of experience in the administration of civil and criminal laws have borne testimony to the advantages of uniform procedure, the relevance of the Promotion of Administrative Justice Act in unfolding altogether a more established procedure for ensuring administrative justice cannot be minimised in modern South Africa. What should be clear, however, is what would be the procedural requirements during a formal and an informal hearing.

Asimow[25] has conceptualised two different types of adjudicatory models which would insist in the compliance of procedural fairness but depending on the type of issues at stake and on the type of issues that must be resolved. Different levels of formality will, therefore, be appropriate, depending on the particular claim to administrative justice.[26]

During a formal adjudication where important rights such as when the state seek to revoke a professional licence, expel a student from school or impose a disciplinary sanction against an employee, the procedures stated in Section 3 of the Promotion of Administrative Justice Act have to be invoked. This means that the individuals must be properly informed; they must be given an opportunity to put their side of the story; they must be able to challenge adverse allegations by the administration; must appear in person and be given an opportunity to obtain assistance and, in serious and complex cases, legal representation. This section has not however, expressly provided for the testimony and the right parties to cross-examine. Nevertheless it should be presumed that any act that is judicial, quasi-judicial or administrative in nature, requires adherence to procedural fairness.[27]

The second model, Asimow calls an informal or conference procedure where the deciding authority is required to provide proper notice and an impartial decision maker to decide the case exclusively on the record and provide a written statement of reasons. However, the authority could dispense partially or completely with testimony by witnesses and cross-examination. Instead, the litigants would be entitled to submit written statements and to make oral arguments.

Informal procedure would be appropriate for matters where less important rights are at stake, such as small monetary sanctions or a brief disciplinary suspension from job or school. It is especially useful where the agency need not resolve questions of adjudicative fact. For example, cases involving economic issues such as ratemaking, licence applications, land planning and zoning are appropriate subjects for informal procedure; they often involve issues of discretion but not adjudicative fact. Most factual issues arising in this sort of case can be fairly resolved through written submissions by experts, followed by oral argument.

Finally, there are cases which involve relatively trivial stakes or which are characterised by an extraordinary need for speedy and routine disposition. Here, even informal procedure may be too costly. The statute might call for a third model called summary procedure, in which a party is provided an opportunity to tell his or her side of the story to a decisionmaker. The decisionmaker need not be impartial or uninvolved in the dispute and need not decide the case on an exclusive record. The party would be entitled to receive an oral or written explanation of the decision and would have an opportunity to seek reconsideration of the decision and would have an opportunity to seek reconsideration of the decision at a higher bureaucratic level. Summary procedure provides relatively little procedural protection, but it is better than nothing and may be all that society can afford to provide in a wide range of situations.

It is now up to the administrative lawyers and the tribunals to use the correct model and apply a set of flexible procedures to suit particular circumstances of each case.[28] In *van Huysteen and others NNO v Minister of Environmental Affairs and Tourism and others* Farlam J stated:

> *"....the correct interpretation of the meaning of the right to procedurally fair administrative action entrenched in Section 24 (b) must be a generous one avoiding what has been called "austerity of tabulated legalism," suitable to give to individuals the full measure of the fundamental rights....referred to."*[29]

In the final analysis of Section 3 of the Promotion of Administrative Justice Act, there can be little doubt that by its codifying the rules of administrative justice, more particularly procedural fairness, the constitutional right to administrative justice as provided in Section 24 of the Interim Constitution and Section 33 of the 1996 Constitution, the constitutionally entrenched system of administrative law was confirmed and given a stamp of effective recognition.

This administrative justice clause will be quite instrumental in bringing out and resolving contentions issues such as who the bearers of the right to administrative justice would be, the forms of tribunals where the right to review administrative action may be exercised[30] and the precise parameters of the right to procedural

fairness.[31] Other questions which the statute has addressed is the exact scope of administrative action, more particularly where the administrative action effects the public.[32]

Such a codification will, hopefully, carry a great advantage of making the administrative law principles of procedural fairness more precise and accessible to the entire process of adjudication rather than remaining a somewhat amorphous and confusing body of law.

Having discussed the concept of procedural fairness in its broader context with a view to give substance to a just administrative action, it is important now to look at its application within the narrower context of the law of dismissal due to misconduct. In this part of the discussion particular attention will be paid to the codification of procedural fairness in schedule 8 of the South African Labour Relations Act 1995 whose aim is to advance economic development, social justice, labour peace and democracy in the workplace by means of realising and regulating the fundamental rights of the workers and employers as entrenched in Section 23 of the Constitution of the Republic of South Africa which provides that "every person shall have the right to fair labour practices." The new Labour Relations Act has remained consistent with the new Constitution[33] by providing that in order to be fair, a dismissal which is not automatically unfair must be for a fair reason and in accordance with a fair procedure.[34] This also reflects the opinion of Cheadle who stated:

> ***The purpose of the new Labour Relations Act is to change the law governing labour relations and to give effect to section 23 of the constitution in order to provide simple procedures for the resolution of labour disputes through statutory concilation, mediation, and arbitration for which the Commission for Conciliation, Mediation and Arbitration (CCMA) is established."***[35]

The Labour Relations Act constitutes, therefore, the initial component of a new framework of labour statutes that seek to give a wider dimension to procedural fairness. Thus item 4 of Schedule 8 of the Act has attempted to codify the industrial court's unfair labour practice jurisprudence and hence regulated the law of dismissal due to misconduct.

3.3.3 Schedule 8 of the Labour Relations Act 1995

3.3.3.1 The Code of Good Practice and its Legal Status.

Item 1 (1) of the Code states that the Code is intended to be general, and that departures from the norms established in the Code may be justified in certain circumstances. The norms established by the Code in respect of fair pre-dismissal procedures are contained in Item 4 (1) of the Code. These are:

- The employer must normally investigate to determine whether there are grounds for dismissal, but it need not be a formal investigation.
- The employee must be informed of the allegations.
- The employee should be entitled to state a case in response to these allegations.
- The employee should be given reasonable time to prepare the response.
- The employee is entitled to be assisted by a trade union representative or co-employee.
- The employee should be informed of the decision and preferably be given reasons for the decision.
- Unions must be informed if disciplinary steps are taken against union officials.

It is now important to analyze the general tenets of the Code.

Provisions of the Code

The first impression is that the provisions of the Code are a radical departure from that adopted earlier by the industrial court. However, closer examination shows that initially the industrial court's intention was not to develop procedural fairness requirements into a rigid, inflexible and legalistic set of rules.

PAK Le Roux writing in Cheadle et al Current Labour Law states:

> ***"Finally, the question of the time and costs involved in following the detailed strict procedures prescribed by many decisions of the court for a procedurally fair dismissal should be reconsidered."***[36]

Criticisms like this and numerous others on the stringent requirements for procedural fairness undoubtedly influenced the reform of the South Africa Labour Law, as can be seen in paragraph 14 of the explanatory memorandum of the Labour Relations Bill 1995.

There is no doubt that procedural fairness still features prominently under the 1995 LRA in the requirements for a fair dismissal. These requirements are, however, less stringent and formalised than was the case under the unfair labour practice jurisprudence of the industrial court. A different course has been chartered which requires a shift from the past and an effort to interpret this new approach. It is submitted that commissioners are not interpreting the new Act, but are handing down decisions as if the old law still applies.

The procedural fairness requirements in respect of misconduct dismissals are regulated by section 4 of Schedule 8, and entail the following:

Section 4(1) determines that, normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry.[37] Van Zyl and Rudd argue that the wording will create confusion instead of the desired simplification.[38] They continue to say that given the current relative legal certainty as regards disciplinary hearings and the fact that such hearings will, in many instances, be regulated by negotiated collective agreements (which take primacy over the Code), it is likely that, despite the simplification of the process envisaged in s4(1), there might be a strong and general tendency to continue to use formal disciplinary hearings and adhere to the requirements laid down in the case law over the past years. This, it is submitted, would be an approach that lacks vision. The terminology used by the drafters surely is deliberate. They chose to avoid the words 'hearing' and 'enquiry' Woolfrey states: "The irresistible inference by the Code, from an enquiry or hearing as contemplated by the Industrial Court."[39]

What the Code does make abundantly clear is that there does not have to be a formal enquiry. Le Roux points out that this view is supported by ILO Convention 158 and by the justification of efficiency.[40] Unfortunately many of the decisions from the CCMA are still referring to the jurisprudence of the industrial court instead of

interpreting the Code which deliberately avoids the formalism of many of the industrial court decisions. Du Toit et al warn that an uncritical acceptance of the court's jurisprudence in this area will undermine the new legislative scheme.[41] The Code should be used by commissioners as a broad guideline rather as Woolfrey puts it: "re-introduce discarded requirements or create new ones."[42]

At the same time the Code should not be interpreted by employers as an invitation to disregard the fundamental principles of fairness.[43] It must be remembered that the Code lays down minimum standards of fairness that employers must follow. The principles of natural justice should always define the proper content of procedural fairness.

Prior notification of allegations

Schedule 8 section 4(1) determines that the employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The use of the word 'form' must be taken to mean the manner in which the allegations are conveyed and contemplates either the written or oral medium. As regards the language requirement, it means the language that the employee can reasonably understand. It is submitted that this is welcome relief. Nowhere is mention made of charge sheets, or how to frame them. This will enable employers to concentrate on the more important substantive fairness and not spend valuable time adhering to a checklist of procedural requirements developed by the industrial court. Again it must be emphasized that the Code is framed in general terms and will require much interpretation. What is good for a specific case may not be appropriate for the next.

Opportunity of accused employee to state a case:

Schedule 8 Section 4(1) states that the employee should be allowed the opportunity to state a case in response to the allegations. In the majority of the cases of the industrial court accused employees were allowed to question employer's witnesses. They were also permitted to call their own. Van Zyl and Rudd argue that the legislature must, at the time of drafting, have been well aware of the existence in case law on the "rights" held to be attendant on disciplinary hearing and that, had it meant to require that such rights should be recognised under the 1995 LRA, it would have stated so.[44] The fact that it did not, suggests that it will in future be open to commissioners to decide what constitutes an "opportunity to state a case." It can only be hoped that such opportunity will not embrace all the formally recognised rights as listed in the Mahlangu case. Woolfrey points out that this is perhaps the most, fundamental requirement of a fair procedure.[45] However, this requirement has been applied at the workplace as in a court of law and this requirement has been simplified by the Code in that the employee is given an opportunity merely to respond to the allegations of the employer.

Reasonable Opportunity to Prepare a Response

Schedule 8 section 4(1) determines that the employee must be afforded a reasonable time to prepare a response. Presumably what is intended here is that reasonable opportunity to prepare must exist between the time of the notification of the allegations and the time of hearing is not defined. It is submitted that it will depend on the nature and seriousness of the allegations. Commissioner may well seek guidance from case laws when considering what a 'reasonable time' will entail.

Assistance by a co-employee or trade union representative

Section 4(1) determines that the employee is entitled to assistance from a fellow employee or trade union representative. Although the right to assistance forms part of the sentence dealing with the right to reasonable time to prepare a response, it is assumed that it was not intended to limit the right to assistance to the preparative stage but also to grant such right in respect of the "investigation" itself.[46]

Section 4(1) appears to restrict the right to representation conferred to internal representation. It also appears that the right to representation is not a general right and Chapter 111, Part A, s14(2)-14(5) of the 1995 LRA and the definition section (s213), wherein a "trade union representative" is defined as a member of a trade union who is elected to represent employees in a workplace, that a trade union representative is more or less what the previous Act referred to as a shop steward. An employee may not insist that a legal representative or any person outside the workplace be permitted to assist. Woolfrey highlights the fact that the Code speaks of "assistance" and not "representation", leaving the responsibility for presenting a response with the employee, in or through the person assisting but this may be done in the presence of the person assisting.

This part of the Code is basically endorsing what the industrial court's view on the entitlement to be assisted at a disciplinary enquiry was. In NUM & Another v Kloof Gold Mining Co. Ltd[47] the court referred to it as 'an elementary requirement of justice', especially when workers are illiterate or uneducated.

Notification of decision

Section 4(1) determines that, after the enquiry, the employer should communicate the decision taken, preferably in writing.

Notification of Reason for Dismissal and of Rights to challenge Dismissal

Section 4(3) determines that, if the employee is dismissed, the employee should be given the reason for the dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement. Van Zyl and Rudd pose the question as to whether or not an appeal hearing is required. There is certainly no express reference to an appeal hearing in s4 of the Code and the provisions of s4(3) appear to suggest that, after dismissal, the next step (without any interim appeal step) is the referral of the dispute to the Commission or any relevant council or collective agreement-determined dispute-resolution mechanism.[48]

Prior Consultation with Trade Union when Accused is a Shop Steward or Office Bearer of the Union

Section 4(2) determines that discipline against a trade union representative or an employee, who is an office-bearer or official of a trade union, should not be instituted without first informing or consulting the trade union. Sceptics of the Code may ask what is envisaged by this requirement, and what is expected to constitute the content of the consultation? It is submitted that too much should not be read into this provision. As Woolfrey points out, the purpose of the consultation is merely to inform the union of the reasons for the pending disciplinary action and to invite suggestions on how best to deal with the matter.[49] This provision in no way means that special treatment will be afforded to trade union representatives in the disciplinary process.

Exemption from the procedures in exceptional cases:

Section 4(4) determines that the exceptional circumstances where the employee cannot be reasonably expected to comply with the above procedures. The industrial court may in this instance provide guidelines. These exceptions will be dealt with later. However, this part of the Code should not be read as an opportunity to dispense with pre-dismissal procedures in their entirety, hence an adaptation of the procedures would be more advisable. It is submitted that that the nature and size of the employer's enterprise will influence commissioners. The drafters of the new legislature intended to remove the list of 'rights' of a fair disciplinary enquiry which was laid down by various industrial court decisions. The classic example being the Mahlangu case. Is the effect of s4(1) going to be that the rights laid down in Mahlangu are no longer going to be recognised as 'rights' and that a failure to afford the employee such rights will, under the 1995 LRA render a dismissal procedurally unfair? This remains to be seen but surely these'rights' would have been laid down in the Code if this were the specific intention. It is argued that the broad and sparse way the Code has been framed is deliberate in that it will allow commissioners to treat each specific case on it merits, rather than apply a checklist approach to every dismissal. The *Majaji v Creative Signs* [50] case is an example of the CCMA giving effect to the less formalistic procedures of the Code, where a small employer's failure

to comply with the procedural requirements of the Code was excused in circumstances where there was clear evidence of the misconduct being committed and little chance of the employee being able to forward a suitable explanation.

It is submitted that the Code charts a different approach from that of the industrial court. Le Roux and Van Niekerk, who list as what they term 'casualties' of the new approach, confirm this.[51] The first casualty they list is the right to a formal and impartial hearing. The Code is clear in that it states that the form in which an employee is granted the right to state a case need not be a formal enquiry.[52] The next casualty is the checklist approach to procedural fairness developed in Mahlangu's case. Employers and the labour courts are entitled, it would seem, to adopt a far more flexible approach than in the past.[53]

The following 'rights' also find no place in the Code:

- Charge sheets that need to be elaborately formulated;
- Evidence no longer has to be led through the medium of witnesses and cross-examination;
- No mention is made of the right to appeal to a more senior level of management.[54]

In Nongqayi v Shuter and Shooter EC[55] the CCMA, in dismissal was not procedurally unfair, said that although the hearing may have been flawed in the technical sense, it was satisfied from the evidence that the charges were put to the employee and he was given the opportunity to respond. This, it is submitted is the way the new act should be interpreted.

The LRA confirms the more limited role of procedural fairness in section 193. This section provides that, but for certain exceptions, the Labour Court or an arbitrator must grant reinstatement in all cases where the dismissal is proved unfair and where the employee so desires, except where the employer merely failed to follow a fair procedure. Here they can award compensation alone, calculated according to the remuneration the employee would have received between that date of dismissal and the last date of the arbitration or trial.[56] Unfortunately, in *Smith v De Bruyn Park Pharmacy*, [57] the CCMA awarded an amount they "deemed appropriate" under the

circumstances in a dismissal that was only procedurally unfair. One questions if this was a basic error or a case of the commissioner not studying the Act in this instance?

The intention of the Code is clear – to rid pre-dismissal procedures of the complex technicality, which the industrial court has evolved in its dismissal jurisprudence.[58] The Legislators of the new LRA have adopted a 'broadbrush' approach to procedural fairness as apposed to the "checklist' approach of the industrial court. This intention is in line with the economic development purpose of the Act. The problem, it is submitted, is that a paradigm shift of stakeholders needs to take place to give effect to this purpose. Trade unions, employers and commissioners need to resist the temptation to simply fall back on the jurisprudence of the industrial court but take the effort to interpret the Code. In many cases coming out of the CCMA, commissioners either do not interpret the Act or simply have not taken the time to study the Act and seem to behave as if the old Act still exists. In Monetsela Lekhotla Mabea v Impala Platinum Refineries[59] it is unfortunate that the CCMA found the dismissal to be unfair because the charge (gross misconduct emanating from involvement in dishonest activities) was vague and not formulated correctly.

Because the Code is vague (deliberately so) in its approach it is clear that the CCMA should, where pertinent to the cases before it, make an effort to explore and interpret the provisions of inter alia, item 4 of the dismissal Code, so that some sort of clear and consistent interpretive jurisprudence in this regard can be established which, in turn, is imperative to enable employers and employees to establish the permissible parameters of their conduct under the 1995 LRA. If this does not transpire, reference will continually be made to industrial court jurisprudence.

In *Makatsi v Mamello Pre-school*[60] the CCMA found that a misconduct dismissal will be held to be procedurally unfair where the employer:

- Did not conduct an investigation before accusing the employee of the misconduct concerned;
- Did not afford the employee the opportunity to disabuse the employer of the belief that he had committed the misconduct in question;
- Did not hold a proper enquiry before dismissing the employee.

What constitutes a proper enquiry is an extremely vexed question and no interpretation of item 4 of the Code is given. In *Mkhize v JLR Hay-Yoon Enterprise*,[61] however, the CCMA provided a useful interpretation of item 4. This approach needs to be encouraged. In this case the CCMA recommended between following the less formalistic approach as laid down in item 4 of the Code where no oral evidence is led and hence no cross-examination. Instead, all that need occur, is that the employee is, prior to the hearing, presented with the allegations against him which must comprise not only the nature of the charges, but also the alleged facts that may constitute grounds for dismissal.

Hence, for example, it would not be sufficient, according to this interpretation, merely for the employer to inform the employee that he is charged with theft. Instead the employer would, in the "allegations", have to set out fully the basis for such charge. The employee is thereafter given an opportunity to "state a case in response". Rather, states the CCMA, this can only be done when it is possible to come to a fair decision without hearing oral evidence during the enquiry. This approach seems to make sense if one heeds Woolfrey's warning that the Code of Good Practice is merely a guideline. Decision makers are required to 'take it into account' rather than 'apply' it.[62]

It is submitted that herein lies the key to the difference between the course the industrial court developed and the one proposed by the new dispensation. By switching from 'enquiry' to 'investigation' the drafters have shown that a more informal approach to procedural fairness will be tolerated. Again Woolfrey warns that this should not be interpreted as an invitation to 'disregard' the fundamental principles of fairness.' There is no doubt that the principles of natural justice (the right to be heard, and the right to decision by an unbiased decision-maker) will continue to determine if there was a fair procedure.[63] In *Mekqoe v Standard Bank*[64] the dismissal was found to be procedurally unfair as the employee was not given a fair opportunity to be heard prior to making its decision.

The positive approach is that there are various commissioners who are giving effect to the less formalistic procedures in the code. In *ECCAWUSA obo Nkosi and Vilakazi v Wimpy Kempton City*[65] where the employer was grabbed, thrown to the ground and

kicked, absence of a fair procedure was condoned. The CCMA referred to Item 4 of Schedule 8 (the Code of Good Practice) which states: "in exceptional circumstances, if the employer cannot reasonably be expected to comply with this guideline, the employer may dispense with pre-dismissal procedures" The CCMA in casu also referred to the *Mjaji v Vcreative Signs* and stated:

> ***".....as in the Mjaji case, no procedure or remnant of procedure was followed prior to dismissal but a characteristic shared by both cases is that the operation conducted by the employers is of a comparatively small nature and both of the employers occupied the position of sole members/sole proprietors and worked in close association with their employees and as a result of the assault were emphatic that the relationship of trust and confidence had irretrievably broken down..."***

In *McDuling v Motor Industries Federation*[66] the CCMA found that the dismissal of an employee was not procedurally unfair in consequence of the fact that the appeal hearing was held in the employers absence. The CCMA motivated its decision by saying that the Code of Good Practice contained in Schedule 8 of the 1995 LRA does not require an appeal as an automatic component of a fair procedure. It is submitted that this is the correct approach. However where the employer has conferred greater rights than those laid down in Schedule 8, the fairness of the employee's conduct should be assessed in accordance with it's compliance with such greater rights. Herein lies the challenge, many disciplinary codes are highly technical and employers have spent too much time administering these highly complex procedures, rather than as Woolfrey argues – 'getting on with the job at hand.' Employers and unions need to get around the table and renegotiate these pre-dismissal procedures and rid them of the complex technicalities, which the labour courts have developed in their dismissal jurisprudence. At the same time Commissioners are unfortunately ignoring the provisions codified in the Act and developing their own jurisprudence in the area of procedural unfairness.

In view of the aforesaid it is clear that a different, more informal approach was intended by the drafters of the Code. It is submitted that the following quotation is a succinct description of the route advocated by the Code:[67]

'What is envisaged in the Code is an investigatory (fact-finding) rather an adjudicative process. The purpose of this process is two-fold: first, it aims to ensure that employers make their decisions with the best possible information at hand; and, secondly it gives affected parties the opportunity to participate in the process, thus legitimating the ultimate outcome. Unlike an adjudicative process, it does not purport to guarantee a correct decision. What it does do is to ensure a fair decision, one made upon a judicious and dispassionate consideration of all the information at the employer's disposal."

The true test to establish whether the drafters of the Act and the Code succeeded in their goal is to evaluate the latest case law in this regard.

3.3.3.1.1 The legal status of the Code

Unlike the British[68] or Swazi legislation[69] where it is clearly stated that the code of practice is not enforceable, the 1995 Act makes no such provision. However, section 188 (2) mandates any person considering whether or not the dismissal was effected by a fair procedure to "take into account" means, the express pronouncement in the code itself that the investigation which the employer enjoined to conduct need not be formal clearly points to the fact that the application of the stringent rules of natural justice applicable in administrative law is not envisaged and so, the decisions of the old Industrial Court based on such principles will to the extent that they tend towards rigidity be inapplicable. When, however, it is recalled that most of the Industrial Court's decisions in this area had involved the interpretation and application of the operative employer's disciplinary codes, it follows that such cases will continue to be relevant unless distinguishable on their facts. It is also to be borne in mind that the code is not a substitute for the employer's disciplinary codes nor for the disciplinary procedures often incorporate in collective or recognition agreements between trade unions and employers.[70] The code provisions could only come into play where no such employer's code is in operation.

Another factor which places some doubts on the legal status of the code is the fact that it is not, like the provisions of section 189 relating to consultations in the event of retrenchments for operational requirements,[71] contained in the Act itself. This, and the

other factors raised above, combine to deprive the code of statutory authority hence it has been held not to have a force of law in the sense that it cannot on itself find a cause of action.[72] In other words, the code is a guideline [73] and not, in the words o a British judge, "an Act of Parliament or a testamentary disposition."[74]

The distinction between the code provisions and section 189 was adverted to by the Labour Court in *Chetty v Scotts Select A Shoe*[75] where Landman J held that by so enacting, the legislature intended that the procedure regarding dismissal for operational requirements should governed by law rather than by guidelines. Therefore, the duty on employers to follow the procedure laid down is significantly higher with regard to dismissals for operational requirements as against dismissals for misconduct or incapacity.[76] Indeed, it has been held that it is not obligatory for an employer to exhaust all steps set out in the code before resorting to dismissal[77] nor should the chairperson of a disciplinary enquiry stick rigidly to the letters of a disciplinary code without considering all the circumstances of a case and exercising a proper discretion.[78]

It has further been held that the employer's disciplinary code which is a product of collective bargaining between the employer and the workers' representatives takes precedence over the code of practice such that an arbitrator who ignores the employer's disciplinary code in preference to the code of good practice commits a "gross irregularity".[79] On the other hand, a Commissioner does not commit a "gross irregularity" where he/she applies the employer's disciplinary code instead of the standards laid down in Item 4 of the code of practice. The fact being that the Labour Relations Act "promotes and encourages parties to regulate their relationships through privately agreed procedures and processes. Where parties have an agreed disciplinary code and procedure, that is the process through which they have agreed to resolve disciplinary issues. The provisions of Item 4 would therefore apply where parties do not have an agreed process. In the court's view once parties have agreed to a disciplinary process that encourages a liberal standard, one of them cannot be heard to argue that a conservative standard contained elsewhere should have been applied."[80] Similarly, the employer cannot rely on an agreement to the effect that the employee could be dismissed "immediately" to defeat the statutory requirement of fair

procedure. "If that was the intention it would be contrary to the spirit and content of the Code of Good Practice and the case law that has developed over many years.

3.3.3.1.2 The interpretation of the Code By The CCMA And The Labour Courts:

From the early Labour Court and CCMA reports it appears that the judges and commissioners realized that the Code, although lacking the force of law, intended a different approach to procedural fairness. This change was acknowledged by the Labour Court in *Moropane v Gilbeys Distillers & Vintners (Pty) Lts & Another*[81]

> ***'Procedural fairness under the 1995 Act... demands less stringent and formalized compliance than was the case under the unfair labour practice jurisprudence of the Industrial Court.'***[82]

This approach was endorsed by the CCMA in *Cornelius and Others v Howden Africa Ltd t/a M & B Pumps.*[83] In this case the commissioner stated clearly that it not required that each of the procedural requirements listed in the Code be observed, but that the procedure in aggregate is fair:

> ***'In my view, a holistic approach must be adopted. Each factor cannot be considered in isolation but must be looked at to determine whether, on balance, the procedure adopted amounted to such deviation from the Code of Good Practice to justify the granting of relief.'***[84]

From the reports it appears that the CCMA commissioners have thus far appreciated and applied the "holistic" approach advocated in Cornelius. The Code in general and more particularly item 4 thereof, are not treated as prescriptive, but rather as a suggested approach to procedural fairness. Non-compliance with the specifics of the Code is not in itself fatal to the cause of procedural justice. Instead, the entire process is judged and evaluated against the notion of fairness.[85]

In ECCAWUSA obo Jafta/Russels Furnishers,[86] the fact that a union was not informed of disciplinary proceedings against a union official, as is required by the

Code, was held not to be unfair since there was no indication that non-compliance with this requirement resulted in an unfair procedure. Similarly, in most instances where an employee was given short notice to attend a hearing, it was held to be unfair,[87] but in other instances where it was obvious that the fairness of the proceedings was not compromised, short notice was accepted by the CCMA.[88]

The CCMA has also ventured beyond the parameters of the Code in the interest of fairness. It stated:

> ***'Moreover the requirements for a fair hearing go beyond merely the guidelines set out in Section 4 of Schedule 8. Regard must also had to be the precepts of natural justice.'***[89]

In terms of the Code, an employee is not entitled to legal representation during a disciplinary hearing. This has in general been upheld by the CCMA[90] but in *Blaauw/Oranje Soutwerke (Pty) Ltd*[91] the refusal to allow an employee legal representation was held to be unfair, despite the provisions of the Code. In that particular instance the employer was represented by an attorney, leaving the employee in a disavantaged and thus unfair position.

The CCMA's treatment of the Code's requirement of an investigation, which need not be formal enquiry, also merits comment. Closer scrutiny of the few instances where disciplinary hearings were held to be unfair, not because of the lack of a hearing as such, but because the dismissed employee was not given an opportunity to state his/her case[92], implying that a 'hearing' is not the same as 'stating a case', thus endorsing a less formal approach.

The impression must not be created that all commissioners actually appreciate the new order which the drafters of the Code endeavoured to introduce. In *Camhee v Parkmore Travel*[93] the arbitrator implicated that an opportunity to state a case did not differ from a hearing.

This, however, does not reflect the CCMA's appreciation of disciplinary proceedings in general. The following quotation from *Sehomo/D&K Coffin Manufaturers*[94] it is

submitted, correctly illustrated the meaning of an investigation as envisaged by the drafters of the code:

> ***"It is common cause among the parties that there was a meeting attended by the applicant, the supervisor, the manager, the two shop stewards and chaired by D.Poonee, the Director, to discuss the applicant's behavior. According to he code of Good Practice, it is not necessary that there be an formal inquiry. Therefore, I do not think the applicant's contention that what was held was a "discussion" rather than an inquiry is material and I am satisfied that an "investigation", as envisaged by the Code was held."***

In most of the other instances where procedures were held to be unfair, it appears that the unfairness related to the absence of natural justice rather than the requirements of the Code. This illustrates once again that procedural fairness does not depend on whether the Code as such was honored, but whether a fair procedure was followed. The Code is merely a tool used to answer that question:

> ***"The employer may not have followed the guidelines relating to fair dismissal as contained in the Labour Relations Act but this does not mean that the employee was not allowed the opportunity to state her case, albeit on the telephone. It would be unfair to expect the employer, who does not have the infrastructure, to follow the guidelines to the finest detail."***[95]

And

> ***"It does not matter whether each of the procedural requirements have been meticulously observed. What is required is for all the relevant facts to be looked at in the aggregate to determine whether the procedure adopted was fair. One must guard against rigid imposition of judicial style proceedings in inappropriate situations."***[96]

The Practitioners

The previous paragraph was an effort to reflect on the principles and notions in respect of procedural fairness as it emerged from the Labour Court and CCMA reports. Practitioners and Labour law consultants have expressed conflicting opinions about their experiences in this regard. From my personal interview with them, I was able to conclude the following:

Some have indicated that in their experience, CCMA commissioners still require pre-dismissal procedures to be in the nature as was suggested in Mahlangu's case. One company indicated that due to bad experiences at CCMA in this regard, it halted its efforts to introduce a less judicial pre-dismissal procedure and reverted to its pre-1995 disciplinary code. One labour consultant indicated that he still advises his clients to follow formal predismissal procedures in view of the fact that the applications of the Code is in his opinion still too inconsistent. Others indicated that in their opinion commissioners generally understood the impact of the Code and only tested procedure to establish whether or not the employee was inhibited by anything that occurred during the hearing.

The latter view seems to be consistent with the sentiments that have emerged from the reports studied.

3.3.4 Conclusion

This chapter examined the constitutionalisation and codification of the concept 'procedural fairness in both Mauritius and South Africa'. Both countries have, through their respective constitutions, in particular the Bill of Rights entrenched the right of procedural justice to an individual. The only difference between the constitutions of both countries is that by its section 10 the Constitution of the Republic of Mauritius has attempted to codify the requirements of procedural fairness and so far South Africa is concerned, Section 24 of the Interim Constitution and Section 33 of the final constitution have both prescribed, without codifying, a general principle of administrative legality, which includes the principle of lawfulness, the

principle of procedural fairness and the substantive principles of justifiability and reasonableness. The codification part has been effected in section 3 of the Promotion of Administrative Justice Act which makes it mandatory on any competent administrative authority to adhere to procedural rules when making any decision that affects materially and adversely the rights or legitimate expectation of any person.

Section 119 of the Industrial Relations Act and Section 32 (2) (b) of the Labour Act of Mauritius have not codified the rules of procedural fairness as it has been detailed in item 4 schedule 8 of the South African Labour Relations Act 1995. To a large extent, however, schedule 8 does not differ in content to what has been provided in the Mauritian Labour Statutes. Item 4 of schedule 8 of the Labour Relations Act has codified what the industrial court has developed over the years. What is significant is the statutory weight that the Labour Relations Act affords to schedule 8. It has been held that the code does not have the force of law, it is a mere guideline.

However, the code is not different in content to what the jurisprudence of the industrial court required for procedural fairness were found through sifting the cases over the years.

No reference to the statute could provide one with what was required for a fair dismissal. The rules were at first implicit and gradually more explicit, however, still case specific. Through codification, these requirements for procedural fairness are explicitly stated in the statute. It is not case-specific and no evolution of jurisprudence can change what is required. This does not imply rigidity since the Code is phrased in a general way precisely to permit the size and the nature of the business to be considered. The manner in which the procedures are implemented depends on these factors, as long as the basic elements of procedural fairness are present.

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[1] – *1891 MR P49*

[2] – *1974 MR P299*

[3] - *1991 SCJ P347*

[4] – *1986 LRC P707; In Transport Employees v Permanent Arbitration Tribunal MR 1977 P83 it was decided the court will never disregard its specific provisions to follow the English rules.*

[5] – *Police v Noorbannoo 1972 MR 22*

[6] – *1972 MR P145*

[7] – *1988 SCJ No.132*

[8] – *1987 SCJ P229*

[9] – *Regulation 30 of the Public Service Commission and regulation 27 of the Police Service Commission state that "the Commission shall not exercise its power in connection with the dismissal, the disciplinary punishment or the termination of appointment otherwise than by way of dismissal regulations as may be made by the commission." And Section 78 (2) and Section 93 (2) of the Constitution regulate the termination of employment of judges of the Court of Appeal and Court of Criminal Appeal and other public officials.*

[10] – *Supra note 8*

[11] – *1983 SCJ at 87*

[12] – *1982 SCJ at 284*

[13] – *1978 SCJ at 226*

[14] – *1991 SCJ Record No. 40619*

[15] – *Boulle LJ 'ADR Applications in Administrative law' 1993 Acta Judica 138 defines administrative justice as follows: "Administrative justice denoted a system of public administration which upholds fairness, reasonableness, equality, propriety and proportionality. These principles can be advanced through mechanisms of accountability and control, review and supervision, openness and consultation. Administrative justice is made more accessible, in an immediate sense, where those affected by the decisions of public authorities have the knowledge, financial means, procedural avenues and information to enforce those principles before, during or after such decisions have been made.*

[16] – *The wide spectrum which an 'interest' can cover was well expressed by Derkin J in Bearmans Ltd and another v Metropolitan Police District Receiver (1961) 1 ALL ER 384 (CA) at 391. He stated:*

> *" The word "interest" is not a word which has any well defined meaning. Anybody who has asked what it meant would at once want to know the context in which it was used before he could venture an opinion. It may mean a direct financial interest on the one hand, on the other hand it may mean*

nothing more than the ordinary human interest which everyone has in the outcome of proceedings in which he is likely to be a witness."

The question of whether the Courts will afford a broad or a narrow interpretation to "interests" may perhaps be answered by having regard to provisions of Section 7 (4). It dramatically relaxes the requirements for standing to sue in the assertion of a constitutional right, at the same time greatly broadening the class of persons who may approach the Court for Constitutional relief in a given case. It is therefore clear that the scope of judicial review, from the point of view of who may invoke the remedy, has been considerably widened through the introduction of the concept of an "interest". Being a term capable of flexible definition, it is moreover a useful tool for the development of administrative law remedies in years to come.

[17] – De Ville in his article 'The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution' 1995 SAJHR Vol 11 Part 2 page 264, cites the case R v Markowits 1911 TPD 555 at 588 in which threat is defined as being a "menace of destruction or injury to life, property or reputation." The author also notes that such a risk would have to be real one rather bland concept of "affect", it would appear that Mureinik, referred to in De Ville's article, has made the greatest contribution towards establishing a coherent meaning of his word "affect" through his so-called "deprivation" and "determination" theories. In terms thereof affect can mean either the taking away of a right (deprivation) or the settling of a right i.e. the determination thereof. Thus, for example, a person applying for a liquor license who has not previously applied therefore, will be "affected" by a decision refusing him a license in as much as the administrative authority will determine whether his latent right is to be recognized or not.

There is general consensus that "affect" implies a much greater degree of interference than does the concept of "threaten." On a purely linguistic or grammatical basis this need not necessarily be the case. When any citizen's proprietary or personal stake in the subject matter of an administrative process is "affected" this can either be a positive or a negative development. In this sense the word "affect" is neutral and value free. "Threaten" however contains a much stronger connotation of a potentially prejudicial effect upon the stake in question. It is difficult to see what relief someone whose stake has not been harmed or left untouched, would wish to seek under Section 24 and thus proponents of the "plain language" school of drafting might prefer to see the word "prejudicially" inserted prior to the appearance of the word "affected" where ever it appears in the Section. Be that as it may, Section 24 can only make sense if "affect" is interpreted as being more prejudicial to the stake holder than a mere "threat" to his rights, interests or legitimate expectations.

[18] – 1989 (4) SA 731 (A) at 755 (c)

[19] – 1995 (1) SA 373 (D)

[20] – 1997 (1) SA 273 (N)

[21] – In his report on Administrative Justice in New Zealand, G,S, Orr remarks that 'There is a general agreement that it is neither desirable nor feasible to formulate a detailed code governing the procedure of all tribunals."

[22] – Franks Committee Report, CMD 218 (1957) p15

[23] – *Y.Burns. Administrative Law Under the 1996 Constitution, 1998 Butterworths at 134*

[24] – *P Woll, Administrative Law (Berkley, Los Angeles), 1963 University of California Press, p31*

[25] – *M.Asimow, Administrative law under South African Final Constitution. The Need for an Administrative Justice Act, 1997 SALJ at 613*

[26] – *S v Makwanyane & another 1995 (13) SA 391 (cc)*

[27] – *Supra note*

[28] – *In Van Huyssteen and others NNO v Minister of Environmental Affairs and Tourism and others 1995 (3) SA74 the Cape Provincial Division of the Supreme Court exhibited praise worthy flexibility in holding that a party entitled to procedural fairness in terms of Section 24 (b) of the Interim Constitution is entitled to "the principles and procedures...which in any particular situation or set of circumstances, are right, just and fair."*

[29] – *I bid at 305 F-G*

[30] – *Section 6 of the Mauritian Administrative Justice Act No3 of 2000*

[31] – *I bid Section 3*

[32] – *I bid Section 4*

[33] – *Section 23 (1) Act 108 of 1996. The Constitution of the Republic of South Africa*

[34] – *Section 188 of Act 66 of 1995, the Labour Relation Act*

[35] – *Cheadle et al 1997 Current Labour Law 1996, Juta & Co. Ltd p75*

[36] – *I bid 142*

[37] – *The Labour Relations Act 66 of 1995*

[38] – *Van Zyl an d Rudd SA Labour Law through the law Books* http://www.vanzylrudd.co.za

[39] – *Woolfrey Predismissal Disciplinary procedures under the New LRA (1997) 6 Labour Law News and Court Reports at 2*

[40] – *PAK Le Roux and A. Van Niekerk The South African Law of Unfair Dismissal 1994 Juta & Co p59.*

[41] – *Du Toit et al, The Labour Relations Act of 1995 2ed. 1998 Butterworths at 386.*

[42] – *Woolfrey Supra note 35*

[43] – *I bid*

[44] – *Supra note 38*

[45] – *Supra note 35 at 3*

[46] – *Van Zyl Rudd 89 Labour Law through the law Books* http://www.vanzylrudd.co.za

[47] – *(1986) 7 ILJ 375 (IC)*

[48] – *Supra note 38 at 90*

[49] – *Supra note 40 at 4*

[50] – *(1996) 7 (2) SALLR 1 (CCMA)*

[51] – *Le Roux & Van Niekerk Supra Note 40 at 58*

[52] – *I bid*

[53] – *I bid*

[54] – *I bid*

[55] – *(1998) 7 BLLR (CCMA)*

[56] – *Grogan 'Workplace Law' 3ed (1998) 149*

[57] – *(1998) 7 BLLR (CCMA)*

[58] – *I Bid 140*

[59] – *(1998) GA 28226 Sabinet on line (CCMA)*

[60] – *(1996) 7 (1) SALLR 11 (CCMA)*

[61] – *(1995) 6 (11) SALLR 1 (CCMA)*

[62] – *Supra note 39 at 2*

[63] – *I Bid*

[64] – *(1997) 1 GA 1019 BLLR (CCMA) at 1021*

[65] – *(1996) 7 (12) SALLR (CCMA)*

[66] – *(1996) 7 (12) SALLR 1 (CCMA)*

[67] – *Supra note 39 at 4*

[68] – *On this see Smith & Wood Industrial Law (4ed) at 266 commenting on the legal status of the UK Code of Practice*

[69] – *S89, Industrial Relations Act 1996*

[70] – *Item 1(2), Code of Good Practice : Dismissal*

[71] – *This Section, among other sections of the Act, has become a veritable source of litigation that attention may be drawn to the following: Bank of Lisbon International v Pinheiro (1998) 19 ILJ 549 (LAC); Johnson & Johnson (Pty) Ltd (1997) 9 BLLR 1186 (LC); SA Clothing & Textile Workers Union & ORS v Discreto – A division o Trump & Springbok Holdings (1998) 19 ILJ 1451 (LAC); NUMSA v Ascoreg (1999) 2649 (LC); PPWAWU & Ors v Nasou-Via Afrika, A Division of the National Education Group (Pty) Ltd (1999) 20 ILJ 2101 (LC); Dhlamini & Ors v Faraday Wholesale Meat Supply (1999) 8 BLLR 771 (LC); Francois Burger v Alert Engine Parts (Pty) Ltd (1999) 1 BLLR 18 (LC); SA Typographical Union v Press Corporation of SA Ltd (1998) 19 ILJ 1553 (LC); Visser v SA Institute for Medical Research (1998) 19 ILJ 1616 (LC; Ellias v Germiston Uitgewers (Pty) Ltd t/a Evalulab (1998) 19 ILJ 314 (LC); Steynberg v Coin Security Group (Pty) Ltd (1998) 19 ILJ 304 (LC); Keller v Transnet (1998) 1 BLLR 62 (LC); Heigers v UPC Retail Services (1998) 1 BLLR 45 (LC); Chothia v Hall Longmore & Co (Pty) Ltd (1997) 18 ILJ 1090 (LC); NUMSA & Ors v Precious Metal Chains (Pty) Ltd (1997) 8 BLLR 1068 (LC)*

[72] – *Per Landman AJ in Morepane v Gilbeys Distillers & Vintners (Pty) & Anor (1998) 19 ILJ 635 (LC) at 640H-I*

[73] – *County Fair Foods (Pty) Ltd v CCMA & Ors (1998) 19 ILJ 815 (LC); Leonard Dingler (Pty) Ltd v Ngwenya (1999) 5 BLLR 431 (LAC)*

[74] – *Per Lord McDonald in Carr v Alexander Russell Ltd (1976) IRLR 221 at 222*

[75] – *(1998) 19 ILJ 1465 (LC) at 1467*

[76] – *I bid at 1471 para 24*

[77] – *Dube v Nasionale Sweisware (1998) 19 ILJ 1033 (SCA)*

[78] – *Mondi Paper Co. V Dlamini (1996) 9 BLLR 1109 (LAC). Contra the Civil Service Staff Code the non-compliance with which was held by Hlope J to be fatal in UWC & Ors v MEC for Health & Social Services & Ors (1998) 19 ILJ 1083 (CPD) at 1096A*

[79] – *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU & Anor (1999) 3 BLLR 223 (LCO) at 225*

[80] – *East Rand Gold & Uranium Co. Ltd v CCMA & Ors (1999) 20 ILJ 2348 (LC) at 2361 para 39 per Mlambo J*

[81] – *(1998) 19 ILJ 635 (LC)*

[82] – *I bid at 639*

[83] – *(1998) 19 ILJ 928 (CCMA)*

[84] – *I bid 928D*

[85] – *Also see NUM obo Mateta New Vaal Colliery (1999) 3 BALR 332 (IMSSA) and SACWU obo Reeding/Plastamid (Pty) Ltd (1999) 4 BALR 391 (CCMA)*

[86] – *(1998) 4 BALR 391 (CCMA)*

[87] – *Gxabela/Samcor 1998 6 BALR 683 (CCMA) and Num obo Makanye/Rustenburg Platinum Mines Ltd Amandelbult (1998) 10 BALR 1289 (CCMA)*

[88] – *Sehomo/D&K Coffin Manufacturers (1998) 12 BALR 1601 (CCMA)*

[89] – *Avanes/Budget Rent A Car (1999) 6 BALR 657 (CCMA) at 670H*

[90] – *Davids/ISU Campus (Pty) Ltd (1998) 5 BALR 534 (CCMA)*

[91] – *(1998) 3 BALR 254 (CCMA)*

[92] – *See Labuschagne v WP Construction (1997) 9 BLLR 1251 (CCMA); Snell v SSM Manufacturing (1997) 2 BLLR 240 (CCMA); Burger/LG Marketing (1998) 4 BALR 387 (CMMA); Makhetha/Bloem One Stop (1998) 5 BALR 566 (CCMA); Obery (Pty) Ltd and Redition (Pty) Ltd (1998) 7 CCMA 7.2.3; Jantjies and B&S Communications (1998) 7 CCMA 7.2.8 and Kgopane and Metrotool (1998) 7 CCMA 7.2.9*

[93] – *(1997) 2 BLLR 180 (CCMA) Also see Coyler v Drager SA (Pty) Ltd (1997) 2 BLLR 184 (CCMA)*

[94] – *(1998) 12 BALR 1601 (CCMA) at 160 8C-D*

[95] – *Steyn and Muscle Health Bar (1999) 8 CCMA 7.2.1 (page 4 of 4)*

[96] – *Cornelius & Others v Howden Africa Ltd t/a M&B Pumps (1998) 19 ILJ 921 (CCMA) at 928c*

[97] – *See Labuschagne v WP Construction (1997) 9 BLLR 1251 (CCMA); Snell v SSM Manufacturing (1997) 2 BLLR 240 (CCMA); Burger/LG Marketing (1998) 4 BALR 387 (CCMA); Makhetla/Bloem One Stop (1998) 5 BALR 566 (CCMA); Obery (Pty) Ltd and Redition (Pty) Ltd (1998) 7 CCMA 7.2.3; Jantjies and B & S Communications (1998) 7 CCMA 7.2.8 and Kgopane and Metrotool (1998) 7 CCMA 7.2.9*

[98] – *(1997) 2 BLLR 180 (CCMA) Also see Coyler v Drager SA (Pty) Ltd (1997) 2 BLLR 184 (CCMA)*

CHAPTER 4

Requirements for Procedural Fairness in Pre-dismissal cases for Misconduct in Mauritius and South Africa.

4.1 Introduction

In chapter 2, it was discussed that procedural fairness is the yardstick against which the employer's pre-dismissal actions are measured and its requirements have developed from the rules of natural justice of the common law to suit the employment arena.[1] The standard of fairness to which much has been alluded in the previous chapter, represents the minimum content of fair procedure which have been provided in the Mauritian and South African constitutions, and in their respective labour statutes. Very little has been discussed so far about the requirements for procedural fairness in pre-dismissal cases related to misconduct.

The focus of this chapter will, therefore be to examine critically the requirements for procedural fairness in pre-dismissal cases for misconduct in Mauritius and South Africa.

In the delineation of this area of research, it is important, at the very outset, to note the limitations envisaged by the researcher to collect and collate information relevant, particularly, to the Mauritian law of procedural fairness as there has been fewer judicial decisions, as compared to South African labour jurisprudence, by the Industrial Court and the Supreme Court of Mauritius in this regard. The glaring deficiency that is mostly of note is that the Mauritian cases have not been able to single out each and every requirements of procedural fairness and examine them with the thoroughness they deserve, even though Section 111 of the Industrial Relations Act and Section 32(2)(a) of the Labour Act have codified, to a certain extent, the rules of procedural fairness. In fact, these provisions have not spelt out what the requirements of procedural fairness are. In very broad terms, Section 32(2)(a) has provided that "no employer shall dismiss a worker unless he has afforded the worker an opportunity to answer any charges made against him."

In Mauritius, the notion "an opportunity to answer the charge" has been equated to `a hearing' which has to be complied with the provisions of the Labour Act and carried out in compliance with a fair procedure. In *A.I Mamode v F.M.J.P Doger de Speville*[2] it was stated:

> ***"It will be noted that subsection (1)(b)(ii)(a) (of the labour act) describes the procedure traced in subsection 2(a) as a hearing. Undoubtedly, the cases other than those provided for in 1(b)(ii)(c), that is to say, the cases where a hearing must take place even when the termination of employment is accompanied by the payment of normal severence allowance and the payment of wages in lieu of notice, for the failure to grant a hearing in this situation would amount to an unjustified termination of employment. (Vide, in this sense, Bundhoo v Mauritius Breweries (1981) SCJ No.140"***

Thus, the notion `opportunity to answer the charge' needs to be expanded to give specificity and precision to the requirements of procedural fairness. The courts are, in fact, uncertain about the varying standard of the concept. For instance in the case of *Natal v Longtill (Mauritius) Ltd*,[3] the Supreme Court of Mauritius seems to be uncertain in the degree of formality required in pre-dismissal procedures. It is stated that

> ***"The word `hearing' used by the counsel in his submission and the Magistrate in his judgment was certainly not the word of choice and may convey the meaning that before dismissing his employee or employer must as sine qua non institute some sort of court proceedings and hold a formal hearing. What the law provides is that no worker shall be dismissed unless he has been afforded an opportunity to answer any charge made against him..."***

The court further held that

> ***"the hearing is not required to be conducted with the formality and all the exigencies, whether procedural or evidential, appropriate to a court or tribunal. Vide Tirvengadum v Bata Shoe (Mauritius) Co.Ltd (1979) MR 133). The concept of hearing requires that it should be conducted with fairness"***

The implication that can be derived from this statement is that pre-dismissal hearings should not be conducted with all the trappings of a court of law and deviation from strict procedural rules would be an acceptable norm. This does not indicate, however, what the requirements of procedural fairness would be.

This opinion of the Supreme Court is repeated in *Tirvengadum v Bata Shoes (Mauritius) CO.Ltd*[4] where it is stated: "What the law has done is to say that the worker must not be prevented from giving an explanation, this can take a number of forms." One of them, as was envisaged in *La Sentinelle v David*,[5] where the court held:

> ***"But, in a situation where an editor of 6 years' standing, who had previously performed creditably, is charged with committing an act of serious misconduct by disobeying orders given by the `director', which renders him liable to summary dismissal, and the latter puts a number of reasons which, by all accounts, are not patently flimsy pretexts, in order to explain or excuse his act, there can be no compliance with the provisions of the law requiring an employer to give the employee an adequate opportunity to answer the charge if the hearing resolves itself into an interview between the employee and the very person whose orders were disobeyed, who is not the employer."***

In this particular instance, all the requirements of procedural fairness may not be followed, but again, *Tirvengadum v Bata Shoes (Mauritius) Co.Ltd*[6] deviates from its stance and recommends the full compliance of procedural fairness, "where the person or body of persons responsible for making the ultimate decision to dismiss, hears of the misconduct at second hand, e.g from a co-worker or junior officer."

Still, none of these cases have specified the requirement for procedural fairness, though the court has been decisive at one point, that is, that an employee before being dismissed, should be accorded some form of opportunity to answer the allegations that may lead to dismissal.

Thus for lack of adequate precision and clarity on the applicable rules of procedural fairness, the law of unjustified dismissal in Mauritius has remained very scanty, and has left any adjudicating authority with a haphazard and guesswork approach to pre-dismissal hearings.

Perhaps, this situation, as depicted in the Mauritian law of procedural fairness, may be compared diametrically with the South African doctrine of unfair labour practice at its offing two decades ago, when its definition had a deliberately imprecise starting point so as to allow the court to develop, through the years, a comprehensive and exhaustive set of guidelines for application to cases related to dismissal due to misconduct. Subsequently, the industrial court in South Africa was able to provide in its judgements sufficient guidance for an employer to know with certainty what is expected of him whenever he decides to dismiss an employee for misconduct. These guidelines have not only helped the employers but have also enabled the employees and in particular, the union representatives to exercise their rights to procedural justice.

With these positive views in mind, the drafters of item 4 of Schedule 8 of the South African Labour Relations Act, have consolidated the opinions of the industrial court judgments and given the concept of procedural fairness a well programmed and logical shape.

In this chapter, reference will mainly be made to Section 32(2)(a) and (b) of the Labour Act 1975 of Mauritius and relevant cases on procedural fairness. But having seen that the Mauritian Labour Statutes and decided cases have inadequately formulated the principles of procedural fairness during pre-dismissal hearings, reliance will therefore, mostly be placed on the South African labour jurisprudence to give a holistic approach to the requirements of procedural fairness. The advantage that will flow from this reliance will show that the Mauritian law of `unjustified dismissal' will, undoubtedly benefit from the richness of the resource material available from the numerous South African industrial court decisions. Proceeding further, the requirements of procedural fairness will be examined.

4.2 Requirements for Procedural Fairness in pre-dismissal cases for Misconduct in Mauritius and South Africa.

The Industrial Relations Act and the Labour Act of Mauritius, have expressly provided a broad framework on which lies the basic rules of procedural fairness so as to ensure that the employer collects all the facts before making a decision regarding an employee alleged to have committed a disciplinary offence. The significance of this procedure is not unknown as its objective is to improve the chances of an employer to make a good, substantive decision on the merits of the case.[7]

But whether an employer should act in a semi-judicial manner, similar to the rigorous standard of a court of law and follow all the requirements of procedural fairness has raised controversy and extensive debate.[8] On the one hand, the court was of the opinion that the requirements were sometimes unrealistic, placing unreasonable and at time unnecessary costs on employers, and on the other it prescribed less cumbersome and time consuming requirements of procedural fairness.[9]

However, despite the fact that the courts in Mauritius and South Africa have accepted that procedural fairness should be flexible in content and what will constitute a fair procedure will depend on the circumstances of each case, the impression gained from the decisions is that, as a general rule, "unrealistically strict procedural requirements" were expected from the employers.[10]

These technical requirements often failed to promote the fairness of the procedure yet an employer who was found to have deviated from these guidelines generally had difficulty persuading the IC that notwithstanding the lapse in procedure, the dismissal was still fair.[11] One of the most influential cases in defining the right to procedural fairness was *Mahlangu v CIM Deltak, Gallant v Deltak.*[12] As elucidated earlier, the IC prescribed 10 guidelines which formed the requirements for procedural fairness. The guidelines in Mahlangu[13] dominated not only IC jurisprudence, but many disciplinary codes and procedures that sought to ensure compliance with that jurisprudence in the workplace.

The drafters of the Code in South Africa signalled a clear departure from this formalism and the stringent requirements of disciplinary fairness by referring to an investigation as opposed to an enquiry. They emphasised this by stating that "the investigation need not be a formal enquiry." This informal approach is preferable, since the person presiding and other participants usually have little or no knowledge of court procedures and the rules of evidence.[14] Mauritius does not have such a provision.

Although the effective implementation of this requirement is clearly illustrated in *Mjaji v Creative Signs*,[15] and *Makatsi v Mamello Pre-school*,[16] where the CCMA established that a (misconduct) dismissal may be held to be procedurally unfair where the employer;

a. did not conduct an investigation before accusing the employee of the misconduct concerned;
b. did not afford the employee the opportunity to disabuse the employer of the belief that he (the employee) committed the misconduct in question;
c. did not hold a proper enquiry before dismissing the employee.

Although these basic requirements ensure fairness, the Code promotes a streamlined and balanced approach where the employer acts fairly but is not required to follow a checklist. The above requirements are however indicative of the approach characterized by the IC and reflect little movement towards a flexible approach to fairness.

In the first case the CCMA appropriately found substantial compliance with a fair procedure in the absence of a formal procedure and disciplinary hearing. Mjaji was informed of the offence (assault) and was invited to respond. The decision to dismiss was communicated to him verbally. The Commissioner stated that although it appears as though Mjaji was not afforded the assistance of a fellow employee, he is of the view that despite any shortcomings, there had been substantial compliance with a fair procedure. He referred to exceptional circumstances which had entitled the employer party to dispense with the pre-dismissal procedures (ie. conclusive proof of

the assault and serious nature of the misconduct). Adv van Zuydam stated that "the more formal and exact procedures would not have brought about a different result than the informal procedures did." In this instance the Commissioner accurately interpreted the requirements of the Code.

The CCMA hinted at a movement towards less stringent requirements in *Gavander v Navanethem Pillay & Co*[17] where it stated that "no attempt was made" by the employer party to follow the procedural requirements. The CCMA indicated that "an attempt may have led to procedural fairness," whilst the total absence of any procedural fairness led to the finding of procedural unfairness.

A less onerous requirement was also made in *FAWU v Snoek Wholesalers (Pty) Ltd*[18] where the CCMA referred to the fact that the employer had "largely followed the provisions of a fair disciplinary procedure." The Commissioner specifically referred to the necessity for flexibility in this regard. In this particular case the CCMA was therefore prepared to oversee mistakes of the employer party since overall fairness in the the procedure existed.

In *Gumede v Colors*[19] the CCMA however found the dismissal procedurally unfair due to the fact that the respondent had "dismissed the applicant without convening a disciplinary enquiry." These and other CCMA cases indicate a lack of consistency. Although the CCMA has been attempting to set guidelines for pre-dismissal requirements it should make the effort to interpret the provisions of the Code consistently so that a clear interpretative jurisprudence in this regard can be established. In the analyses of requirements which form a pre-requisite for procedural fairness in the CCMA/LC, a sombre picture develops which often reflects the requirements stipulated by the jurisprudence of the IC. An influencing factor may however be Recognition Agreements, which have been put into place by parties and over-ride the Code of Good Practice.

Whatever forms the courts of both countries have prescribed, the general consensus seems to be that the requirements for procedural fairness have enormous similarities. These requirements will be discussed under the various sub-headings below.

4.2.1 Notice of Allegations

In *NUM & Another v Kloof Gold Mining Co.Ltd*,[20] it was held that "if justice is to be done then it is essential that an employee be informed of all allegations and charges against him prior to holding the inquiry itself."

Such was the debate in *Riviere du Rampart Bus Service Co.Ltd v B.H.Ramjan*[21] where evidence was given to the effect that on 30 July 1976 the respondent left his house at 7.30a.m and returned only at about 6.00p.m when he found a letter asking him to attend a disciplinary board meeting to answer the charges of inciting the workers to strike and "virtually paralysing the operations of the company." He was not scheduled to work on 30 July 1976. On the 31 July 1976, which was a Sunday, he called for work at the company's office but was informed by the stand regulator of the company that his services had been terminated. He reported the matter to the police and on the next day he complained to the labour office about his dismissal.

The magistrate of the Industrial Court found that the respondent was not afforded an opportunity to answer the charges levelled against him as required by Section 32(2)(a) of the Labour Act and consequently the dismissal was found to be unjustified.

The entire issue of fair procedure in this case is centred around whether proper notice was served to the respondent to give him adequate time to prepare for his defence or plead in mitigation against the charges levelled against him. It was contended that the company acted in haste. The notice to attend the disciplinary board meeting was too short and the respondent was not to be blamed for his absence. This short notice may, under the circumstances mean no notice at all.

On appeal, the Supreme Court of Mauritius held that:

> ***It is true that the appellant fixed the board meeting to an early date ie. the 30th July, 1976. But it must be borne in mind that a strike had virtually paralysed the operations of the Company only some two days earlier and according to the appellant Company it was the respondent who had formulated all the trouble. The situation demanded quick action and in our view the Company could not be blamed for having acted promptly. It is also to be noted that the Company did not act..... It sent copies of the convocation letter, among others, to the representative of the Union to which the respondent belonged. The union representative received the letter in time to attend the meeting. It follows that the respondent would have received the letter in the normal course of things had he been at home. The respondent said that be came aware of the contents of the letter only at about 6p.m on the 30th July,1976. One would have expected him to go to the Company at the first opportunity to explain his absence at the board meeting. He did nothing of the sort. He reported the matter to the police and the Labour Office.***

The Supreme Court reversed the decision of the learned magistrate of the lower court and held that " we are unable to say that the dismissal was unjustified on the ground that it did not comply with the requirements of Section 32(2)(a) of the Labour Act.

It is, therefore, apparent from the decision of the court that `notice of allegations' is quite an essential requirements of `an opportunity to answer charges', which if served with due consideration fair procedure will have the effect of the law. But what the court did not deal with, is what would then be considered as a reasonable period of notice.

According to the South African labour jurisprudence what constitutes notice or reasonable time within which to present a case[22] is a question of fact and will vary from case to case or, as De Villiers AJ recently put it, "from adjudicator to adjudicator."[23] 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' notice"[24] 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*,[25] 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.[26] This situation clearly indicates that `reasonable time' is a relative concept which can be determined according to the urgency of the matter.

Hence 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 conducted[27] of the allegations against him.

The requirement of notice is the beginning of wisdom in the sphere of fair procedure.[28] 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.[29] It has implications for 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 a case. 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."[30]

The Code provides that "the employee should be entitled to a reasonable time to prepare the response" to the charge. This requirement relates to the IC requirement which requires that "the hearing must take place within a reasonable period" after the

allegations of the disciplinary offence have become known to the employer. The IC further required that the employee be given "timeous notice of the hearing."

In *Mkhize v JLR & Hay-Yoon Enterprises*[31] the Commissioner explained the various requirements for procedural fairness without making reference to the employee's right to a reasonable period of time to prepare the response. Requirements for procedural fairness were also discussed in *Makatsi v Mamello Pre-school*[32] and *Hayward v Protea Furnishers*[33] without reference being made to the requirement for "sufficient time to prepare before the investigation." The deduction which can be made consistently is that this is one of the less important elements for procedural fairness. The balanced requirement of fairness as opposed to the stringent compliance with each element as set by the IC is thus illustrated by the CCMA.

In *FAWU v Snoek Wholesalers (Pty) Ltd*[34] the CCMA found procedural fairness due to the fact that the employer had "largely followed the provisions of a fair disciplinary enquiry." In its reference to those elements where the employer did follow the required procedures, the CCMA specifically referred to the existence of "adequate notification of the hearing and charge." When considering the fact that all requirements were not followed, yet fairness was present, the importance of this element in the specific case may be deduced. Also in NEWU v Durban Deep Wholesale Meat[35] the CCMA specifically motivated procedural fairness in terms of the requirement that the applicant had received proper and timeous notice of the enquiry.

The CCMA has taken a similar route to that of the IC insofar as the nature of the misconduct will influence the period of time which would be seen as "reasonable." This is important since more complicated cases may require more extensive investigation by both the employer and employee,[36] while in cases where the employee implicitly admits guilt, (and time could create a barrier for the employer to bring witnesses to prove his default), a two-hour warning of an impending hearing will not be judged inadequate.[37] It is clear that both the IC and the CCMA agree on these and other aspects/reasons which influence the timeous arrangement of hearings.

In support of the view that the IC and CCMA show similar flexibility in this regard the following cases are illustrative. In *Trauchweitzer v Robert Skok Welding (Pty) Ltd t/a Skok Machine Tools*[38] the court stated that the fact that the employee had not objected to the short notice and had not asked for a postponement, did not make short notice fair, whilst in *FAWU & Others v Amalgamated Bev.Industry Ltd*[39] the Court was prepared to accept the procedural fairness of a dismissal despite the required period of notice not being given. Often the provisions of the employers Disciplinary Code set time limits and these will serve as guidelines for the parties concerned.

4.2.2 Disclosure and Details of the charge

It is now common knowledge that fair hearing pre-supposes a precise and definite catalogue of charges so that the person charged may understand and effectively meet it. If the charges are imprecise and indefinite it can be a fatal defect which may vitiate the entire disciplinary proceedings.

Neither the Mauritian Industrial Relations Act nor the Labour Act have provided for the disclosure and give details of the charge to the employee accused of misconduct. Apparently the industrial court has not paid serious attention to this aspect of the procedure. In the South African context, the Code of Good Practice along with industrial court decisions, have given significant importance to the disclosure and details of the charge against an employer.

In *Mahlangu v CIM Deltak. Gallant v CIM Deltak*[40] it was stated that if justice is to be done, it is imperative that an employee should be informed of all relevant allegations and charges before the holding of an enquiry.

In *Bassett v Servistar (Pty) Ltd*[41] the employee complained that no charge had been put to him and was not sure what the nature of the accusation was. The company argued that the employee had been given sufficient information and could have asked what the charges were if he was in any doubt. The court responded that the employee

could not be expected to know what charge the chairman of the enquiry was investigating unless he had been told.

Cameron argues that it would be grossly unfair to summon an employee to a fairly timed enquiry but leave him ignorant of what the charges are until the hearing commences. Preparation by the employee for such a hearing would be meaningless.[42]

In this regard, the court made an important decision in *Metal & Allied Workers Union & Others v Transvaal Pressed Nuts and Bolts & Rivets (Pty) Ltd.*[43] In this case the court found that two out of three employees claiming reinstatement in an unfair labour practice hearing had been given procedurally defective hearings. In the one instance the alleged offence was not disclosed in the notice to attend the hearing which also failed to inform the employee of the right to representation and to call witnesses. In the other instance no written notice of the enquiry was given at all. The employee was also not informed of the alleged offence. Cameron is of the opinion that this case is significant in that the court criticised the defects in procedure, not on the basis of any disciplinary code, but on the basis of the general principles of fairness.[44]

Similarly in *NUM & Others v Transvaal Navigation Collieries & Estate Co.Ltd*[45] the applicant employees were simply confronted with the charge that affidavits had been made by certain persons who alleged that they had been intimidated by the applicants. The names of the deponents of the affidavits were also not disclosed because the deponents feared for their lives if their identities were to be known. Although the employees were given the opportunity to respond to these allegations they could not do so effectively without the knowledge of the exact allegations being made against them. The court found that these employees had not been provided with sufficient particulars of the charges in order to defend themselves adequately.

The code of Good Practice in the South African Labour Relations Act requires more than merely informing the employee of the charge against him. It states that the "employer should notify the employee of the allegations against the employee". The item appears to promote a procedure where no oral evidence is led and the

"allegations" must therefore mean the alleged facts may constitute the grounds for dismissal.[46] In addition, it requires that the employer must "use a form and language that the employee can reasonably understand." The IC too, placed these requirements on employers, in a clear and unambiguous way.

This IC requirement is illustrated in the following two cases. In both *Fihla & Others v Pest Control Tvl (Pty) Ltd*[47] *and FBUSA & Another v East Rand Bottling Co (Pty) Ltd*[48] the reason for dismissal was in dispute, the employer claiming in Fihla that the employee had been dismissed for repeated absenteeism and drunkenness and in East Rand Bottling for gross incompetence. But it was clear in each case that the employee had not been confronted with the allegations on the basis of which the employer had sought to justify the dismissal. For these and other reasons both these dismissals were held to be unfair and reinstatement ordered.

In *NUM & Another v Kloof Gold Mining Co*[49] the IC stated that if justice is to be done, it is essential that an employee should be informed before the holding of the disciplinary enquiry of all relevant allegations and charges. It would be grossly unfair to summon an employee to an enquiry without informing him/her of the misconduct until the hearing commences.[50] The IC also illustrated the requirement in *Trauchweitzer v Robert Skok Welding (Pty) Ltd t/a Skok Machine Tools*[51] where the employee was under a misunderstanding as to the charges he was to be confronted with at the hearing. The IC held that the hearing should have been adjourned in order to enable him to prepare. Where the evidence refers to an offence unrelated to the one with which he was charged, the IC requires the holding of a new hearing in respect of the new charge or charges.[52] This requirement is indeed essential insofar as fairness requires that employees receive the necessary time to prepare themselves in order to present proper defence.

The CCMA too, has placed this obligation on the employer and warned against procedural unfairness should it fail in this regard. In *Snell v SSM Manufacturing*,[53] the CCMA specifically referred to the Company's failure to "inform Snell at any point along the way that his conduct was a problem and could lead to disciplinary action."

The Commissioner continued that the employee should be given sufficient time to prepare for the hearing and be notified of which charges he is required to meet. The Commissioner specifically referred to the fact that "numerous complaints about Snell's conduct and performance were brought forward for the first time at the arbitration hearing as part of the Company's attempt to justify his dismissal." The CCMA therefore found in Snell v SSM Manufacturing[54] that the company failed to show that a proper procedure was adopted when dismissing the employee.

In *SACWU v Harvey's Curnow*[55] the CCMA found procedural unfairness and made specific reference to the fact that the employee was charged with insubordination, whilst neither of the hearings made mention of this. The Commissioner put it clearly that "where the evidence establishes the commission of an offence unrelated to the one with which charged, the holding of a new hearing should take place in respect of the new charge or charges." The CCMA's approach in terms of overall fairness justifies this decision, since the employee was not able to prepare himself and could therefore not properly defend himself. Also in *NEWU v Durban Deep Wholesale Meat*[56] the CCMA acknowledged fairness by confirming that the employee party had understood the charge against him. The upholding of this requirement by the CCMA enhances the following of a fair procedure in the workplace.

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.[57] 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.[58] 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.[59] 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*,[60] 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 of 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.

To further illustrate the foregoing proposition is the Labour Appeal Court decision in *Eskom v Mokoena.*[61] 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 judgement 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.[62]

4.2.3 Ways of Communication and Consequences of Splitting the charge

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.[63] This will enable him to know what issues to address in his defence. By this requirement too, once a person is charged with an offence – criminal[64] 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 of which he had no notice.[65] Nor is it fair to split the charge and multiply them where, as in *Ntshangane v Speciality Metals cc*,[66] 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 *Coallink v TWU obo Pieterse*.[67]

Where an additional charge is merely an amplification of the original charge,[68] 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 thereby prejudiced.[69] 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.[70] Thus in *Boardman Brothers (Natal) Ltd v CWIU*[71] 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 dishonesty 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*[72] 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.[73]

4.2.4 Opportunity to state a case

Section 32(2)(a) of the Mauritian Labour Act reads:
"No employer shall dismiss a worker unless he has afforded the worker an opportunity to answer any charges made against him..."

This provision is the direct replica of the ILO's Recommendation[74] and Convention which state:

"Before a decision to dismiss a worker for serious misconduct became finally effective, the worker should be given the opportunity to state his case..." and "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made..."

The gist of these provisions is to state decisively and unequivocally that in a case of dismissal the employee must be given an opportunity of presenting his or her case

either to justify his/her conduct or argue in mitigation thereof. This confirms the need to apply the audi alteram partem principle when adjudicating cases related to dismissal for misconduct.[75]

Just like Mauritius, South Africa has also entrenched this requirement in its Labour Relations Act 1995. The Code states that "the employee should be allowed the opportunity to state a case in response to the allegations." In other words the employee "should be allowed to respond to the allegation during the disciplinary enquiry and may, for example, give reason for the misconduct or deny the charge."[76]

In South Africa, while the industrial court initially stressed that the content of the right to be afforded a hearing of some kind would not be inflexibly or mechanically enforced, it was so firm and consistent in its emphasis, that the right to a hearing became referred to as the "trite rule of the industrial relations and practice."[77] Its entrenchment in the South African law of labour relations has become so complete that the industrial court's practice has, in effect, started to cast an onus on employer's failing to respect this right.

In *NAAWU v Pretoria Precision Castings (Pty) Ltd*[78] the IC referred to the ILO Recommendation[79] stating that in a case of dismissal the employee must be given the opportunity of presenting his case either to justify his conduct or argue in mitigation thereof. The IC emphasised that "such recommendation relating to the principle of audi alteram partem should not merely be viewed as a recommendation, but in fact forms part of our law." Of all the rules of natural justice, the most important is enshrined in the maxim audi alterem partem, literally "hear the other side."[80]

The IC's unequivocal expectation in this regard has been entrenched in the requirements of the 1995 LRA. The Code states that "the employee should be allowed the opportunity to state a case in response to the allegations." In other words the employee should be allowed to respond to the allegation during the disciplinary enquiry. The employee may, for example. give a reason for the misconduct or deny the charge.[81]

Commissioner Matlhabe stated in *Hayward v Protea Furnishers*,[82] that "there is no evidence that the employee failed or refused, without good cause to attend and participate at a hearing when an opportunity for him to do so was granted." The Commissioner continued that "the company hastily chose a convenient path to deviate from following proper procedure, and thereby dismissed the employee without affording him an opportunity for a fair hearing." The emphasis placed on the audi alterem partem principle is clearly illustrated by the CCMA's statement that "the Company's actions were not only unfair, but must be completely rejected."

The CCMA's requirement in this regard is illustrated in a variety of cases where the Commissioners have simply refused to allow a dismissal to be procedurally fair where the employee has not been granted the opportunity to state his case. In *Gumedi v Sojiha's Take Away*,[83] the applicant had been instructed by the employer's brother that she was dismissed, no procedures were followed. In *Gubayo v King Louis Bakery*[84] the parties could state their case. The Commissioner found that "no just cause existed for dismissal." This clearly illustrates the necessity of procedural fairness to ensure substantive fairness, even in small companies as was applicable in this case. In *Power Rig (Pty) Ltd v Grobler*[85] the employer called the employee one morning, gave her two weeks notice pay and the month's salary. Although this case was found to be substantively fair, procedural fairness was absent since the employee did not have an opportunity to respond to any allegation made against her.

Thus in as much as the Labour Court or 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.[86] And in this regard, the Commissioner's award in NCFAWU on behalf of *Roberts v Ors Handelshuis Koop*[87] 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.[88] 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.*[89] 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 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.[90]

- 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 procedure[91] not to allow the accused person even in disciplinary matters the opportunity of cross-examining his accuser.[92]

- 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.[93]

- 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.[94]

Even though a formal hearing may not be necessary in all cases,[95] 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*.[96] 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 employee's 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 employee's union and one of its officials. Consequently, the employees were informed that their

contracts of 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.[97]

In *Cornelius & Others v Howden Africa Ltd t/a M & B Pumps*[98] the Commissioner adopted the view expressed in Moropane v Gilbeys Distillers & Vintners (Pty) Ltd & Anor[99] 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 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."[100] 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-examine the witnesses, [101] 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.[102] 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*[103] appeared to have misdirected his attack.

4.2.5 Cross Examination of Witnesses

It has always remained a debatable issue whether or not to allow cross-examination of witnesses at a pre-dismissal hearing. In Mauritius, the Supreme Court has evaluated the standard of fairness applicable to various situations in numerous dismissal cases, and has recommended cross examination of witnesses on certain occassions and denied this right in others - for instance, in *Mamode v Doger de Speville*[104] the court stated:

> ***"...in domestic hearing or enquiries of this kind, failure to call a person as a witness is not necessarily a breach of natural justice in the conduct of the hearing or the enquiry, if the substance of the allegations of that person is otherwise put to the person in respect of whom the hearing is being conducted and the latter is given the opportunity of explaining his conduct and putting forward his version of the facts."***

On a similar note in South Africa, the Commissioner in *Mkize v JLR & Hay-Yoon Enterprise*,[105] stated that if it is possible to come to a fair decision without hearing oral evidence then such evidence may be dispensed with.

However, if this is not possible, as would normally be, the case where serious disputes of facts exist, oral evidence must be heard as was stated in the Medine Sugar Estate Co Ltd v Woodally[106] where the Supreme Court of Mauritius held:

> ***"It is essential ingredient of that hearing, more particularly at the hearing before the court, that it should be fair. The element of fairness is lacking when evidence of the material facts is led by a person who conducted an***

enquiry from others without those other persons being heard so as to give an opportunity to the alleged offender to confront them and cross examine them."

The employee is, therefore, entitled to hear the evidence on which the employer relies, to cross-examine the employer's witnesses, to state his case and to call witnesses in support of it. Substantiating this view, the Commissioner in Mkize's case was of the opinion that "should the employee be found guilty of an offence he must also be given an opportunity to lead evidence and to address the chair person of the enquiry in mitigation of the sanction." The case was found to be procedurally unfair because the employee "should have been given the opportunity to hear evidence on which the employer relied, and to cross examine the employer's witnesses."

In other cases the industrial court in South Africa has held that a Presiding Officer should be slow to refuse an application to call a particular witness before such witness is heard (*Ntsibande v Union Carriage and Wagon Co (Pty) Ltd.*[107] Direct or indirect refusal to call witnesses has resulted in gross unfairness. An indirect refusal occurred where the enquiry would be so timed as to prevent the employee from preparing an adequate defence.[108] It was further required by the IC that the opportunity to question should be granted face-to-face. The employee should be present when the evidence against him or her is received and should there and then be able to put questions to the witnesses.

The Code is silent on "calling of witnesses for cross-examination." It is suggested that the question of whether or not the chairperson of the enquiry should allow a party to call a witness or cross-examine depends on the facts of the matter.[109] Grogan[110] may have support insofar as he describes it as a fundamental requirement that an employee accused of a disciplinary offence should be permitted to call witnesses in his defence or in mitigation. The employer then has the right to cross examine such witnesses. It is however important that in cases where the involvement of witnesses is not granted, this be seen in the larger context of the management of the investigation

and not summarily seen as unfair. It should in my opinion, as suggested by the Code, not be evaluated in a narrow sense.

Although the process to question and cross-examine witnesses could give the pre-dismissal procedures a technical, legalistic and formal look, yet the advantage that flows from this cannot simply be overlooked. Cameron is more positive in his opinion:

> An accused should be able to put questions to a witness to challenge the reliability of their version and highlight any weaknesses in the accusers case."[111]

And he refers to the following reasons for allowing employees to challenge the reliability of their accuser's:

- Questions enable the accused to bring out weaknesses in the accuser's case; and
- Questions will enable the witness to comment on the accused employee's version and to rebut it by reacting to it.

The opportunity to question and reply is probably the only adequate means of weighing two or more conflicting versions fairly against each other. Where it is possible to come to a fair decision without hearing oral evidence, this would be the most appropriate route to follow to reduce unnecessary technicalities.[112]

4.2.6 The Right to Representation

What does proper representation mean? Fabricus AM said in *National Union of Mine Workers & Another v Blinkpan Collieries Ltd* :

> ***"Proper representation does not entail the mere physical, impassive presence of another. A representative should at least assist an alleged offender in the preparation and presentation of his case. This is especially so in the case of an illiterate and uneducated worker. A representative***

must ask the offender if he wishes to be actively represented. If the answer is in the negative, he should inform him of the charges and ask him whether he understands them; explain the procedure to him (if there is one); and explain to him that he can challenge any adverse evidence on the merits and on the proposed sanction. If the reply is in the affirmative, he should consult him fully (where necessary) witnesses are consulted and are available; address the tribunal on merits and punishment; and ensure that the employee has presented his case as fully as the circumstances permit. There are elements of natural justice which should apply..."[113]

How is the right to representation accommodated in the Mauritian and South African law of procedural fairness?

There is noticeable similarity between the labour statutes of Mauritius and South Africa in so far as the employee has to be informed of the charges against him and to be given a reasonable opportunity of being heard in respect of those charges, but the labour statutes of both countries have different approaches to where it is proposed to give a reasonable opportunity of making representation.

Section 32(2)(b) of the Mauritian Labour Act provides:

> "The worker may, for the purpose of paragraph (a), have the assistance of a representative of his trade union, if any, of an officer or of his legal representative."

With this express provision, the court in Mauritius has had no difficulty in applying effectively the right to representation. In very clear terms the supreme court has ruled that an employee has the right to choose whoever he wishes to represent him. It can either be "representative of his trade union, an officer of his legal representative:"[114] the court stated:

"It is for the employee to choose. An ill-advised employer could very well object to the employee being assisted by both a trade union representative and a legal representative but the employer cannot dictate who, between the

representative of the union and the legal representative will assist the employee. It is the employee and the employee alone to decide who will assist him."

Two important legal aspects seem to emerge from this court's ruling. Firstly an employee's right to representation is uncontestable; secondly, the employee has the right to be represented either by a union representation or a legal representative. The court is quite emphatic about the point that there is no distinction between being represented by a union or a legal representative.

This is where South African labour jurisprudence seem to differ from the jurisprudence in Mauritius. The South African Constitution, like most common-wealth African constitutions,[115] is silent on the right to legal representation in civil matters although it guarantees the right to just administrative action which is lawful, reasonable and procedurally fair.[116] The court in South Africa is under constant dilema in its determination of the fact that, 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[117] 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.[118]

Decided cases are overwhelming on the side of refusal of legal representation in disciplinary proceedings.[119] The broad proposition which was postulated by Van Zyl J in *Lace v Diack & Others*[120] 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."

The Code of Good Practice stands to support this statement and provides for a right to assistance by a trade union representative (not a trade union official)or a fellow employee and places the election of this person in the hands of the accused employee. Although the court has set the minimum requirements, an employee is generally not entitled to be represented by an advocate or attorney.[121] The CCMA confirmed this in *Khosa v Gypsum Industries Ltd*[122] by stating that "allowing the accused employee, to be represented at the initial hearing and at the appeal by an attorney is an unusual privilege..." Unless there is a contrary arrangement in an employer's disciplinary procedure, the IC has usually limited representation to a co-employee. Employees were generally not entitled to be represented by a union official or a legal representative.

Again, the Appellate Division had made it clear in *Lamprecht & Nissan SA (Pty) Ltd v McNellie*[123] that the term "representative" in the employer's disciplinary guidelines does not include a legal representative[124] 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.[125] Secondly, individual employees, co-employees and office bearers or officials of that party's trade union or employer's organisation all have been given a right of audience in the Labour Court and the Labour Court of Appeal.[126] 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.[127] 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."[128]

Thus, following in the example of Page J in *Cuppan v Cape Display Supply Chain Services*,[129] 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 Union v Minister of Correctional Services & Others*,[130] 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.[131]

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*[132] 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 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.[133]

The question is: can a hearing, investigation or enquiry be invalidated because the employer refused the employee a representative of his own choice?[134] In Motswenyane v Rockface Promotions,[135] 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 "intrinsically 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.[136] "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 is held in his absence."[137] 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.[138]

Some of the other cases decided by the South African labour court have again clarified the position of the court with regard to the right to representation either by a union representative or a legal representative. The court has sent out mixed messages around this issue. Cameron, for instance, states that the decision in *the National Union of Mineworkers v East Rand Gold & Uranium Co*[139] seems anomalous and unacceptable. The applicants accused of assault wished to be represented by a union official. This was refused despite a written assurance that "in terms of company policy you are entitled to a representative of your choice if you so wish." The company went even further and disallowed the request of an employee to be represented by his co-accused. Cameron states that these rulings constituted a gross dereliction of elementary procedural fairness.' The refusal to grant the applicants any relief on the basis that they were not too insistent about representation moved Cameron to say that the court's approach to justify its decision was `feeble.'[140]

In *NUM & Another v Kloof Gold Mining Co Ltd*,[141] the need for a representative to assist an accused at a disciplinary enquiry was described as "an elementary element of justice," especially where workers are uneducated or illiterate. Further in the opinion of the IC, even an educated employee who may not be familiar with disciplinary procedures or may not be sufficiently articulate to defend himself is entitled to have a representative. However where the employee decides that he does not require representation, the procedure will not be unfair.[142]

In *SAAWU & Another v Steiner Services (Pty) Ltd*,[143] a hearing was held to be unfair, inter alia, because the employer had not informed the employee subject to a disciplinary hearing that she was entitled to be assisted by a fellow employee. The employer should generally inform the employee of his right to be represented. If the

employer declines to bring a representative, the employer, however is under no obligation to provide one.[144]

In *NEWU v Durban Deep Wholesale Meat*[145] the CCMA referred to the presence of the applicant's representative, as an argument supporting procedural fairness. By these recommendations of the CCMA, the perception is created that should the applicant be denied the support of a representative, this would suggest procedural unfairness. The right to assistance is in my view essential since the employee is generally nervous, under pressure and may find it difficult to articulate himself. He may feel intimidated and therefore find it hard to argue his case well, especially in the presence of a hostile and/or biased chairperson.

After analysing the facts of numerous cases decided on the question of legal representation in Mauritius and South Africa, one may deduce that Mauritius has expressly advocated for legal representation, whereas, South Africa feels that this is a contentious issue. But although there is a statutory provision for allowing legal representation in disciplinary hearings in Mauritius, the court has not amply analysed the exigencies under such legal representation would become an essential requirement for procedural fairness. Thus, supplementing the labour statutes, the court in Mauritius should give a clear direction on those exigencies which would make legal representation during pre-dismissal hearings an absolute necessity.

In South Africa, the law has not developed to the extent where "the right to legal representation can be regarded as a fundamental right required by the demands of natural justice and equity."[146] Van Zyl J stated in this regard:

> ***"There is certainly no absolute right to legal representation in our law, to the best of my knowledge, although I am of the opinion that, where an employee faces the threat of a serious sanction such as dismissal, it may, in the circumstances, be advisable that he be permitted the representative of his choice."***[147]

This approach certainly points to the direction that an employee when choosing a `representative of his choice', has the option of choosing an attorney as well. But Van Zyl J cautions on the use of this right under exceptional circumstances such as "threat of serious sanction such as dismissal." The question then will be what are those exceptional circumstances which will warrant the use of legal representation in pre-dismissal hearing? In this regard guidance may be found in English and Indian judicial decisions which have persuasive elements advocating the right to legal representation in complex and difficult issues.[148] The reasonings expressed in the various court decisions in England and India may provide some useful guidance which, may be at convenience, adapted to suit the systems prevailing in Mauritius and South Africa. It is to be noted that in these countries as well, the normal rule that prevails during a departmental proceeding is that, one cannot claim as a matter of right that one should be allowed to be represented by a lawyer. But in cases of exceptional nature where there are large number of charges, voluminous records, the severity of the charge and the events leading to it and taking into account the education and experience of the employee, the help of a lawyer may be allowed.

In *Pett v Greyhound Racing Association*[149] Lord Denning said:

> ***The plaintiff is here facing a serious charge...if he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry, I think that he is entitled not only to appear by himself but also to appoint an agent to act for him. Even a prisoner can have his friend... Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who is better than a lawyer who has been trained for the task? I should have***

thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.[150]

Lord Denning said that "much water has passed under the bridges,"[151] since 1929 when Maugham J., expressed, a different view in *McClean v Workers' Union*[152] that before domestic tribunals, counsel has no right of audience. Lord Denning said that this dictum may be correct when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation. He cited as an example, *Re McQueen and Nottingham Caledonian Society*,[153] where a dispute between a member of a friendly society and the managing members thereof respecting a claim on the sick fund was under the rules of the society referred to three arbitrators.

The claimant wanted to be represented by counsel, which the arbitrators refused. In these circumstances, the court held that under the Friendly Societies Act, the arbitrators could decline to hear counsel. Lord Denning further went on to say:

"The dictum in McClean's case does not apply, however, to tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import. Natural justice then requires that he can be defended, if he wishes, by counsel or solicitor."[154]

In India the attitude of the court has been similar to the opinion expressed by Lord Denning. For instance in the case of *Nitya Ranjan v State the Orissa* High Court held that the principle involved in legal representation before such disciplinary enquiries was that:

Though in a departmental inquiry the delinquent public servant may not be entitled as of right to legal assistance to defend himself, nevertheless, there may be special circumstances connected with the case - such as complexity of facts, volumes of evidence, the educational attainments and experience of the public servant etc. which may show that without legal assistance he will not be able to adequately cross-examine the witnesses or to establish his innocence. In such circumstances, denial of legal assistance may be

equivalent to denial of "reasonable opportunity" within the meaning of Art. 311(2) and the entire proceeding is liable to be quashed.[155]

In the instant case, the court allowed the petitioner's contention that he had been denied a reasonable opportunity of defending himself in consequence of the refusal of the tribunal holding the inquiry against him to allow him to be represented by a legal practitioner. The petitioner was comparatively a junior officer of the forest department and was in service for about six years before the departmental inquiry was started against him. The total number of witnesses examined was 91. The number of documents exhibited was 166. The deposition of witnesses alone ran into 437 pages and the written statement of the petitioner consisted of 25 volumes. The report of the tribunal ran into 139 typewritten pages. The charges dealt with criminal breach of trust, falsification of accounts and forgery. The court held that in the circumstances of the case the petitioner did not have intellectual attainments and experience to enable him adequately to cross-examine witnesses. Besides, the prosecution was conducted by an experienced prosecutor and, therefore, the denial of a lawyer in the instant case was held to be denial of reasonable opportunity to the petitioner.

In another case, *Dr Janendra Nath v State of Orissa*[156] applying its own earlier dictum the Orissa High Court held that the refusal by the disciplinary tribunal of legal assistance to the petitioner in the circumstances of the case did not amount to denial of reasonable opportunity. The court referred to the fact that the petitioner had his education abroad and was fairly senior in age (it is not mentioned in the report how old he was), that the charges of misconduct were simple in nature; that he elaborately cross-examined the witnesses for the prosecution and gave a long explanation meeting each one of the charges and the evidence connected therewith.

But there are instances where a disciplinary authority is dealing with matters affecting a man's reputation and livelihood or any matters of serious import, then, undoubtedly natural justice would require that he can be defended, if he wishes, by a lawyer. It is important therefore, to discuss those exceptional circumstances where legal representation would be required. Reference to a few Indian cases will definitely go a

long way to identify the criteria involved before one would assess the viability of the presence of a lawyer in and adjudicative proceeding. (It is to be noted that the Indian cases deal with civil servants, but they are equally applicable to private sector employees).

1. If the prosecution is conducted by an experienced lawyer:

In *Nitya Ranjan v State*[157] one of the additional grounds on which the court said that the petitioner should have been given legal assistance at the departmental proceedings was because the prosecution was conducted by an experienced police officer who was well acquainted with criminal court work. Therefore, in the circumstances the refusal amounted to a denial of reasonable opportunity under article 311(2).

The Supreme Court in *Jagannath Prasad v State of Uttar Pradesh*[158] also examined the facts in determining whether denial of legal assistance to the petitioner would amount to denial of reasonable opportunity in that particular case. It was alleged by the petitioner that the case for the prosecution was conducted by a lawyer whereas he was not allowed to appear by counsel. To this the court observed that the person who appeared on behalf of the prosecution was not a practising lawyer and anyway he did not take any part in the examination of witnesses or cross-examination.

Therefore, it would appear that if the civil servant's impeachment was entrusted to an officer acquainted with court work or someone with legal qualifications the request for permission to appoint counsel in defence may not be unreasonable as its refusal may greatly embarrass the defence. In *James Bushi v Collector of Ganjam*[159] it was argued for the petitioner that when he was denied legal help the authority conducting the case against him should have also been denied legal help and both parties should have been put on an equal footing. This argument was based on article 14 of the Constitution. The petitioner who was head clerk of the civil supplies branch of Ganjam collectorate was charged with corruption and was finally dismissed from service. It was admitted that the evidence against the petitioner at the departmental proceedings was marshalled by a C.I.D. inspector but the court held that the officer was not familiar with conducting cases in criminal courts, as is the case with court-

sub-inspectors or prosecuting inspectors. If, as a fact, the proceedings against the petitioner had been conducted by a court-sub-inspector or by a prosecuting inspector, the court held that:

> ***There may be some justification for holding that the denial of legal help to the petitioner may amount to unfair discrimination and as such offend Art.14 of the Constitution.***[160]

Moreover, the court also took into account the fact that the petitioner was not an illiterate layman but an experienced member of the staff of Ganjam collectorate who had worked for 13 years in several branches of that office. So, in the absence of further materials, the court refused to hold that the petitioner had been prejudiced in his defence by the mere refusal of the enquiring officer to afford him legal assistance.

2. If the Enquiry officer is a lawyer

The facts in *S.Harjit Singh v I.G.Police, Punjab*[161] were as follows: The petitioner was a head constable in the Punjab police. One B.S. registered a case against three persons for abducting his daughter. The petitioner was entrusted with the investigation of the case and he exonerated two of the three persons. When B.S. learnt this, he became inimical towards the petitioner and the report says he "resolved to harm him."[162] A complaint was consequently made by B.S. with the deputy superintendent of police alleging demand and receipt of illegal gratification by the petitioner. Thereupon, the petitioner was charged with misbehaviour towards the deputy superintendent of police and departmental proceedings were initiated. At the enquiry, the petitioner requested that the enquiry officer being a law graduate, he should also be permitted to engage a counsel. This request was disallowed. After some days, the inquiry was transferred to another more senior police officer. On his report finally, the petitioner was dismissed from service. Regarding representation by counsel Dua.J., had this to say:

> ***[A] person against whom a departmental enquiry is held has no inherent right to be represented by a professional lawyer and that there is no rule of natural justice conferring such a right. If the statutory rule governing such***

enquiries gives such a right then the effect of its non-compliance would be governed by the language of the rule itself. But apart from such a provision, as at present advised, I do not find it easy to persuade myself to hold that merely because an employee has not been afforded the facility of being represented by a professional lawyer the enquiry against him must be struck down as violative of the rule of natural justice.[163]

With due respect, several, objections can be raised with regard to this judgment. Firstly, to the request that the petitioner should be allowed to be represented by counsel because the enquiry officer had a law degree, the court did not say anything. However, it is submitted that only on this ground it may not be necessary to hold that the petitioner should be represented by counsel - the enquiry officer is not to take sides with either party and if at all, his legal training may help to conduct the case impartially and justly. In *Union of India v Kula Chandra*[164] the district magistrate was the person appointed to conduct the departmental enquiry against the respondent who had been charged with conspiracy to cheat the government of large sums of money. At the enquiry the respondent's request to be represented by a lawyer was turned down.

Therefore, it would appear that whether the enquiry officer is legally qualified or not is not of consideration in the question whether the delinquent officer should be represented by counsel.

The learned judge in Harjit Singh's case did not make any reference to the facts of the case as the other courts[165] had done to see if the denial of the assistance of a lawyer to the civil servant in the circumstances was denial of reasonable opportunity within article 311(2). The report says that B.S. resolved to harm the petitioner because he was annoyed at the way the latter had carried out his professional duty and so lodged a complaint that he had accepted a bribe. It is somewhat difficult to see the connection from here that thereafter the petitioner was charged with misbehaviour towards the deputy superintendent of police. However, it is submitted that since the possibility of a false charge was there, from a complainant who had become inimical towards the petitioner because of the way the latter carried out his duty, this is surely

one of the cases where help of counsel ought to have been given to the civil servant who would have been better equipped, by cross-examination mainly, to cast doubts on the truth of the charges. The court flatly denying that the officer had a right to counsel without looking at the circumstances of the case and to see if such denial was reasonable within article 311(2) is, it is submitted, wrong and should not be followed. Also, to deny legal assistance before such quasi-judicial tribunals without looking into the merits of the case is almost like saying that a surgical operation should be done only by a person not qualified in surgery.

Another objection to the judgment of Dua,J., is that, if there was a statutory rule governing such enquiries giving such a right, then that right would be governed by the language of that rule. It is submitted, that a statutory rule cannot detract from the constitutional guarantee given to the civil servant under article 311(2) of having a reasonable opportunity to defend. Somanatha Iyer,J., in *Muniswamy v State of Mysore* said:

> ***The constitutional duty to afford an opportunity which conforms to the required standard of reasonableness not being discretionary but mandatory, that imperative duty cannot by a rule be transformed by the Governor into a discretionary function.***[166]

Therefore, if there is a service rule in point, it would govern the situation, but the rule itself must not be repugnant to the provisions of article 311(2) of the Constitution.

3. If the Employee is legally Qualified.

If the charge is against a member of the judicial service, then can he still claim to be represented by a lawyer? There are two interesting decisions, one of the Calcutta High Court and the other of the Orissa High Court on the point.

In *Nripendra Nath v Chief Secretary, Govt. of West Bengal*,[167] the public servant concerned who was dismissed from service was a senior member of the state judicial service and an additional district judge towards the end of his career of service

extending over a quarter of a century. Nevertheless, the majority of the judges held that the denial of legal help to him, even for the limited purpose of taking notes, while the departmental proceedings were going on, of inquiry into eleven charges against him, was tantamount to denial of an adequate opportunity to defend himself. In coming to this conclusion, they were mainly influenced by the volume of the depositions and number of witnesses and documents in the case. Bose,J., who dissented from the majority opinion on this point, based his view mainly on the following:

> ***The petitioner was himself an experienced judicial officer sufficiently conversant with law and the practice and procedure of conducting cases and so he was not as helpless as he represented himself to be.***[168]

As pointed out by Bose.J., it would have been sufficient in this case to engage a stenographer who could have taken more copious notes than what a junior lawyer as requested by the petitioner would have taken down if it was only for taking notes of depositions adduced by the prosecution.

In *Braja Kishore v State of Orissa*[169] the Orissa High Court held that no special circumstances existed in this case for assistance of a lawyer to the public servant. The court referred to the fact that the delinquent public officer held a law degree and he had been a munsiff and a subordinate judge of the state judicial service for more than 10 years. He was asked to compulsorily retire from service as a result of the departmental proceeding. The facts of the case were not unduly complex especially for a judicial officer, the court said, because the charges dealt with specific instances of bribery, irregularity in the holding of trials in civil suits and purchasing a car without the necessary permission from the government. Although the Calcutta case had been cited before the Orissa High Court, the latter case did not deal with it on this point.

These two cases show how differently the courts can interpret almost similar facts, where judicial officers have been charged, to the requirement of legal representation. Of course, it is clear, especially to a lawyer, that every case can be distinguished from

another on the facts. However, some uniformity of approach so as to make the law more certain is desirable rather than each case depending on its particular facts only.

4. Arguing the case Oneself

Another ground for enlargement of the opportunity to be given to the government servant to be represented by a lawyer is that the civil servant concerned who is so much involved in his own case may not be able to look at the facts from a distance as it were, and present the case properly. This is what an American judge had to say in one case:[170]

> ***Petitioner tried his own case. He introduced no evidence, except to make a formal statement which unfortunately, we find far from clear. This perhaps illustrates the fact that a party who tries his own case is like a man cutting his own hair - in a poor position to appraise what he is doing.***

Lord Denning in the Pett case had also said, "fairness may require an oral hearing; and with an oral hearing, then legal representation."[171]

The Allahabad High Court[172] has held that personal hearing includes a right to argue the case and that personal hearing at the inquiry stage is part of the reasonable opportunity guaranteed under the Constitution. Personal hearing enables the authority concerned to watch the demeanor of the witnesses and the party appearing to persuade the authority by reasoned argument to accept his point of view.

Therefore, if oral hearing must be given to the civil servant at the inquiry stage, then following Lord Denning's reasoning, legal representation also follows. This, it is submitted, is sound reasoning, because, as already mentioned earlier, the person charged may become tongue-tied or nervous or be not otherwise competent to make personal representation or cross-examination, so that assistance of the lawyer, if he so desires, ought to be given as of right.

Also, in such cases, where a civil servant has a right to be heard and to show cause, to call witnesses and cross-examine witnesses, get the relevant documents and marshall the evidence and where he has to do these himself without the aid of counsel, this

right may prove quite illusory except in the simplest of cases. Where some knowledge of law and legal art is required, the courts recognize that a lay person cannot meet the case in the court himself and provision is made for appointment of counsel in undefended criminal cases or as amicus curiae or where persons sue in forma pauperis. Therefore, on principle, it is submitted that unless there are considerations of public policy, over-riding the claims of natural justice in any particular class of matters, the assistance of counsel is necessary if a reasonable opportunity is to be given to a civil servant to meet the case against him.[173]

5. Reservations about the consequences of the Disciplinary Action

In *Dr K.S Rao v State*,[174] the petitioner had been removed from service on the ground that he had disobeyed government orders and stayed away from duty and also that he had cast unwarranted aspersions on the integrity, independence and judgement of the medical board. At the enquiry, he had requested to be represented by counsel but this was refused. The Andhra Pradesh High Court held that:

> ***Rightly or wrongly when the petitioner was under a reasonable apprehension that the enquiry was the result of a preconceived plan and a concerted action on the part of the Medical Department, his request for professional help was certainly justified and the enquiry officer should have given him that opportunity. His refusal to accede to that simple request has certainly deprived the petitioner in the circumstances of the case of an opportunity to defend himself.***[175]

It is submitted that this view is correct and it may be noted that the court did not go into the facts of the case - whether they were complicated or not, the number of witnesses and so on - but instead said that from the point of view of the petitioner, it was a serious matter which affected his official career and which might, as indeed had happened in the case under reference, result in his dismissal from service.

Thus an employee against whom disciplinary action is to be taken, which entails any of the serious punishments of dismissal, removal or reduction in rank, should not by judicial interpretation be given a narrow scope. The right to reasonable opportunity cannot also as a rule be detracted from. Legal representation, if he so desires, to the civil servant against whom disciplinary action is taken, should not be denied to him by the courts saying that he can by his age, experience, the number of witnesses, nature of evidence and charges effectively conduct his own defence. This is not taking into account the serious consequences of the disciplinary action, viz, the fact that in a case where a civil servant's livelihood and reputation is at stake, where for example he is about to be dismissed after long years of service on certain charges, he wants to get the maximum possible help and succour from all available sources - and surely a competent lawyer to present his case is a friend to whom, at least the courts themselves should not deny him access. It is submitted that the courts should, in the interpretation of article 311(2), lean more in favour of legal representation in such cases, than give it a restrictive meaning because to err on this wider meaning would be less harmful in the circumstances. Besides, one must also not forget that a lawyer would be an important actor in the stage of a "life and death" drama which the civil servant is trying to enact against a powerful collosus, viz, the government machinery who has all the brains, power and finances at its disposal.

To make this important plea for legal representation depend finally in each case on the way the court would review the facts would mean, that a civil servant who has already been punished, will go through another expensive and protracted case in the courts to vindicate his rights. On principle, therefore, it is submitted that unless there are over riding claims of public policy in any class of matters, which must be laid down, it is necessary to give the civil servant a right to be represented by counsel and the law should be suitably amended and made clear on this point.

The principles emerging from these decisions can, without doubt, assist Mauritius and South Africa in the formulation of a substantive basis for a more programmed action, either through legislative enactments or case law, towards making legal representation in disciplinary proceedings a constructive strategy to bring relief to employees who

need assistance in exceptional circumstances, especially when his/her livelihood is at stake. In fact, both through the instrumentality of section 32 (2) (b) of the Labour Act and Section 3 (3) (a) of the Promotion of Administrative Justice Act respectively formally recognised the significance of legal representation as a cornerstone of procedural fairness within the context of dismissed due to misconduct.

4.2.7 Right to Disciplinary Decision free from Bias

This requirement embodies the principle of procedural fairness expressed by the maxim` nemo index in sua causa' which means no man should be a judge in his own cause. The Rt.Hon. Lord Mackay of Clashfern summarises this requirement in the following manner.

> ***"The chief objects of courts of justice must be to secure that justice is done and the idea of justice contemplates at least an independent, impartial and non-partisan judge... It is of course vitally important that judges should be able to decide for and against the executive in all its branches according to the merits of the case without any influence whatever from the executive, except in the form of submissions put before the judge in accordance with the principles of natural justice with an opportunity for them to be countered by any opposing party."***[176]

In the concept of impartiality of justice lies the foundation of the law of Bias which in its wider sense means that no one acting judicially should have, or appear likely to have, a bias[177] in favour of one side or the other. As an intrinsic requirement of the administration of justice, it is "rooted in confidence and confidence is destroyed when right-minded people go away thinking that the judge was biased.[178]

Grogan points out that the rule against bias in administrative law requires that an officer presiding at a disciplinary hearing not only be impartial, but also that there should be no grounds for suspecting that his decision might be shaped by extraneous factors, even if this is not the case.[179] In employment law the requirement seems to be

that the presiding officer should not be involved in the incident which gave rise to the hearing.[180]

Thus 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."[181]

We are concerned here 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 there from involves the imposition of the ultimate sanction which had aptly been described as "akin to capital punishment in criminal law"[182] 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.

In Mauritius and South Africa this requirement is unquestionable whenever the issue relates to the disposition of the person investigating the misconduct of an employee.

The Supreme Court of Mauritius, in very unqualified terms stated:

> ***"There is no doubt, however, that the very purpose of this provision of the Labour Act Section 32(2)(a), requires that the hearing should take place with fairness. We do not think that the purpose of the law is fulfilled where four out of the five members of the Disciplinary Committee were either victims or else the immediate witnesses of the alleged insubordination. Witnesses and victims of an alleged offence cannot be expected to assume the mantle of adjudicators, however hard they may try to split their personality and exercise their integrity in determining whether these offences took place or not. We do not think, therefore, that the trial court was wrong in holding, if only for this reason, that the dismissal of the respondent was unjustified."***[183]

From this decision of the court, it leaves no doubt, that there is a duty on the decision-maker, in the present case, the employer, to comply with the rule against bias or any likelihood of bias. The witnesses in the present case had become personally interested in the subject matter of the case, and, therefore, in the interest of justice, fair play and equity, it is inconsistent with proper administration of justice.

Just like Mauritius, the non inclusion in the Code and Labour Act of the requirement that the chairperson investigating against the employer or the chairperson of the disciplinary hearing should conduct the proceedings in good faith, does not mean that this important aspect of natural justice is thereby excluded from the South African Labour jurisprudence 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 unfortunately because of its segregated and closed shop policies, the employees in South Africa were comparatively more sensitive to the notion of bias than in Mauritius. In *BTR Industries SA (Pty) Ltd & Others v Metal & Allied Workers Union and another*,[184] Hoexter JA depicts how the South African industrial relations is marked by disharmony and mutual distrust:

> ***"We are dealing with a highly sensitive field. The relationship between the management and workers in this country and many others has historically been tense and strained for much of the time. In a relationship that is characterised by a high degree of mutual suspicion, at times of acrimony and hostility, and understandable reasons in that there are fundamental conflicts of interest between management and workers, or at the very least***

what are perceived by them as being fundamental conflicts of interest. The industrial legislation recognises all this. It recognises that this is not an area in which one easily gets people to see the other side's point of view, that it is not an area in which one easily gets give and take, that it is an area in which people are highly partisan, in which they tend to see matters in their own interests and from their own point of view only."[185]

With such a historical background, the employer in South Africa has to be careful to ensure that the hearing is run in such a way as to place it above suspicion of actual partiality, however, with reference to numerous decisions of the industrial court one can easily see how wisely the feeling of bias has been counteracted. Wherever, if it appeared "that there is, or is to say a probability of (actual) bias on the part of the decision maker or adjudicator,"[186] the court has nullified those decisions.

Take for example, the case of *Ntsibande v Union Carriage & Wagon Co (Pty) Ltd*[187] 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.[188]

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"[189]who, observing the proceedings, would go away concluding that the chairman was not disinterested and impartial and ought not sit to hear the matter.[190] The chairperson must not by his conduct[191] or utterances[192] betray his prejudice towards one side or the other in the dispute or allow his personal knowledge or feelings to impair his sense of judgement thereby rendering himself incapable of assessing the evidence tendered in a rational manner.[193] It is 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 judgement over such matter.[194]

Even though the rule against bias is "a cornerstone of any fair and just legal system"[195] 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 Commonwealth public law,[196] 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,[197]yet, there remains the basic requirement that some form of detachment or independence be maintained between the chairperson of the enquiry and management.[198] What has been said elsewhere[199] 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 wrong doing 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.[200] Or simply put, the person taking the disciplinary decision should not be biased [201] or appear to be so.[202] He/she should enter into the proceedings with an open mind[203] so that the enquiry should not appear to be an attempt to whitewash what was a decision already taken.[204] The person taking on the investigation must not be the accuser or witness to the facts sought to be established. [205] The haring 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.[206] 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."[207]

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.[208] 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 [209] 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 two factors put together support an allegation of bias.[210] For as Zondo J (now AJP) put it in *Afrox Ltd v Laka & Others*[211] where it was contended 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."[212] However, the Constitutional Court, in the unusual application to rescue 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'". [213] 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.

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[214] property or where he had witnessed the incident leading to the charge against the employee.[215] 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.[216] In *Goosen v Caroline's Frozen Yoghurt Parlour (Pty) Ltd & Another*,[217] 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 has 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 court also dealt with certain cases where there was obviously no attempt by the person chairing the enquiry to adhere to the basic tenets of natural justice. Such indications have taken the form of notice of dismissal having been prepared and signed prior to the employee being invited to state his case. Therefore in Nodlele v Mount Nelson Hotel and another,[218] the court took into account the "applicant's appraisal of the meeting that the hotel had already decided to dismiss him." In *NUM and another v Kloof Gold Mining Co.Ltd,*[219] the court found that the chairman of the enquiry had taken a "jaundiced view of the case." The court said this was clear from the record, which showed he had only taken into account factors which were unfavourable to the employee. The court also found that his decision to dismiss had been influenced by the fact that the union had called for a legal strike and the employee was the chairman of the shaft stewards committee.

Again the courts have taken, to some extent, a conflicting approach to the problem of bias in disciplinary procedures and Le Roux uses *Sappi Fine Papers v Yumata and others*[220] and *Anglo American Farms v Konjwayo*[221] to illustrate this. In the Sappi case certain employees, who had not taken part in a legal strike complained that employees participating in the strike, had addressed threatening remarks to them. Over a period of eight days the general manager of the mill conducted separate hearings for each of the employees against whom complaints had been lodged. The

result was that all these employees were dismissed. In the subsequent appeal the general manager confirmed the dismissals after rehearing all the witnesses. The employees approached the industrial court, which found that they had been unfairly dismissed. The employer appealed to the labour appeal court.

The employees argued that the procedures had been unfair on two grounds. The pertinent argument was that the employees had been prejudiced as a result of the fact that one manager had presided over all the disciplinary hearings and another over the appeal hearings. The prejudice, that the employees were alleged to have suffered, was based on the argument that the evidence against the employees was provided by three or four witnesses who gave evidence at more than one of the disciplinary hearings.

The result was that once the evidence of one of the witnesses had been accepted at a specific disciplinary hearing, the disciplinary committee could not reject the same witness's evidence at any subsequent hearing. The committee could therefore not approach the subsequent hearing with an open mind. The same applied to the general manager who had heard all the appeals.

With the above in mind, the labour appeal court came to the conclusion that `a sufficient likelihood of bias for it to be said that the hearings were unfair and clearly prejudiced flowed there from.' On the employee's argument that in the ordinary courts presiding officers were not prevented from hearing a case merely because witnesses would be heard who had already given evidence in another case, the court said that trained judicial officers would not create the impression of bias. However, where a lay-person such as a manager was faced with this type of situation `such observers may well gain the impression of bias."[222]

In the Anglo American Farms v Konjwayo the labour appeal against the decision of the industrial court which had held that a waiter had been unfairly dismissed for stealing a can of cooldrink from the Boschendal restaurant. It was argued that the manageress who chaired the enquiry had been biased due to her involvement in the incident which resulted in the dismissal. She had questioned the dismissed employee

on the alleged theft and heard his explanation. During the enquiry she had described what she had seen and heard in connection with the case.

The court found that her involvement had been `fairly peripheral' and had not concerned any matter which had subsequently been placed in dispute by the employee.[223] Unlike the Sappi case the court found that an independent observer would not reasonably have thought that the risk of an unfair determination was unacceptably high. The court also found that the discussion that was held between the chairperson of the enquiry and her senior who had presided over the appeal hearing was not procedurally incorrect. Neither was the fact that the group's industrial relations manager who advised her of consequence.

Le Roux highlights a significant viewpoint in this case. He points out that at disciplinary hearings presided over by laymen, it could not be expected that all the niceties that a court of law would adopt would always be observed.[224]

There must be a realisation that in the employment relationship, there is always a possibility of some prejudging having taken place due to the proximity of the parties. Le Roux comments that the `concept of an unbiased and disinterested judge hearing the matter in splendid isolation from the parties, his mind unburdened by preconceptions based on often intimate knowledge of the behaviour and attitudes of the protagonists, is very difficult to apply in the employment sphere.'[225]

The foregoing illustrations notwithstanding, breaches of fair procedure do not in all cases vitiate a hearing however trivial they may be.[226] The split decision of the Labour Appeal Court in *Mondi Timber Products v Tope*[227] 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,[228] the operations manager and the human resources manager, before the employee was found guilty of repairing his 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."[229]

The courts have also stressed that given the inevitable interaction between such a Presiding Officer and co-employees; and his involvement in the daily activities of the company, it cannot be expected that such a Presiding Officer will maintain the same state of isolation as a judge in the court of law.[230] It therefore follows that the fact that a Chairperson consults with the initiator would not necessarily render the dismissal procedurally unfair due to bias. This would rather depend on whether such consultation had the effect that the Chairman, in reaching his decision, did not exercise his own discretion.

4.2.8 The Duty to Give Reasons

There is a lack of general consensus amongst the common law jurisdiction as to whether or not time has arrived for making reasons for a decision a general duty at common law. Some jurisdictions have been encouraging while others still believe that the position at common law has not been altered and the deciding authority is not in anyway obliged to give reasons.[231] But since the modern view with regard to administrative justice requires that the decision has to be reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations

of policy or expediency, statutory provisions have been made to remedy where the common law has fallen short in influencing the concept of duty to give reasons.

Reference can be made to various statutes which have as their aim to improve the adjudicatory process. In England, for instance, the importance of giving reasoned decisions was recognised by the Donoughmore Committee as early as 1932.[232] The committee formulated the principle that a party is entitled to know the reasons for the decision and recommended the acceptance of this principle as part of the doctrine of natural justice. Nothing happened till the Franks Committee, reporting in 1957, insisted that there should be a general practice that adjudicatory bodies give reasons for their decisions.[233] Accordingly, the obligation to give reasoned decisions was imposed by the Council and Tribunal Act, 1958. But the reasons are to be given only when demanded by the party concerned. In the United States of America, a similar obligation is imposed by the Federal Administrative Procedure Act of 1946.[234] In India, the Law Commission in its Fourteenth Report relating to Reform in Judicial Administration recommended:

> ***"In the case of administrative decisions provisions should be made that they should be accompanied by reasons. The reasons will make it possible to test the validity of these decisions by the machinery of appropriate writs."***

Accordingly the Administrative Tribunals Act 1985 has underlined that an administrative authority should record its decisions. Supporting this provision the Supreme Court of India in *Travancore Rayons Ltd v The Union*[235] of India observed that the necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached in cases where a non-judicial authority exercises judicial functions is obvious."

The Mauritian and the South African legal system have not been immune to the expanding horizon of procedural fairness which requires over and above other requirements, the duty to provide reasons by an administrative authority for its

decision. The Mauritian Constitution, in its Bill of Rights, has entrenched in Section 10(3) the following provision:

> "Where a person is tried for any criminal offence, the accused person or any person authorised by him on that behalf shall, if he so requires and subject to any payment of such reasonable fee as may be specified by or under any law, be given within a reasonable time after judgement a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court."

This provision has a specific application in the Mauritian law of dismissal due to misconduct. Section 112(d) of the Industrial Relations Act 1973 provides:

> "details of any disciplinary action shall be given in writing to the employees and, if he so wishes, to his workplace representative."

In the South African context reference can be made to three statutory provisions, namely, Section 33(2) of the Constitution, Sections 3(2) and 5 of the Promotion of Administrative Justice Act and Section 4(3) Schedule 8 of the Labour Relations Act 1995.

Section 33(2) of the constitution states:

> Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

Section 3(2)(e) of the Promotion of Administrative Justice Act reads:

> In order to give effect to the right to procedurally fair administrative action, an administrator...must give a person (whose rights and legitimate expectations are materially and adversely affected)....

(e) adequate notice of the right to request reasons in terms of Section 5 and Section 5 provides:

> 5.(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
> (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.
> (3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings to judicial review that the administrative action was taken without good reason.

More specific within the context of dismissal due to misconduct is Item 4(3) of Schedule 8 of the Labour Relations Act which reads as follows:

> If the employee is dismissed, the employee should be given the reason for dismissal.

The norm set by the statutory provisions of the various legal jurisdictions is that fairness requires the additional procedural safeguard of reasons, so that the applicant could know what issues the adjudicating authority had addressed and on what basis of the fact it had reached its decision. Now that Mauritius and South Africa have expressly provided in their respective Codes of Good Practice the duty to give reasons, the employers are enjoined with the duty and responsibility to see to it that in adjudicating disciplinary proceedings they adhere to reasoned decisions so that those affected by the decisions are assured that their cases have received proper consideration at the hands of the said authorities, and that such decisions have been reached according to law and have not been a result of caprice, whim or fancy or have been reached on ground of policy or expediency.[236] Thus what the employer is required by this requirement of procedural fairness is not a mere formality but to give

the reasoned finding so that the employee may canvass the correctness of the decision on appeal to a higher level of management or for judicial review. Therefore,

> ***"The reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order..., the refusal to disclose the reasons would equally be open to the scrutiny of the court; or else, the wholesome power of a dispassionate judicial examination of the executive orders could with impunity be set at naught by an obdurate determination to suppress the reasons. Law cannot permit the exercise of a power to keep the reasons undisclosed if the sole reason for doing so is to keep the reasons away from judicial scrutiny."***[237]

This view of the court supports the general meaning contained in the Mauritian and South African statutes. It may, however, be mentioned that unlike South Africa where, under the general heading of `just administrative action', a person who is aggrieved or threatened by an adverse decision, the statute has made a clear and unqualified provision for the right to be given written reasons', the Mauritian statute does not have any specific provision that deals solely with `just administrative action' which are qualified as "lawful, reasonable and procedurally fair." The Mauritian legal system has not put into place any structure as contained in the Promotion of Administrative Justice Act which enjoins the decision maker to follow fair procedures in arriving at a decision that is `lawful, reasonable and procedurally fair.' Though constrained by lack of these provisions, the Mauritius Constitution Order 1966 providing for the Public Service Commission Regulations, 1967 has laid down specific procedural approach when dealing with a public officer charged with misconduct Section 39 reads:

> "If the Secretary to the Council of Ministers or a responsible officer, after having considered every report in his possession made with regard to a public officer, is of the opinion, that it is desirable in the public interest that the service of such public officer should be terminated on grounds which cannot be suitably dealt with under any other provisions of these Regulations, he shall notify the public officer, in writing, specifying the complaints by reason of

which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the public officer."

Within the content of this provision that the employees in the Mauritian public sector have found an administrative process whereby the state becomes accountable for its disciplinary actions and liable to judicial scrutiny. Similar protection is provided to the private sector employees by section 112 of the Code of Good Practice in the Mauritian Industrial Relations Act. The provisions of both statutes require reasons to be given in support of a decision to dismiss an employee, and such a decision, may without reason, be considered as wholly defective in the eye of the law.[238]

In South Africa Item 4(1) of the Code of Good Practice requires that `after the enquiry' the employer should notify the employee of the decision taken. Strydom explains that:

> ***"In terms of this guideline the employee must be informed of the verdict. Furthermore, if the employee is found guilty the employer must inform the employee of the penalty."***[239]

Thus to give validity to an employer's decision the modern administrative law principles dictate that employers are bound to give reasons for dismissing an employee. Procedural fairness therefore, demands as one of its requirements that an applicant should have access to reasons for a decision and in the present context, the employee needs to know whether the employer has acted lawfully, reasonably and with procedural fairness, and whether the employee may have grounds for appeal or judicial review.

Mauritian law of `unjustified dismissal is deficient in appropriate cases dealing with the issue of duty to give written reasons for dismissal. But in *Mkize v JLR and Hay-Yoon Enterprise*,[240] the Arbitrator in South Africa found the dismissal was procedurally unfair in that the employee was "not informed that he had been found guilty and thereafter given an opportunity to place mitigating factors before the chairman of the disciplinary enquiry."

This decision of the CCMA lays to rest the sweeping argument that reasons which are given after the decision has been made, cannot be required by natural justice or fairness, which was only concerned with procedure at a hearing. This argument was expressly rejected by McCowan LJ. in *R. v Court Service Appeal Board, ex parte Cunningham*,[241] who recognised that other procedural inputs such as "the opportunity of a party to state his case would be nugatory of procedure for these purposes ended with final speeches." He concluded that "the form of the recommendation is part of the procedure of the hearing and...subject to the requirements of natural justice."[242]

Behind this reasoning is the recognition that the law presumes that reasons are formulated before a decision is made, and hence they do relate to the process by which a decision was reached. This reasoning does not rely on the wider argument that, like other procedural requirements, a duty to give reasons may enhance the quality of the decision by improving the way in which it was made, because a decision maker who knows that he must explain his conclusion will be likely to reach it more carefully. Thus the implications which can be drawn from a failure to give reasons was described quite appropriately by Lord Keith in *R v Secretary of State for Trade and Industry, ex parte Lourho*:[243]

> ***"The absence of reasons for decision... cannot of itself provide any support for suggested irrationality of the decision. The only significance of the absence for reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of different decision, the decision-maker cannot complain if the court draws the inference that he has had no rational reason for his decision.***

It has also been observed that in the absence whether it is impossible to determine whether or not there has been an error of law, hence "failure to give reasons amounts to a denial of justice and is itself an error of law.[244] The non giving of reasons would, therefore, militate against the principle that justice should not only be done but should manifestly be seen to be done.[245]

Thus by mere insistence of the duty to give reasons in their statutes, Mauritius and South Africa have re-established not only a positive attitude towards the giving of reasons in administrative decisions, but have also promoted the duty to give reasons, especially, where the `rights or legitimate expectations' of a person are affected. Unfortunately, this area of the law being in its initial stage in both countries, it lacks precedents through judicial decisions, and which needs to be applied with greater consistency. However, since there is already statutory duty to give reasons in place, the implication is that the decision of a deciding authority will be invalid for non-compliance with this statutory requirement. Hence the court can compel the adjudicating body to give reasons for its decisions. In this regard Wade[246] wrote:

> ***"...nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review; now that so many decisions are liable to be quashed or appealed against on the grounds of improper purpose, irrelevant consideration and errors of law in various kinds..."***

It may be noted that an administrative decision may not contain reasons, but at least, the record should disclose reasons.[247] It is not required that reasons should be as elaborate as in the decision of a court of law.[248] The reason may be precise. It cannot be laid down that an order is a non-speaking order simply because it is brief and not elaborate.[249] Every case has to be judged in the light of its own facts and circumstances what is necessary in that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy.

The advantages that emanate from compliance with the duty to give reasons will perhaps give the Mauritian and South African law of dismissal a further insight into its serious application.

Firstly, this requirement acts as a restraint on the employer as an adjudicative authority against any possibility of use of his/its power in an arbitrary manner. Needless to say that Mauritius and South Africa, being committed to "democratic

values, social justice and human right," will find this requirement of great significance especially where so many administrative authorities are being given quasi-judicial powers. It is, therefore, the dictate of prudence that chances of misuse of power by such bodies are minimised, and reasoned decisions by such authorities become a pre-requisite for fair dismissal.

Secondly, an employee would be in a better position to plead his/her case before a higher level of management if he/she is aware of the reasons on which the lower body has held against him. Undoubtedly, in the absence of reasons, he has to grope in the dark, and thus, cannot be held to have had a fair hearing before the higher authority if he is not aware of the points which have been made against him/her. He/she can, therefore, argue effectively before the higher tribunal only if he/she knows the conclusion of the lower tribunal. Besides this, reasons also enable a reviewing authority to understand the basis of the decision better; thus allowing that authority to carry out the appellate function more effectively and in a better way.

Thirdly, as already stated in Section 3(4)(b)(v) of the Promotion of Administrative Justice Act of South Africa that "the administrator must take into account all relevant factors, including the need to promote an efficient administration and good governance," the duty to provide reasons for an administrative decision is essential to the efficient functioning of the workplace machinery. In this context, the giving of reasons affords the decision making process a measure of impartiality and gives the appearance that the decisions are free from arbitrariness and bias, thus giving employee confidence in the system of administration. Reasons also tend to give legitimacy to administrative decisions, encouraging acceptance of a decision even where they are adverse to the person affected, since reasons would appear rational, unbiased and logical.

Last but not the least, in these days of hierarchial quasi-judicial adjudication, for a process not to be a sham or showy, but effective to uphold the due rights of the people, it appears to be a matter of first principle that a decision making authority must give its own reasons for its decisions.

All these advantages have been summed up quite succinctly by Davidson CJ in *Potter v New Zealand Milk Board*:[250]

> ***"The giving of reasons helps to concentrate the mind of the tribunal upon the issues for determination. It enables litigants to see that their codes have been carefully considered and appreciated; it enables the litigant dissatisfied with a decision to more readily consider whether there are grounds for appeal; and it enables an appellate court or tribunal to ascertain the determinations of the tribunal or questions of fact, to which appellate courts pay difference on the hearing of an appeal and also enables the appellate court, where the decision includes findings of law to know what principles of law have been applied and to consider whether such were correct.***

Thus the duty to give satisfactory reasons for reaching a decision to dismiss is a duty of such decisive importance in the entire process of procedural fairness that it cannot be lawfully disregarded. As this duty is vital for the purpose of showing an aggrieved person that he is receiving justice, Mauritius and South Africa should make this duty mandatory in all disciplinary processes, especially if the final sanction is dismissal.

4.2.9 The Right to Internal Appeal

In the context of dismissal from employment, the major significance of the grounds for appeal is that they enable a dismissed employee to challenge his dismissal on the grounds that the decision to dismiss him was taken in disregard of procedural requirements, including the rules of natural justice, or that it was so unreasonable that no reasonable body could have taken it.[251]

Section 111 of the Mauritian Industrial Relations Act 1973 states:
The procedure shall be in writing and shall...

(c) provide for a right to appeal, wherever practicable, to a level of management not previously involved; and

(d) provide for independent arbitration if the parties to the procedure wish it.

Although the right to appeal has been expressly provided in the labour statute, it seems employees mostly prefer to make use of the Industrial Court, because of its specialised jurisdiction, to appeal rather than rely on internal appeal procedures. This feature seems to be quite conspicuous in the South African jurisprudence. Although the Code of Good Practice has not made provision for an employee to appeal to a higher level of management against the outcome of a disciplinary enquiry, he/she has a recourse to the CCMA which, with its simplified procedures, can serve as an adequate substitute for domestic appeal.[252]

For lack of judicial decisions an internal appeal, a brief look at the Mauritian Industrial Court's jurisdictional power to review decision on disciplinary matters will be quite appropriate here.

4.2.9.1 The Jurisdiction of the Industrial Court in Mauritius

Section 3 of the Industrial Courts Act provides for the setting up of an Industrial Court with exclusive civil and criminal jurisdiction to try any matter arising out of the enactment set out in the first schedule[253] to the Act. The Industrial Court, thus, has jurisdiction to hear and determine all claims arising out, or brought, under these enactment, irrespective of the amounts claimed.

One of the enactments found in the first schedule of the Industrial Courts Act is the Labour Act LA. It will be recalled that section 2 of the LA defines "Worker" as excluding a person whose basic wage or salary exceeds Mrs 72,000 a year. As a result, the employee who cannot satisfy the criteria of "Worker" of the LA cannot have access to the Industrial Court.[254] On the other hand, the Supreme Court held in *Kosseeal v Douget*[255] that "the Industrial Court has jurisdiction to hear all matters pertaining to the breach of the contract of employment, for example, a request for the payment of severance allowance, as long as they are provided for by part VI of the LA which concerns all employees irrespective of the amount of his salary or wages."

Section 7 of the ICA[256] provides that proceedings before the Court are instituted and conducted in the same manner as proceedings in a civil or criminal matter before a District Magistrate. It follows that, the worker himself or his attorney, may institute proceedings before the court. However, instead of going directly to court, an aggrieved worker may go and seek help at the Ministry of Labour and Industrial Relations. It is to be noted that in respect of procedure for cases of unjustified dismissal, the worker should refer the matter to the officer within 7 days after he has been notified (s32(3)(c)LA. There, an officer will consider his case and may even contact the employer to try and settle the matter. But, if they fail to reach a solution agreeable to both parties (the employer and the employee) the officer may then lodge a complaint with the clerk of the court signed by him. So as to guarantee the employee access to the court, the legislator has provided[257] that no court fees shall be chargeable on any proceedings commenced by the Permanent Secretary on behalf of any worker against his employer. In such a case the worker will have no expense at all to bear, not even that of his representation in court in so far as the employment inspectors represent him.[258]

Further, to help the worker who may be unaware of the real identity of his employer, proceedings against a body corporate are validly instituted if instituted against a person who is concerned in the management of the body corporate.

Before the court, the burden of providing that the termination of employment relationship was justified will lie upon the employer because he will be the one who has to prove that he could not in "good faith" take any other course if he is to be dispensed with paying any severance allowance.

At the close of the case the magistrate, may by virtue of s9(2)(e) ICA order the plaintiff or the defendant to pay to the other party such amount by way of compensation for the wages lost, or expenses incurred, in attending the court, as he thinks fit. Finally, every order or judgment of the court shall be enforced as if it were an order or judgment of the District Court and the Magistrate may make any order as to costs that a District Magistrate may make.

4.2.9.2 Informal powers of the Magistrate of the Industrial Court

The Magistrate of the Industrial Court is endowed with certain informal powers. The first of those informal powers is found in s5(1)(a) of the ICA which provides that any person may apply to a magistrate for advice, guidance or help in the settlement out of court of a dispute arising or which is likely to arise, in respect of a matter within the jurisdiction of the court, even though no action has been entered or complaint made. The magistrate would be playing the role of conciliator. This would be to the benefit of both the employer and employee because it offers them the chance of resolving the dispute between them peacefully without undergoing any cumbersome court procedures.

Further, under s5(2) of the ICA the magistrate may at any time offer his advice, guidance or help to any person if he considers that such a course is desirable to promote good industrial relations. In practice, this provision may find its application where the issue is already being tried before the court and the magistrate feels on an analysis of the circumstance of the case that an out of court settlement is possible and might be conductive to good industrial relations.

These informal powers of the magistrate demonstrate the intention of the legislator to make justice more accessible and cheaper to the parties, especially the employer.

4.2.9.3 Review of decisions of the Industrial Court

A Reviewing Authority, who may be either the Chief Justice or any other judge as he may depute, is created by s12 of the ICA. Though a reading of the Industrial Court Act (ICA) indicates that it is the Chief Justice who decides proprio motu to cause a case to the reviewed, in practice, the Reviewing Authority is solicited by one or both of the parties to the matter before the Industrial Court.

There is a delay of six weeks from the date of the judgement of the Industrial Court after which no review proceedings can be commenced. After reviewing a case, the Reviewing Authority is empowered to give such judgement and make such order as it thinks desirable in the interests of justice.

The establishment of a Reviewing Authority is in accord with the general philosophy of the ICA, NAMELY, to reduce cost and energy to a minimum.

4.2.9.4 Appeal to the Supreme Court

There are two situations where the issue of an appeal to the Supreme Court will arise:

(i) An appeal to the Supreme Court from a judgement of the Industrial Court Magistrate;

(ii) an "appeal" to the Supreme Court from a decision of the Reviewing Authority.

4.2.9.4.1 Appeal from a decision of the Magistrate

When the Magistrate delivers the judgement, section 11 of the ICA lays down the duty of the Magistrate to inform the losing party of his right to appeal, plus, the conditions under which this right may be exercised.

In the case of *Moorlee and Ramphol v Permanent Secretary, Ministry of Labour and Industrial Relations*[259] the Supreme Court held that the Magistrate should make a note in the record that he has informed the losing party as to the latter's right to appeal.

This is peculiar to the Industrial Court, and is yet another example of the legislator's wish to afford protection to the worker whom he considers not to be on the same footing as the other party to the litigation, namely the employer.

We should note here that, though proceedings can be instituted by the Secretary of the Ministry of Labour and Industrial Relations for and in the name of a worker, it was held in *Lee v Labonne*[260] that by initiating such proceedings in the name of a worker,

the Permanent Secretary does not become a party to the suit and therefore, should not be made a party on appeal.

An appeal from a final judgement of the Industrial Court is subject to the same conditions as an appeal from the decision of a District Magistrate.

4.2.9.4.2 "Appeal" from a decision of the Reviewing Authority

Whether such a recourse is available was considered in the case of *Mauritius Tuna Fishing and Canning Enterprise Ltd v Manne*.[261] In this case, the worker (Mr Manne) was dismissed for a serious misconduct and he brought an action before the Industrial Court. The action was dismissed and the worker applied for the decision to be reviewed. The Reviewing Authority found in his favour, and his employer appealed. The question arose as to whether an appeal could be made against a decision of the Reviewing Authority. The Supreme Court concluded as follows:

> ***"When a case tried by the Industrial Court is reviewed, the Industrial Court's judgement becomes final and appealable, when the Authority has completed its Review. The Reviewing Authority's decision is not a final and appealable one."***

In *Keerodhur v J.R Overseas Investment Ltd*,[262] the point was raised whether an appeal still lies to the Supreme Court if the Reviewing Authority decides that there is no ground to do so. The Court held that in that situation the decision of the Industrial Court is deemed to have been a final one on the day it was delivered and the time to appeal starts to run from that date.

The above decision of the court raises a problem: a person has 21 days during which to appeal to the Supreme Court from a decision of the Industrial Court. If the person has asked for a review and he is not satisfied when the Authority claims there are no grounds for review of the decision it is very likely that the 21 days would have elapsed. The time to appeal would have run out because it would be considered to have been running from the date the Industrial Court gave its ruling and not from the

date of the decision of the Authority. This goes against the spirit of the ICA and of the LA. It should be mentioned here that the ICA has been amended by section 5 of the Judicial and Legal Provisions Act such that now an appeal lies against the decision of the Industrial Court as it has been amended by the Reviewing Authority. The problem still remains for the instances where the Reviewing Authority finds no grounds to alter the decision of the Magistrate.

4.2.9.4.3 Appeal Against Service Commission Decisions

The independence of the Service Commissions or Tribunal, as provided by Section 118(4) of the Constitution, does not exempt their decisions from being reviewed by the Supreme Court. The court's power to review an appeal is not limited to the Public Service Commission only, it also applies to the Judicial and Legal Service Commission and the Police Service Commission.[263]

But it is also stated in *Yerriah v P.S.C*[264] that the court "will not interfere with the decision of the Commission for a breach of administrative rule." In *Unuth v Police Service*[265] Commission, there was a suggestion that in exercising its power of review under Section 119 of the Constitution, the court cannot act as in a case of appeal against a magistrates's judgement. This suggestion was upheld by Justice *Ahnee in Norton v Public Service Commission*[266] where he made the point that bodies like the Service Commission are not subject to appeal, although they have no more powers than those conferred upon them by the constitution.

It is now therefore, settled that the court will not interfere to review a decision but only to look at the decision making process.[267] But the court would interfere in a case where it is obvious that the irregularity was so gross as to render the whole decision making process void.[268]

It is however, not enough for the Commissions to show "that they have followed the procedure laid down" and that they have not "contravened any provision of any other law or the Constitution".[269] The court would apply the principles laid down in the

leading English case of *Anisminic v/s Foreign Compensation Commission*[270] where it was held that an otherwise valid decision would be a nullity if the public body making it fails to comply with the requirements of natural justice or misconstrues the provisions giving powers or directs itself to irrelevant matters or has left out relevant matters.

In the case of *Y.Descelles v PSC*[271] P. de Ravel Judge stated that:

> ***"Following the principles laid down in the case of Yerriah v PSC[272] I am of the opinion that this Court has jurisdiction to enquire whether the Public Service Commission in the exercise of its power has been acting in conformity with the provisions of the Public Service Commission Regulations and has not infringed the element of natural justice and rights safeguarded by the Constitution of this country."***

With regard to the first rule of natural justice namely the right to a fair hearing the Court will quash a decision if the whole proceedings are tainted with manifest injustice. If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie a breach of natural justice, irrespective of whether the material in question arose before, during or after the hearing. If the deciding body receives or appears to receive evidence ex parte which is not fully disclosed, the case for setting the decision aside is obviously very strong; the maxim that justice must be seen to be done can readily be invoked.

For instance if the inquiring body or officer acts on evidence received behind the back of the "accused" in that evidence is never made available to the latter or to his Counsel. this would be most improper and would amount to a blatant breach of the rule of fairness in relation to the hearing.[273] In that case the inquiring body set up to hear the case against the applicant acted upon a report which was never made available to the latter to find one of the charges proved. The respondent acting on the finding of the board retired Mrs Hafejee in the public interest. The decision of the respondent was quashed because "of the manifest injustice which tainted the whole

proceedings when evidence forming the basis of the guilt of the applicant was received behind her back."

The court will also see to it that in arriving at a decision, the disciplinary authority "has taken into account all the relevant considerations and has not been influenced by considerations which are either irrelevant or not borne out by the record. Faced with a situation where such does not appear to be the case, this Court has no option but to quash the determination".[274]

It goes without saying that this court also controls whether a hearing has been given or not. It is not because the same conclusion would have been reached even had a hearing been afforded that the importance of the hearing should be minimised.[275] What the rules of natural justice require, therefore, in such a case is that those persons who have to determine a particular charge must keep an open mind. There should be nothing in their conduct that should arouse any `reasonable suspicion of a real likelihood of bias'. Mere presence of those persons is not enough. Nor would it be sufficient to show a mere suspicion of bias. And the burden rests on the complaining party to show `reasonable suspicion of a real likelihood of bias'.

The court also expects that "the record of the commissions speak for itself" and "if a record shows that no reason is apparent for a decision, the court is entitled...to assume that the decision was taken for no particular reason, hence to quash it.[276] The court also requires the commissions to act on relevant facts, and on relevant facts only. It is important in this respect that the commissions ask themselves the right question.

Another important question which arises is whether the court may control the sanction imposed by the disciplinary authority. In other words can it pronounce itself on the severity of the sanction.ie. can it control "l'adequation de la sévérité de la sanction a la gravite de la faute?" The court's answer is in the affirmative as it has been held in the case of *Ismael v UBS*[277] that "the jurisdiction of this court should not only (a) to pronounce on the severity or otherwise of disciplinary measures affecting salary and inappropriate cases. to substitute a less severe sanction...but also (b) to pronounce on

the question whether such sanction was justified at all or else was so grossly disproportionate to the misconduct found...' This means that the court may intervene if the sanction is not proportionate to the misconduct.

The intervention of the Supreme Court under Section 119 of the Constitution is limited to three occassions:

(1) When the relevant service commission has performed a function which it is not authorised to perform;

(2) When it has in the performance of a function which it has power to fulfil, violated a provision of a Constitution;

(3) When in the fulfilment of such a function it has contravened any other law.

The principle according to which the sanction pronounced should be proportionate to the `faute' being derived from the common law, it is submitted that the Supreme Court should be able to pronounce itself on the severity of the sanction imposed by the commissions. Contrary to the situation in Labour Law whereby the Supreme Court may even substitute a less severe sanction, here the court may only quash the decision and remit the matter back to the appropriate authority to impose another sanction as it is only the latter which, pursuant to the Constitution may impose a disciplinary sanction upon a public officer unless it has delegated its powers to another person in accordance with the provisions of the Constitution. In *Ramdin v PSC*[278] it was held that "the court's function is not to substitute itself for the respondent in determining what is the appropriate punishment to be meted out to an erring public officer." Even though the judges are persons to whom the service commissions may delegate their powers, so far they have not done so.

The next question which arises is, does the court also have the power to review the decisions made by a person or whom the Service Commission has delegated its power to discipline an officer?

It has been held in the case of *Sookia v the Commissioner of Police & Anor*[279] "the limitations set out by Section 119 of the Constitution on the court's power to review decisions of the service commissions...must apply also to our jurisdiction in relation

to decision made by a person to whom the service commission delegates its powers." In other words the Court may review the decisions of the commissions' delegate but the power of review is a limited one. The Court may only intervene to quash the decisions of a commissions' delegate if it has done something it has no right to do.

In this case the applicant applied for judicial review of disciplinary proceedings in which the respondent, acting under powers delegated to him by the co-respondent in accordance with Section 91(2) of the Constitution, found that he had committed acts which constituted breach of the Police Force Code of discipline. Pursuant to regulation 44 of the Police Service Commission Regulations 1974 the applicant exercised his right of decision, but reduced the punishment originally inflicted. The Court heard the case on the merits and the application was set aside because there was no breach of natural justice. The fact the Court heard the case on the merits stands to reason that even though there has been an unsuccessful appeal, the more so that the question was raised by the Court itself and counsel were invited to argue on it.[280]

It is therefore these shortcomings which the reviewing court will set out to investigate into. The court is not concerned with as to whether the decision is correct or not. In other words, the court cannot substitute itself for the commissions and interfere with the commissions' appreciation of the relevant facts in relation to a particular decision[281]but it is equally important that all the relevant facts, and only relevant facts, are taken into consideration before reaching a decision.[282]

4.2.9.5 The Right to Internal Appeal against Dismissals in the South African Labour Law

Unlike Mauritius, the South African Code of Good Practice does not make provision for an employee to appeal to a higher level of management against the outcome of a disciplinary enquiry. It is however, granted in Section 7(2)(a) of the Promotion of Administrative Justice Act which reads as follows:

"...no court or tribunal shall review an administrative action of this act unless any

internal remedy provided for in any other law has first been exhausted."

and Section 6(2)(c) states:

> ***"A court or Tribunal has the power to judicially review an administrative action if...***
> ***(c) the action was procedurally unfair."***

Two important points have emerged from these two clauses. First of all, by the mere reference to an `internal remedy' concept it implies that the decision of an adjudicating authority may be challenged and subject to review. Secondly, once the internal remedy has been exhausted the applicant aggrieved by the determination may appeal to a court or a tribunal for review of that decision which was taken without due regard to procedure.

Referring specifically to appeals against disciplinary decisions this is somewhat of a different nature, as they have no constitutional or statutory basis, yet they have become a regular practice in the South African Labour relations. The right of appeal and the provision of the appellate machinery are common features in employers' disciplinary codes and procedure agreements[283] that the employer is under an obligation to inform an 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.[284] 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.[285] 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 misconduct prior to dismissal. It was held[286] 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."[287] 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 interferes with the findings of the enquiry. Take the case of *Kohidh v Beier Wool (Pty) Ltd.*[288] 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 down by a properly constituted hearing, on the ground that it did not agree with that decision.[289]

The case of *SAMWU obo Nkuna v Lethabong Metropolitan Local Council*[290] 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 in partially to all 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.[291]

Thus, when a right to appeal exists in the disciplinary procedures applicable to the case, the prescribed procedure should however be observed and followed by the employer and employee. Although the Schedule does not make reference to the dismissed employee's right to appeal, should such right be present in the disciplinary procedure of the employee these requirements override the Code. This is the route followed in both *Mekgoe v Standard Bank of SA*[292] *and NEWU v Durban Deep Wholesale Meat.*[293]

4.2.9.6 Does Management possess Review powers over Disciplinary hearings?

Modern law of procedural fairness is riddled with problems of interpretation and giving meaning to the way disciplinary action is taken and whether or not appeal procedures are followed. But more perplexing is does the management possess review powers over disciplinary hearings?

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?

This aspect of the law has not caught the judicial thinking of either the Industrial Court or the Supreme Court of Mauritius. In fact, as already discussed, such reviewing powers have been devolved on the Industrial Court and Supreme Court, which, therefore, leaves no room for the management to play any role in reviewing the decision of the disciplinary authority.

But in South Africa when this question came before the Industrial Court for the first time,[294] it considered it unfair for senior management to set aside two months after it had 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 case[295] 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.[296]

In the subsequent case of *Botha v Gengold Ltd*[297] 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 jeopardy[298] which, at common law is presented as the pleas of autrefois acquit and autrefois convict,[299] and recognised in the Canadian Charter of Rights[300] and the South African Constitution as an essential element of the right to a fair trial in criminal matters.[301] 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."***[302]

A similar question was considered in *Strydom v USKO Ltd.*[303] 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. 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."[304] 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.[305]

The principle in Botha was considered in *NUMSA obo Walsh v Delta Motor Corporation (Pty) Ltd*[306] 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 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,[307] 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*[308] 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 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 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 "false analogy" with "unfortunate consequences" as Le Roux has submitted,[309] 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 be 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, 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. 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,[310] fairness being the overriding consideration in contemporary labour disputes settlement whether at the level of the undertaking or the labour tribunal.[311]

4.2.9.7 Can a defective hearing be cured by a subsequent appeal?

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

- the procedural defect "has been remedied by this arbitration",[312]or
- "there was no reason why any unfairness could not have been cured at the subsequent inquiry",[313] 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."[314]

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.[315] Although that Court had refrained, in the same manner as the Privy Council[316] and the House of Lords[317] 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 the stage of the dismissals should not have been cured by a full and fair hearing on appeal.

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 the 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."[318] 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*,[319] Megarry J had to consider a maze of conflicting decisions from Canada[320] and New Zealand.[321]

Although the Privy Council in *Calvin v Carr*[322] 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 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."[323] 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."[324]

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*[325] and *Polkey v AE Dayton Services Ltd*[326] 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*[327] 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 (Felixstowe) Ltd*[328] 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 *Westminister City Council v Cabaj*[329] 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*,[330] 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*,[331] 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.

The case law before Slagment

Before Slagment, there were contradictory judicial decisions on this subject in South Africa. The Appellate Division had held in *Turner v Jockey Club of South Africa*[332] that the various procedural transgressions committed by the Inquiry Board against a member charged with 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 Council of Review, *SADF & Ors v Monnif & Ors*[333] 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*,[334] the hearing was riddled with many irregularities that it was held that the appeals 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."[335] Combrinck J came to a similar conclusion in *SACTWU & Anor v Martin Johnson (Pty) Ltd*[336] 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'. Van Zyl J arrived at an opposing conclusion in Henred Freuhauf Trailers (Pty) Ltd v NUMSA & Ors.[337] 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.

The cases since Slagment

Not only that the decision in *Slagment (Pty) Ltd v BCAWU & Ors*[338] cannot be regarded as conclusive of the issue discussed in this section, 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) & Anor.[339] 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 Terblanche*.[340] 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"[341] 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.[342] Thirdly, where the subsequent hearing is a rehearing, then the initial defect is cured. In Nasionale Parkeraad, 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* [343], where unlike 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 demand by the shop stewards that they be represented by an official of the union was refused by the chairperson. Even when the request was subsequently approved by management, 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.

The Namibian Labour Court approach

The question which arose in the *Namibian Labour Court & Ors v Kuisch Fish Products Ltd*[344] 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 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 evidence adduced at the rehearing. The Court rejected the approach of Combrinck J in Empangeni[345] and South African Clothing[346] 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."[347] 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."[348] 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."[349]

4.3 Conclusion

It is not unknown in the Mauritian and South African Labour Jurisprudence that the essence of procedural justice requires that a person who is to decide must give the parties affected a fair hearing enabling them to state their case and views. From the abovementioned, various requirements for procedural fairness during pre-dismissal hearings have been discussed.

During the course of discussion certain pertinent issues were highlighted. The requirements of pre-dismissal procedures in Mauritius and South Africa, have taken many years to evolve to their current form. From the influences of the common law to the ILO recommendations and conventions, the industrial courts of both countries, in their preoccupation to provide procedurally fair pre-dismissal rights, evolved a series of procedural requirements that needed to be satisfied before making a dismissal due to misconduct fair. The courts have consistently required that an employee who is faced with dismissal for misconduct should be given an opportunity to present his/her case so as to rebut the charges or plead in mitigation.

The chapter discussed the various requirements that make up the components of the notion opportunity to present his/her case. It is important to note from the various courts decisions in Mauritius and South Africa, that the employer had to, at least, adhere consistently to fair disciplinary procedures whether such rules were formalised in a written code or established in the workplace through precedent or practice. These procedures that aim to promote the requirements of fairness have been summarised

very clearly in *SA laundry, Dry Cleaning, Dyeing & Allied Workers Union & Others v Advance Laundries Ltd t/a Stork Napkins* where Bulbulia AM said:

> ***Such a procedure should provide, interalia, for the individual to be informed of the charges against him and give him the opportunity to state his case. He should enjoy the right to call witnesses and if need be have someone of his choice, including a shop steward or union official, to represent him at the hearing. A fair procedure will also provide a right of appeal and lay down the procedure to be followed. Procedural fairness and substantive fairness are the foundations upon which the audi alteram partem rule rests."***[350]

A general consensus seems to prevail in the approach to the basic understanding of what constitute the requirements of procedural fairness in Mauritius and South Africa. As was indicated by the Supreme Court of Mauritius in *Tirvengadum v Bata Shoe (Mts) Co Ltd*,[351] that an employer, before dismissing a worker guilty for gross misconduct, should not "turn himself into a court of law and hold a formal hearing," clearly prescribes that not all the requirements of procedural fairness need to be complied with. Effectively, the South African Labour Relations Act puts an obligation on the employer to conduct an investigation and not a "formal enquiry."[352] Woolfrey[353] explains that by this procedure, the drafters of the Code have signalled a more informal approach to procedural fairness which obviously means that the employer should adhere to the core requirements, and the deviation of the norm is permissible in proper circumstances.

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[1]*Grogan J, Workplace Law,2000 Juta & Co p154*

[2]*1984 SCJ Record No 3426; 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 v Khonjwayo (1992) 13 ILJ 573 (LAC).*

[3]*1984 SCJ Record No 3377*

[4]*1979 MR 133*

[5]*1987 SCJ No.201*

[6]*Supra Note 4*

[7]*Morepane v Gilbeys Distillers & Vintners (Pty) Ltd & Another 1997 8(3) SALLR 133*

[8]*Tirvengadum v Bata Shoe (Mauritius) Co. Ltd. (1979) MR 133 and Bundhoo v The Mauritius Breweries (1981) SCJ No.140.*

[9]*Ibid*

[10]*PAK Le Roux 1994. South Africa Unfair Dismissal Law: Time for a Reassessment? CLL 3(12) at 117.*

[11]*PAK Le Roux & Van Niekerk, 1994. The South African Law of Unfair Dismissal; Juta & Co. Kenwyn at 53.*

[12]*Mahlangu v CIM Deltak. Gallant v Deltak 1986. 7(2) ILJ at 369*

[13]*Ibid*

[14]*Ibid at 24*

[15]*Mjaji v Creative Signs 28/2/1997 SALLR 7(2) (CCMA)*

[16]*Makatsi v Mamello Pre-school (1996) 7(1) SALLR 11 (CCMA)*

[17]*Gavander v Navanethem Pillay & Co (19/05/1998) Jutastat, (CCMA)*

[18]*FAWU v Snoek Wholesalers (Pty) Ltd (02/03/1998) Jutastat, (CCMA)*

[19]*23/04/1998 Jutastat (CCMA)*

[20]*(1986) 7 ILJ 375 at 384E*

[21] *1979 SCJ Record No 2879*

[22] *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.*

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

[24] *Slagment (Pty) Ltd v BCAWU & Ors (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)*

[25] *(1998) 6 BALR 683 (CCMA). See also Sehomo v D&K Coffin Manufacturers (1998) 12 BALR 1601 (CCMA)*

[26] *NUM obo Makanye v Rustenberg Platinum Mines Ltd Amandelbult Section (1998) 10 BALR 1289 (CCMA)*

[27] *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) SA204 (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.*

[28] *In Cycad Construction (Pty) Ltd v CCMA & Ors (1999) 20 ILJ 2340 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."*

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

[30] *Per Lord Denning in Kanda v Government of Malay (1962) AC 322 at 337*

[31] *Mkhize v JLR & Hay-Yoon Enterprise 1995 SALLR 6(11): 2-15 (CCMA)*

[32] *Makatsi v Mamello Pre-school 1996 SALLR 7(1): 11-15 (CCMA)*

[33]*Hayward v Protea Furnishers 09/05/1997 Jutastat; (CCMA)*

[34]*FAWU v Snoek Wholesalers (Pty) Ltd 02/03/1998 Jutastat, (CCMA)*

[35]*NEWU v Durban Deep Wholesale Meat 11/05/1998 Jutastat; (CCMA.)*

[36]*PAK Le Roux & Van Niekerk 1994. The South African Law of Unfair Dismissal, Juta & Co, Ltd, Kenwyn at 156.*

[37]*E.Cameron. 1986 The Right to a Hearing before Dismissal - Part 1 ILJ 7 (2) at 200.*

[38]*Trauchweitzer v Robert Skok Welding (Pty) Ltd t/a SKOK Machine Tools (1991) ILJ 12 at 1099 (IC)*

[39]*FAWU & Others v Amalgamated Beverages Industry Ltd 1992 ILJ 13 at 1552 (IC)*

[40]*(1986) 7(2) ILJ (IC)*

[41]*(1987) 8 ILJ (IC)*

[42]*E.Cameron `The Right to a hearing before Dismissal' Part 1 (1986) 7 ILJ 201.*

[43]*(1988) 9 ILJ (IC0*

[44]*Supra note 35 at 154*

[45]*(1986) 7 ILJ 343 (IC0*

[46]*Mkhize v JLR & Hay-Yoon Enterprise 1995 6 (11) SALLR (CCMA)*

[47]*Fihla & Others v Pest Control Tvl (Pty) Ltd, (1984) 5 ILJ 165 (IC) at 169B.*

[48]*FBUSA 7 Another v East Rand Bottling Co (Pty) Ltd (1985) 6 ILJ 231 (IC) at 2321*

[49]*WUM & Another v Kloof Gold Mining Co, (1986) 7 ILJ 375 (IC) at 384D*

[50]*E.Cameron, 1986. The Right to a Hearing before Dismissal - Part 1 ILJ 7(2) at 200*

[51]*Trauchweitzer v Robert Skok Welding (Pty) Ltd t/a Skok Machine Tools (1991) 12 ILJ at 1099 (IC)*

[52]*PAK Le Roux & Van Niekerk, 1994. The South African Law of Unfair Dismissal; Juta & Co, Kenwyn at 157.*

[53]*Snell v SSM MANUFACTURING 16/12/1996; Jutastat (CCMA).*

[54]*Ibid*

[55]*SACWU v Harvey's Curnow 15/10/1997 Jutastat; (CCMA)*

[56]*NEWU v Durban Deep Wholesale Meat 11/05/1997; (CCMA)*

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

[58]*Per Buckley LJ in Stevenson v United Road Transport Union (1977) 2 ALLER 941 at 951*

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

[60]*(1997) 18 ILJ 1931 (LC) v Secretary of State for the Home Department & Ors (1993) 3 ALLER 92 at 106. See also: Korsten v Macsteel (Pty) Ltd & Anor (1996) 8 BLLR 1015 (IC) at 1020 C-E; GIWUSA v VM Construction (1995) 9 BLLR 99 (IC0*

[61]*(1997) 8 BLLR 965 (LAC*

[62]*(1997) 8 BLLR 965 (LAC) at 980-981*

[63]*This accords with the constitutional injunction S35(4), Constitution of the Republic of South Africa 1996. Indeed, S35(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. See generally, Kunath v The State (1993) 4 ALLER 30 (PC); State v Gwonto (1985) LRS (Const) 890 (SCN)*

[64]*S35, Constitution of the Republic of South Africa 1996 guarantees rights of fair procedure to arrested, detained and accused persons.*

[65]*SACCAWU on behalf of Mngeni v Pep Stores (1997) 18 ILJ 1129 (CCMA) of 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 Goedehoop Colliery (1998) 12 BALR 1654 (IMSSA). This is so because an incorrect labelling 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)*

[66](1998) 19 ILJ 584 (LC)

[67](1998) 7 BALR 917 (CCMA)

[68]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.

[69]Minaar v Wedge Steel World (1998) 2 BALR 138 (CCMA)

[70]Per Marcus AJ in Nel v Ndaba & Ors (1999) 20 ILJ 2666 (LC) at 2675 para 28. Contra in Mndaweni v JD Group t/a Bradlows & Anor (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."

[71](1998) 19 ILJ 517 (SCA) at 521D-F per Smalberger JA.

[72](1999) 20 ILJ 2666 t 2676A

[73]See also Sappi Novoboard (Pty) Ltd v Bolleurs (1998) 19 ILJ 784 (LAC)

[74]ILO's Recommendation No 199 of 1963 (para.11.5)

[75]G.Nadal v Longtill (Mauritius) Lts. 1984 SCJ Record No.3377; Tirvengadum v Bata Shoe (Mauritius) Co.Ltd (1979) MR 136; Latour v Maurel & Cie (1967) MR 170; Bundhoo v Mauritius Breweries (1981) SCJ No.140; Rivière du Rempart Bus Service Co Ltd. v B.H Ramjan (1979) SCJ Record No.2879

[76]Hayward v Protea Furnishers 9/5/1997 Jutastat (CCMA)

[77]NAAWU vPretoria Precision Castings 1985 (6) ILJ at 369 (IC)

[78]Op cit

[79]Ibid

[80]J.Grogan 1998. Workplace Law, Juta & Co, Kenwyn at 141

[81]PAK Le Roux & Van Niekerk, 1994. The South African Law of Unfair Dismissal; Juta & Co, Kenwyn at 154.

[82]Hayward v Protea Furnishers 9/5/1997 Jutastat (CCMA0

[83]Gumedi v Sojiha's Take Away; 28/04/1998 Justastat; (CCMA)

[84]Gubayo v King Louis Bakery; 02/10/1997 Jutastat; (CCMA)

[85]Power Rig (Pty) Ltd v Grobler 23/04/1998 Jutastat; (CCMA)

[86]*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.*

[87]*(1997) 18 ILJ 1176 (CCMA)*

[88]*Korsten v Macsteel (1996) 8 BLLR 1015 (IC)*

[89]*(1998) 2 BALR 160 at 168-169 (CCMA)*

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

[91]*SACCAWU obo Moqolomo & Ors v Southern Cross Industries (1998) 11 BALR 1447 (CCMA)*

[92]*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 & Ors (1999) 20 ILJ 2340 at 2346 para 21,22 and 24.*

[93]*See also SAMWI 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.*

[94]*See the discussion in part one of this article*

[95]*See e.g CSIR v Fijen (1996) 17 ILJ 18(A)*

[96]*1997 (11) BCLR 1624 (LAC)*

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

[98]*(1998) ILJ 917 (CCMA)*

[99](1998) 19 ILJ 921 (LC)

[100]Ibid at 922D

[101]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 & Ors (1999) 20 ILJ 2340 at 2346 para 20.

[102]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 & Anor v Golden Arrow Buse Service (Pty) Ltd (1994) 8 BLLR 105 (IC); CNA (Pty) Ltd v CCAWUSA & Anor (1991) 12 ILJ 340 (LAC); Anglo American Farms t/a Boschendal Restaurant v Konjwayo (1992) 3 (6) SALLR 1 (LAC); Durban Confectionery Workes (Pty) t/a Beacon Sweets v Majangaza (1993) 4(6) SALLR 1 (LAC).

[103](1999) 20 ILJ 2666(LC)

[104]1984 SCJ No.172

[105]1995 6(1) SALLR 1 (CCMA)

[106]1993 SCJ 173

[107]Ntsibande v Union Carriage and Wagon Co.(Pty) Ltd (1993) 14 ILJ (IC)

[108]E.Cameron 1986. The Right to a Fair Hearing before Dismissal - Part 1; ILJ 7(2):183-217

[109]PAK Le Roux & Van Niekerk. 1994. The SA Law of Unfair Dismissal; Juta & Co, Kenwyn at 154

[110]Ibid at 144

[111]Supra note 108 at 210

[112]Ibid at 211

[113](1986) 7 ILJ 579 at 782

[114]Retreaders Ltd v Marie 1989 SCJ No.376

[115]S35(3)(f), Constitution of the Republic of South Africa 1996; art 12(1)(e), Constitution of the Republic of Namibia 1990; S18(3)(D), Constitution of the Republic of Zimbabwe 1979 as amended by ActNo.13 of 1993; S10(2)(D), Constitution of the Republic of Botswana 1966; S9(2)(D), Constitution of the Kingdom of Lesotho 1966.

[116]*S33(1), Constitution of the Republic of South Africa 1996; art 18, Constitution of the Republic of Namibia 1990.*

[117]*The Supreme Court of Nigeria has held that a denial of the right to counsel in a civil case before a court of law is a violation of the citizen's right to a fair hearing "in the determination of his civil rights and obligations" enshrined in S33(1) of the 1979 Constitution of Nigeria because "reason and reflection require us to recognise that in our adversary of justice fair trial cannot be assured without legal representation" whether in criminal or civil cases. See per Oputa JSC in Ntukidem & Ors v Oko & Ors (1986) 12 SC 126 at 188-189. See generally, Chuks Okpaluba, The Right to a Fair Hearing, op cit. at 275.*

[118]*See the following - English cases: Pett v Greyhound Racing Association Ltd (No.2) (1969) 2 ALLER 221 at 228G-H (CA); Enderby Town Football Club v Football Association (197) 1 ALLER 215; Fraser v Mudge (1975) 3 ALLER 78; Hone v Maze Prison Board of Visitors, McCartan v Maze Prison Board of Visitors (1988) 1 ALLER 321 at 325F-H; 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.Andrews College (Grahamstown) & Anor 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 & Ors v Administrator, Natal & Ors 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 & Anor 1993(1)ZLR 162.*

[119]*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 ALLER 221 at 228G-H to allow such representation and which according to Van Zyl in Lace v Diack & Ors(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 & Ors v Administrator, Natal & Ors 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. It is remarkable that in the Nigerian jurisdiction, where the offence for which a person is brought before a disciplinary tribunal amounts to a criminal offence, the Supreme Court has held that it is a violation of that person's fundamental right to a fair hearing for a domestic tribunal to purport to hear and determine such charges. The party is entitled to have those offences tried in a court or tribunal established by law and constituted in such a manner as to secure its independence and impartiality(S33(1), Constitution of the Federal Republic of Nigeria 1979). On which see Garba & Ors v University of Maiduguri(1986) 1 NWLR(18)550. This obviously eliminates the issue of a domestic tribunal trying such serious*

offences as fraud, theft and arson thus reducing the quest for legal representation in such proceedings.

[120]*(1992) 13 ILJ 860 at 865D-F. See also Myburgh v Voorsitter van die Shoemanpark Ontspanningsklub Dissiplinere Verhoor & Ander(1995) 9 BCLR 1145(O).*

[121]*Basson et al 1998. Essential Labour Law (Volume1 - Individual Labour Law) Juta & Co Ltd, Kenwyn at 24.*

[122]*Khosa v Gypsum Industries Ltd (1996) 7(5)SALLR 1 (LAC).*

[123]*(1994) 11 BLLR 1(AD)*

[124]*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."*

[125]*S140(1)(A); Afrox Ltd v Laka & Ors (1999) 20 ILJ 1732(LC); Smollen (Tvl)(Pty) Ltd v Lebea NO & Anor (1998) 19 ILJ 1252 (LC); Vidar Rubber Product (Pty) Ltd v CCMA & Ors (1998) 19 ILJ 1275 (LC); Strydom v USKO Ltd (1997) 3 BLLR 343(CCMA).*

[126]*Labour Relations Act 1995, ss161 and 178 respectively*

[127]*Public & Prisons Civil Rights Union v Minister of Correctional Services & Ors (1999) 20 ILJ 2416 at 2424 para 28.*

[128]*Ibid per Jali AJ*

[129]*(1995) 16 ILJ 846(D)*

[130]*(1999) 20 ILJ 2416 (LC)*

[131]*Ibid at 2424 para 30.*

[132]*(1998) 3 BALR 254 (CCMA)*

[133]*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.*

[134]*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.

[135]*(1997) 2 BLLR 217 (CCMA)*

[136]*Ibid at 220A-B*

[137]*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).*

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

[139]*(1986) 7 ILJ 739 (IC)*

[140]*Ibid.*

[141]*(1986) 7 ILJ 375 (IC)*

[142]*NUM and others v East Rand Gold and Uranium Co 1986 7 ILJ 739(IC) at 342*

[143]*SAAWU & Another v Steiner Services (Pty) Ltd (1988) 9 ILJ 895(IC)*

[144]*J.Grogan.1998. Workplace Law, Juta & Co (Pty) Ltd, Kenwyn at 143.*

[145]*NEWU v Durban Deep Wholesale Meat 11/05/1998 (CCMA)*

[146]*Lace v Diack & Others (1992) 13 ILJ 860(W) at 865*

[147]*Ibid at 865*

[148]*See W.Wade, Administrative Law 6 ed. 1988 at 546; P.P.Craig, Administrative Law(2 ed 1989) at 220; D.Foulkes Administrative Law (7ed.1990) at 298-300.*

[149]*(1968) 2 ALLER 545 at 549 (CA)*

[150]*(1968) 2 ALLER 545 at 549; Geoffrey Flick in `Natural Justice, principles and practical Approach (2n Ed. 1984, Butterworths, Sydney) at 180 has stated: "The advantage of having a representative trained in law are too frequently ignored and consequently deserve recollection. Counsel can, interalia, act as a deterrent to the summary dismissal of a party's case; bridge possible hostilities between the party and tribunal members; clear up vagaries and inconsistencies in testimony; can focus the attention of the tribunal members on elements of a party's claim. Moreover, it is fair to observe that a lawyer has a rather unique ability to interprete relevant statutory provisions and ensure consistency in administrative decision making by marshalling whatever prior decisions of the exercise of administrative decisions. The*

ability of a lawyer to delineate what may otherwise be a complex legal and factual issue and his role in acting as a check upon the administrative process should never be under-estimated."

[151]*Ibid*

[152]*(1929) ALLER 468 at 471*

[153]*(1861) 9 C.B.N.S 793.*

[154]*Ibid at 549*

[155]*AIR 1962 Ori 78 (D.B) at 84*

[156]*AIR 1964 Ori 241 (D.B)*

[157]*AIR 1961 S.C 1245 at 1255*

[158]*A.I.R. 1962 Ori 78 (D.B)*

[159]*A.I.R 1961 S.C 1245 at 1255*

[160]*Ibid*

[161]*A.I.R 1963 Pun 90.*

[162]*Id at 90.*

[163]*Ibid. at 91*

[164]*A.I.R 1963 Tripura 20.*

[165]*E.g see Nitya Ranjan v State, Supra Note 157; Dr Janendra Nath v State Orissa. supra note 158; Muniswamy v State of Mysore, A.I.R 1966 Mys.220*

[166]*A.I.R 1964 Mys 250*

[167]*A.I.R 1961 Cal.1 (Special Branch)*

[168]*Ibid at 18*

[169]*A.I.R 1966 Mys.220 at 221*

[170]*Aldrich J, in Carr v Federal Trade Commission 302F. 2nd 688 at 689-690 (1962)*

[171]*(1968) 2 ALLER 545 at 549 (CA)*

[172]*C.S. Sharma v State of V.P, A.I.R 1961 ALL.45*

[173]*Seervai, Constitutional Law of India 702 (1967)*

[174]*A.I.R 1957 A.P. 414 (D.P)*

[175]*Ibid at 418*

[176]*Lord Mackey of Clashfern, The Administration of Justice, (The Hamlyn Lectures, forty fifth series,1993) pp 12-13*

[177]*As per Black's Law Dictionary 5 ed., bias is a "condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in a particular case." In Rex v Queen's Country Justices (1908) 2 IR 285 at 294, Lord O'Brien, L.C.J said, " by bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious; In R v Chandi & Another 1933 OPD 267 Krause JP made the following observations: "It is a matter of gravest policy that the impartiality of the courts of justice should not be doubled; or that the fairness of the trial should not be questioned, otherwise, the only bull mark of the liberty of the subject, in these times of revolutionary tendencies, would be undermined."*

[178]*Metropolitan Properties (F.G.C) Ltd v Lannon (1969) 1 QB 5777, per Lord Denning MR.*

[179]*Grogan J `Workplace Law' 3ed. 1998 at 144*

[180]*Ibid*

[181]*Per Solomon J. in Liebenber v Brakpan Liquor Licensing Board 1944 WLD 52 at 54-55*

[182]*Per Joffe J. in SA Polymer Holdings (Pty) Ltd t/a Megpipe v I Lale (1994) 15 ILJ 277 (LAC) at 281*

[183]*United Bus Service Co.Ltd v Roheeman 1986 SCJ No.311*

[184]*(1992) 13 ILJ 803 (A)*

[185]*Ibid at 825 A-B*

[186]*Mining & Others v Council of Review and others 1989(w) SA 866(C)*

[187]*1993 14 ILJ 1566 (IC) at 1573B*

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

[189]*BTR Industries SA (Pty) Ltd & Ors v MAWU & Anor 1992 (3) sa 673 (a) at 695C-E*

[190]*Mekler v Penrose Holdings Ltd (1995) 5 BLLR 71 (IC). In Ellerines Holdings v CCMA & Ors (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. Of the test propounded by Lord Denning in Westminister Properties Co. (FGC) Ltd v Lannon (1970) 1 QB 577 at 599.*

[191]*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 preemptory 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.*

[192]*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 & Ors (1997) 10 BLLR 1261.*

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

[194]*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 & Anor v Armed Response (1997) 1 BLLR 80 (IC)*

[195]*Khosa v Gypsum Industries Ltd (1996) 7(5) SALLR 1 (LAC)*

[196]*See the judgment of the Full Court of the Constitutional Court in President of the RSA & Ors v SARFU & Ors 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*

[197]*See Wade & Forsyth Administrative Law (7ed) Ch.14; Baxter Administrative Law(1985) 557;Okpaluba, The Right to a Fair Hearing in Nigeria (2ed) Ch.9 Okpaluba, `Protection Against Partiality in the Adjudicatory Process in Nigerian Public Law' in Commonwealth Caribbean Legal Essays, University of the West Indies (1982) 120.*

[198]*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" forthcoming, African Journal of International & Comparative Law (1999).*

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

[200] *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 ALLER 724. The House of Lords recently laid it down in its recent decision in R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex P.Pinochet Ugarte (No2)(1999) 1 ALLER 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.*

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

[202]*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) & Ors v MAWU & Ors (1992) 13 ILJ 803(A); BHT Water Treatment (Pty) Ltd v Maritz NO & Ors(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.*

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

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

[205]*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)*

[206]*NUM & Anor v Unisel Gold Mines Ltd (1986) 7 ILJ 398 (IC) at 403.*

[207]*Steelmobile Engineering (Pty) Ltd v NUMSA (1992) 1 LCD 91 (LAC). See also National Union of Wine, Spirit & Allied Workers v Distillers Corp (Pty) Ltd (1987) 8 ILJ 789 (IC) at 788F-G; Anglo American Farms t/a Boschendal Restaurant v Konjwayo (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.*

[208]*On the application to recuse a Commissioner who had conciliated a dispute from arbitrating it see S136, LRA; CWIU on behalf of Mthombeni v Amcos Cosmetics (1999) 20 ILJ 2739 (CCMA) at 2741.*

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

[210]*Transport & General Workers Union & Ors v Hiemstra NO & Anor (1998) 19 ILJ 1598 (LC)*

[211]*(1999) 20 ILJ 1732 (LC) at 1742 para 31.*

[212]*See also the Appellate Division decisions in BTR Industries SA (Pty) Ltd & Ors v MAWU & Anor 1992 (3) SA 673 (A) at 6931-J; Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1(A).*

[213]*President of the RSA & Ors v SA Rugby Football Union & Ors 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 & Ors v South Africa Rugby Football Union & Ors 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.

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

[215]*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."*

[216]*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).*

[217]*(1995) 2 BLLR 68(IC)*

[218]*(1984) 5 ILJ 216 (IC)*

[219]*(1986) 7 ILJ 375 (IC)*

[220]*CA 511/80, 16 May 1991, Unreported.*

[221]*(1992) 13 ILJ 573*

[222]*Supra note 220 at 135*

[223]*Supra note 221*

[224]*Ibid 136*

[225]*PAK Le Roux `Disciplinary Appeal Hearings' (1991) CLLI (4)*

[226]*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 award of compensation.*

[227]*(1997) 18 ILJ 149 (LAC)*

[228]*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.*

[229]*(1997) 18 ILJ 149 at 152D.*

[230]*South African Breweries Ltd (Alrode) v FAWU Stanley Selepe and Petros Bulekiswe 1991 2(a) SALLR 1 (LAC).*

[231]*Public Service Board of New South Wales v Osmond (1986) 63 ALR at 559.*

[232]*The Committee on Ministers' powers, known as Donoughmore Committee , in its report submitted in 1932 recommended (at p100) that "any party affected by a decision should be informed of the reasons on which the decision is based" and that "such a decision should be in the form of a reasoned document available to the parties affected."*

[233]*The Committee on Administrative Tribunals and Enquiries popularly known as Franks Committee, in its report in 1957 recommended that "decisions of Tribunals should be reasoned and as full as possible." The said committee observed (at para.58): "We are convinced that if tribunal proceedings are to be fair to the citizen, reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out."*

[234]*Section 8(b) of the Federal Administrative Procedure Act of 1946 requires administrative decisions to be accompanied by findings and conclusions, as well as the reasons or basis therefore, upon all material issued of law, facts or discretion presented on record. The said provision is now contained in section 557(c) of Title 5 of the United States Code (1982ed)*

[235]*AIR 1971 SC 862*

[236]*Chaudhury T.G., Penumbra of Natural Justice, 1997 Castern Law House, at 208*

[237]*Maneka Gandhi v Union of India AIR 1978 597 at p613 per Y.V. Chandrachund.J.*

[238]*Government of India v Maxim A. Lobo (1991) 190 MR at 101.*

[239]*EML Strydom, `Dismissal for Misconduct', in Basson et al, Essential Labour Law' (1998) at 157*

[240]*(1995) 6(1) SALLR 1 (CCMA) KZ 373; The CCMA has unambiguously placed an onus on the employers to give reasons for dismissal. In Hugo v Violet Rye 10/12/1997 Justastat (CCMA), the CCMA identified that the only compliance with the fair procedure was the communication to Mr Hugo of the decision against him. The Commissioner put it that even if it "would not have made a difference in the outcome, the right to a fair hearing is so*

fundamental', the absence of a proper disciplinary procedure cannot be condoned. In NEWU v Durban Deep Wholesale Meat 11/05/1998 (CCMA), procedural fairness was motivated with specific reference to the fact that the applicant had been informed of the finding that he had been dismissed.

[241] *(1991) I.R.I.R 297 C.A*

[242] *Ibid at 303*

[243] *(1989) 1 WLR 525 at 539*

[244] *Alexander Machinery Ltd v Crabtraa 1974 ICR 120 at 122*

[245] *Jackson's, Natural Justice, 2nd ed. at 96*

[246] *Wade H.W.R, Administrative Law 1988 Clarendon, Oxford 6ed.*

[247] *Maharashtra state board of Secondary and Higher Secondary Education v K.S Gandhi (1991) 2 SCC 716*

[248] *Ibid*

[249] *Tara Chandkhatu v Municipal Corporation of Delhi (1977) 1 SCC at 472.*

[250] *1983 NZLR 620 (HC0) at 623*

[251] *C.S.S.V v Minister for the Civil Service (1985) A.C 374 per Diplock at 326*

[252] *J.Grogan, Workplace Law, 1998 Juta & Co at 161*

[253] *These enactments are : Employment and Training Act, Export Processing Zones Act, Export Services Act, Labour Act, Occupational Safety, Health and Welfare Act, Passenger Transport Industry (Buses) Retiring Benefits Act, Sugar Industry Retiring Benefits Act, Workmen's Compensation Act.*

[254] *Maxo Products Ltd v Permanent Secretary, Ministry of Labour (1991) SCJ 225: the Reviewing Authority held that the Industrial Court did not have jurisdiction to hear the matter because it did not concern the application of the LA, the employee in question being unable to satisfy the criteria of "worker" of the LA*

[255] *(1994) SCJ 216*

[256] *Industrial Courts Act*

[257] *S16 ICA*

[258] *S15(1)ICA*

[259] *1988 MR 223*

[260]*1980 MR 331*

[261]*1989 MR 115*

[262]*1993 SCJ 381*

[263]*In Unuth v Police Service Commission 1982 MR 232 it was stated "section 76 of the constitution does not preclude the Supreme Court from exercising in relation to a body such as the Police Service Commission the power of review it derived from section 119 of the constitution.*

[264]*1974 MR 22*

[265]*1982 MR 232*

[266]*1985 SCJ 112*

[267]*A.R Baureck v P.S.C 1987 SCJ 229*

[268]*Sookia v Commissioner of Police 1983 SCJ 87*

[269]*Unuth v Police Service Commission 1982 MR 232*

[270]*1969 AC 147*

[271]*1978 SCJ 226*

[272]*1974 MR 22*

[273]*Hafajee v P.S.C & Anor 1989 SCJ 321*

[274]*Ramdin v PSC 1990 SCJ 26*

[275]*Deelawar v LGSC & Ors 1989 SCJ 32*

[276]*Municipal Council of Portlouis c LGSC 1988 SCJ 164*

[277]*1986 SCJ 303*

[278]*1990 SCJ 26*

[279]*1983 SCJ 87*

[280]*Ibid*

[281]*Ramsanaruth v PSC 1984 SCJ 357*

[282]*Boodhoo v PSC SCJ 253*

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

[284]*See NCFAWU on behalf of Roberts v Ons Handelshuis Koop (1997) 18 ILJ 1176 (CCMA)*

[285]*This conclusion coincides with that of the Labour Court in Cycad Construction (Pty) Ltd v CCMA & Ors (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 presuade management to reconsider their decision. See also Cameron, "The right to a hearing - Part 1 (1986) 7 ILJ 187 at 214.*

[286]*1997 4 BLLR 445 (CCMA)*

[287]*Ibid at 455G-H*

[288]*1997 18 ILJ 1104 (CCMA)*

[289]*Ibid at 1106 B-D*

[290]*1999 7 BALR 867 (IMSSA)*

[291]*1999 7 BALR 867 (IMSSA) at 870B-D*

[292]*Mekgoe v Standard Bank of SA (1997) 3 LLD 88 (CCMA)*

[293]*NEWU v Durban Wholesale Meat (11/05/1998) Record display from CCMA (CCMA)*

[294]*Amalgamated Engineering Union of SA & Ors v Carlton Paper of SA (Pty) Ltd (1988) 9 ILJ 588 (IC)*

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

[296]*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."*

[297]*1996 4 BLLR 441 (IC)*

[298]*This concept was developed by the United State 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 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; Firedland, MR Double Jeopardy (1969)

[299]*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;Kieapple v The Queen (1975) 44 DLR (3d) at 364-365, per laskin J. See also DPP v Nasralla (1967) 2 ALLER 161 (PC); Nafiu Rabiu v The State (1980) 2 NCR 117; (1981) 2 NCLR 293 (SCN)*

[300]*S11(h); PW Hogg, Constitutional Law of Canada (1997) 16.5(b)*

[301]*S35(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.*

[302]*1996 4 BLLR 441 (IC) at 450F-H*

[303]*1997 3 BLLR 343 (CCMA)*

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

[305]*Ibid at 352C-D. See also Hendricks v University of Cape Town 1998 5 BALR 548 (CCMA)*

[306]*1997 8(2) SALLR 1 (CCMA)*

[307]*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 Spoornet 1999 7 BALR 872 (IMSSA)*

[308]*1997 1 BLLR 94 (IC)*

[309]*PAK Le Roux, `Overturning disciplinary decisions: Can more severe penalties be imposed by senior management?" (1997) 7(4) Contemporary Labour Law 31 at 34*

[310]*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.*

[311]*See particularly, the Botswana Court of Appeal in Botswana Railways Organisation v Setsogo & 198 Ors (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 & Anor (1997) (Unreported) Case No.11/97*

[312]*BMW(SA) v NUMSA obo Mthombeni & Ors (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.*

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

[314]*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)*

[315]*Slagment (Pty) Ltd v BCAWU & Ors (1994) 12 BLLR 1(A)*

[316]*Calvin v Carr (1980) AC 574 at 593 per Lord Wilberforce*

[317]*Lloyd & Ors v McMahon (1987) 1 ALLER 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.*

[318]*Leary v National Union of Vehicle Builders (1970) 2 ALLER 713 at 720. See also R v Ashton University Senate ex P.Roffey (1969) 2QB 538; Glynn v Keele University (1971) 1 WLR 487*

[319]*(1963) 2 ALLER 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.*

[320]*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 Sasachewan (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.*

[321]*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.*

[322]*(1979) 2 ALLER 440*

[323]*Ibid at 448*

[324]*Per Lord Bridge (1987) 1 ALLER 1118 at 1165*

[325]*1986 IRLR 112*

[326]*1987 IRLR 503*

[327]*1979 IRLR 98*

[328]*1992 IRLR 273*

[329]*1996 IRLR 399*

[330]*1986 IRLR 112 at para 24*

[331]*1987 IRLR 503 per Lord Mackay at para 4 and Lord Bridge at para 28*

[332]*1974 (3) SA 633(A)*

[333]*1992 (3) SA 482 (A)*

[334]*(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*

[335]*1992 13 ILJ 352 at 358E*

[336]*1993 14 ILJ 1033 (LAC0*

[337]*1992 13 ILJ 593 (LAC)*

[338]*1995 (1) SA 742(A)*

[339]*1996 5 BLLR 657(IC)*

[340]*1999 20 ILJ 545 (LAC)*

[341]*per Zulman JA in Dube & Ors 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.*

[342]*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*

[343]*1997 10 BLLR 1261 (LAC)*

[344]*1996 17 ILJ 923 (LCN)*

[345]*Empangeni Transport (Pty) Ltd v Zulu (1992) 13 ILJ 352 (LAC)*

[346]*SACTWU & Anor v Martin Johnson (Pty) Ltd (1993) 14 ILJ 1033 (LAC)*

[347]*1996 17 ILJ 923 (LCN) at 926D.*

[348]*Ibid at 925-926I-A*

[349]*Ibid at 926D-E*

[350]*1985 6 ILJ 544 (IC) at 569*

[351]*1979 MR 136*

[352]*PAK Le Roux & A.Van Niekerk `Procedural Fairness' and the New Labour Relations Act 1997 Contemporary Labour Law Vol.6 No.6 p57*

[353]*D.Woolfrey, Pre-dismissal Disciplinary Procedures under the New LRA, 1997 Labour Law News and Court Reports Vol.6 No.9 p2*

Chapter 5

Exceptions to Procedural Fairness in Dismissals for Misconduct

5.1 Introduction

In the foregoing chapters it was discussed that there has been a general recognition in the Mauritian and South African law of `unfair dismissal' that an employee's right to an adequate and fair hearing before his/her dismissal for misconduct remain a consistent and unanimous theme in their respective Labour Relations Acts and industrial court judgments. Cases abound in both countries in which employees allege to having been prejudiced by a failure on the part of the employer to observe the requirements of predismissal fair procedures.

It is assumed in the reasonings of all the cases that the main objective of holding an enquiry is to establish facts, and, accordingly, the reasoning goes, if there appear to be no facts to be established, there need be no enquiry.[1] It is obvious that the possibility that an enquiry may bring to light facts relevant to determining whether a worker is guilty of the offence charged and, if so, what the appropriate penalty should be, is the central reason for holding an enquiry.[2] In *National Union of Mineworkers & Others v Durban Roodepoort Deep Ltd*[3] it was observed:

> ***The primary object of the enquiry, whatever form it takes, is to endeavour to investigate any complaint against an employee, as honestly and as objectively as is possible, so that he or she is not dismissed for want of a just cause and without having been afforded a fair and reasonable opportunity of speaking in rebuttal or in mitigation of the complaint in accordance with the audi alteram partem rule."***

Thus in a particular case the circumstances of the alleged misconduct may be such as to suggest that there was another side of the story and that fairness required that the

applicant be given a chance to explain the extent and the reasons for any involvement. Hence, an enquiry will be "desirable to enable the parties to unearth the underlying causes and grievances which led to the unrest in the first place."[4]

This principle has been discussed and critically analysed in the previous chapters. It was observed that the concept and requirements of procedural fairness have been firmly established in the Mauritian and South African labour jurisprudence. There are, however, instances where an employer may dispense with pre-dismissal procedures under exceptional circumstances.

In the present chapter, it is proposed to discuss those exceptional circumstances where the employers have deviated from the accepted norms and deemed it unnecessary to hold disciplinary hearings. But the contentious issue that immediately comes to mind is, does the deviation from procedural fairness not recreate the British situation whereby the employer could be excused because a hearing, even if it were held, "would make no difference?" The other issues which need to be resolved are whether or not an employer is exempted from pre-dismissal hearings where the instances relate to mass dismissals and managerial or executive level employees. Finally, the chapter will discuss Item 4(4) of the South African Labour Relations Acts and the judicial decisions illustrating those 'exceptional circumstances' where employers are exempted from holding disciplinary hearings.

5.2 Court's views on Instances where Employers have made Exceptions to Procedural Fairness at Dismissal for Misconduct

5.2.1 No Difference Argument

In England, initially, the court did emphasise the importance of employers adhering strictly to the basic procedural standards of fairness taking as their guide the Code of Good Practice or Industrial Relations. In one of the earliest cases, *Earl v Slater Wheeler (Airlyne) Ltd.*[5] Sir John Donaldson said that a dismissal for misconduct

without giving the employee a chance to state a case rendered a dismissal unfair unless "there can be no explanation which could cause the employers to refrain from dismissing the employee". [6] So it had to be almost inconceivable that the hearing could have made any difference. This `inconceivability' test has since been replaced by even more lenient standards. It was first held to be "too universal," [7] then it was modified to the point where the test was whether a hearing would have been highly unlikely to have made any difference [8]; and, finally it came to the test laid down by the Employment Arbitration Tribunal in *British Labour Pump v Byrne* [9] where it was held that the test is whether on the balance of probabilities the employer would have taken the same course even if he had held the enquiry. It was stated:

> ***"...even if judged in the light of circumstances known at the time of dismissal, the employer's decision was not reasonable because of some failure to follow a fair procedure yet the dismissal can be held fair if, on the facts proved before the industrial tribunal, the industrial tribunal comes to the conclusion that the employer could reasonably have decided to dismiss if he had followed a fair procedure."***

But substantial limitation on the "no difference" argument has been achieved by the decision of the House of Lords in *Polkey v A.E Dayton Services Ltd.* [10] In determining whether a dismissal is procedurally fair or unfair for the purposes of S57(1) of the Employment Protection (Consolidation) Act 1978, it is not for the industrial tribunal to apply a hindsight test in order to determine hypothetically whether a hearing would have made any difference. The House of Lords held that:

> ***If the facts known to the employer at the time of dismissal made it reasonable to dismiss the employee for the relevant offence, even without a hearing, then the dismissal will be fair. But if the facts did not at the relevant time indicate to the employer that a hearing would be "utterly useless" then he/she could not have acted reasonably in dismissing, no matter how substantial the underlying reason.***

The facts in the Polkey case strongly illustrate the point. There it had become urgently necessary for the employer's enterprise to shed certain van drivers. The appellant was called in, suddenly and `quite out of the blue', and handed a redundancy letter. He was then immediately driven home by a fellow employee. `There can be no more heartless disregard of the provisions of the code of practice [requiring pre-dismissal consultation] than that', the industrial tribunal found.[11] Yet, because `the result would not have been any different' if the requirements of the code of practice had been applied, the industrial tribunal felt compelled under the then existing law to reject the claim that the dismissal was unfair.

The House of Lords held that this approach was wrong. It was not correct to draw a distinction between the reason for dismissal (eg redundancy) and the manner of dismissal as if these were mutually exclusive. The English statute showed that `at least some aspects of the manner of dismissal fail to be considered in deciding whether a dismissal is unfair since the action of the employer in treating the reason as sufficient for dismissal of the employee will include at least part of the manner of the dismissal.'[12]

Lord Bridge further added:

> *"...in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation...if an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by S57(3) of the EP(C) A1978 is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of S57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the*

decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under S57(3) may be satisfied."

The crucial elements of this decision are that, before a decision is made by the employer to dismiss an employee, the following should be considered:

(i) the employee's knowledge as it existed at the time of the dismissal;

(ii) rejection of any approach involving hindsight and hypothesis;

(iii) affirmation of the principle that there is a lack of equity inherent in the failure to accord an employee pre-dismissal fairness;

(iv) the question whether a dismissal is fair cannot be judged without considering the manner of the dismissal.

Most important of all the considerations, the House of Lords has drawn the instances when procedural compliance will be excused very narrowly. It has ruled that warning or consultation will be redundant only if at the time of dismissal it appears that either will be "utterly useless".

The above principles have had a tremendous impact on the Mauritian and South African labour jurisprudence. The reviewing and appellate powers of the Mauritian Industrial Court and Supreme Court respectively, and the South African industrial court's unfair labour practice and status quo jurisdiction have made procedural fairness a necessary, though not sufficient, condition for dismissal.

In its pursuit of establishing procedural justice, the industrial court has endorsed both fairness and functional considerations in the law of dismissal. The effect of this is that the courts in Mauritius and South Africa have intervened with utmost rigour in situations where a dismissal is not preceded by a hearing, or an adequate hearing, on the ground that the employee would still have been dismissed even if an enquiry has been held. The Supreme Court of Mauritius has unequivocally stated:

"Proof of gross misconduct is a necessary prerequisite to dismissal, whether at an informal hearing conducted under section 32(2)(a) of the Labour Act or a more

> ***formal hearing before the Industrial Court. It is an essential ingredient of that hearing, that it should be fair. The element of fairness is lacking when evidence of material facts is led by a person who conducted an enquiry from others,...without those other persons being heard so as to give an opportunity to the alleged offender to confront them and to cross-examine them..."***[13]

In *Tayab Ghoorum v A.G. Nabee and Co.* [14] the Supreme Court laid down the principle that:

> ***Now before there could be a hearing, the person concerned must be made aware of the charge against him and he must further be afforded an opportunity to be assisted by a trade unionist or a legal advisor of his choice. In the present case, the plaintiff was called to explain for his absences and there is no evidence whatsoever that a charge was levelled against him. I, therefore, uphold the submission of the counsel that there had been no hearing proper. I, therefore, find that the dismissal of plaintiff was unjustified and the defendant is amenable to pay severance allowance at punitive rate."***

In South Africa, the industrial court being empowered under its unfair labour practice jurisdiction and status quo position[15] has attempted to remedy the situation where a dismissed employee was not treated unfairly in that an enquiry would have made no difference. The court has, on numerous occassions rejected the basis of this argument, and as a matter of policy, has discharged all arbitrarily managed dismissals, not only because they are unlikely to be fair, but because even if they are eventually shown to be fair, the dismissed employee is unlikely to know anything of the justification of the dismissal and will see only arbitrariness in it. It means that the court's unfair labour practice jurisdiction not only tries to avoid conduct that produces results that are unreasonable, capricious or harsh, but also tries to promote fairness that recognises the dignity of the human being and enhance equitable labour relations.[16] It was, therefore, the court's decisive ruling in *Bissessor v Beastores (Pty) Ltd t/a Game Discount World*[17] that:

> ***It is conducive to fair and equitable labour relations that it is in accordance with principle that before an employee is dismissed for alleged misconduct the employer should hold as full and proper an enquiry into the circumstances of the alleged misconduct as possible.***

It is thus the view of the court that every employee faced with dismissal is entitled to a hearing regardless of whether or not it is probable or even possible that the procedure will bring new facts to light or make dismissal any less likely.

The statutory basis for the imposition of the requirement of procedural fairness in Mauritius and South Africa is, therefore, the functional consideration that the non-compliance of any of its requirements will always constitute an unfair labour practice.

5.2.2 Hearing in Mass Dismissals

There is some suggestions in the case law that the number of workers involved in a disciplinary infraction, if large enough, may excuse an employer from the requirements of procedural fairness.[18] This proposition has not been favoured by the court, especially in a strike situation. In *National Union of Mineworkers & Others v Durban Roodepoort Deep Ltd*[19] the court dismissed the employer's argument that, the case which involved 348 workers, it was impractical to hold an enquiry or a number of separate enquiries. The court held:

> ***"...There is no reason why the respondent could not have arranged for any suitable procedure, suitable in the circumstances, whereby it could have put charges to those whom it intended dismissing, and affording the accused employees a fair and reasonable opportunity of responding to such charges. The fact that it may simply be inconvenient or bothersome to hold an enquiry involving hundreds of employees is no justification for not wishing to hold an enquiry at all.*** [20]

The Supreme Court in Mauritius could have envisaged such a situation in *G.Nadal v Longtill (Mts) Ltd* [21] where mass dismissal was contemplated by the employer,

without a hearing, due to concerted stoppage of work and refusal to work, inspite of being requested to do so, by the applicant and sixty other workmen. The court, however concentrated mainly on the plaintiff's case and held that the conduct of the appellant amounted to gross misconduct warranting summary dismissal. (This case will be dealt with later on in this chapter as an exception to procedural fairness).

In the South African industrial context the dilemma that has confronted the decision making process in disciplinary matters has manifested itself where acts of misconduct are perpetrated but the employer is not in a position to pinpoint the offending employee nor are the employees disposed or willing to co-operate with the employer in tracking down the perpetrator(s). The questions that one may ask under these circumstances are:

1. Is the employer in such a situation expected to hold individual enquiry so as to ascertain the extent to which each employee contributed to the act complained of or to be able to pin down the real perpetrator(s) of the act or should the management dismiss them `en masse' without a hearing?
2. Can the employer, for instance, visit `virtually all staff' with mass dismissal in a situation where there is a massive and systematic theft?"

This question was pointedly put by Cameron JA in *Chauke & Ors v Lee Service Centre CC t.a Leeson Motors*[22]: "where misconduct necessitating disciplinary action is proved, but management is unable to pinpoint the perpetrator or perpetrators in what circumstances will it be permissible to dismiss a group of workers which incontestably includes them?" Judicial opinion is divided on the issue. According to one line of reasoning, the employer cannot dismiss the workers collectively because the concept of collective guilt is "wholly foreign to our system and repugnant to the requirements of natural justice."[23] The main objection to the collective guilt approach is that those employees who did not participate in the unlawful act or who did not associate themselves with the behaviour of the perpetrators will be punished along with the wrongdoers. The consequence therefore is that the collective guilt approach endorses the dismissal also of innocent employees.[24] While upholding the rule against

collective guilt. Moletsane C held in *FEDCRAW & Ors v Librapac CC*[25] that there was no legal duty on the employees to disclose the name of the perpetrator although there might be a moral duty to do so. In any case, the chairperson of the disciplinary enquiry had been involved in the preliminary investigation and that once the employer decided that there was a collective guilt, individual mitigating factors should have been considered. In an application by the union and the employees to make the Commissioner's award an order of court and the employer's cross-application to review the same, the Labour Court had to decide whether the review application had any chance of success and came to the conclusion that there was no justification for holding that pre-dismissal procedures were impossible to fulfil.[26] Indeed disciplinary proceedings were instituted, but the fact that they "took a turn to the frustration of the applicant, in that the evidence it believed should be presented, was not presented, did not permit it simply to terminate the disciplinary enquiries and to resort to a finding of collective guilt"[27]. This was not one of those "exceptional" circumstances contemplated in Item 4(4) of the code whereby the applicant could be rescued from the substantive defects in its case against the bulk of its employees.

Although the other school of thought fully recognises the repugnancy of the collective guilt approach, which generally endorses the onus on the employer to prove the guilt of any individual employee it intends to dismiss for misconduct, it holds that employer's collective action and collective sanction can indeed be justified in certain circumstances. For instance, it has been held[28] that the principle of fairness was satisfied where the employees knew of a system to check stock shrinkage (the so-called 'shrinkage action plan') and of collective team control, so that it was possible to hold the individual employee liable as a group. In line with this reasoning, what Item 9 of the code requires in terms of poor work performance, it is contended, is that the employee be made aware that he/she had failed to meet the standard of performance set by the employer and that he/she be given the opportunity to meet that standard failing which dismissal will follow as a consequent sanction.[29]

In accordance with this approach, where a group of workers act as a "cohesive group" and in so acting unlawfully causes physical or economic harm to an employer, then there is no reason why the employer should not be entitled to interdict such harm by reference to collective unit. Thus in *Oconbrick Manufacturing (Pty) Ltd v SABAWO & Ors*,[30] the Labour Court held that where the workers had formed a cohesive group, acted in concert and obstructed access to the employer's premises - these not being individual unlawful acts but conscious acts of striking workers acting in concert - it would be "anomalous" within the context of the Labour Relations Act, "to treat workers as a collective, especially where collective bargaining is concerned, and yet to retreat to an individualistic approach when it comes to facing up to the consequences of collective industrial action."[31] The Court distinguished the earlier cases of *Ex parte Consolidated Fine Spinners & Weavers Ltd*[32] and *Mondi Paper (A Division of Mondi Ltd) v PPWAWU & Ors*[33] on the facts. It will be recalled that in both cases the High Court had adopted the approach that in respect of interdicting workers committing acts of misconduct during a strike, such interdict would not be granted against a group of employees unless and until the individual perpetrators are identified.

Meanwhile, the collective sanction principle has eminently been bolstered by the judgment of South Africa's highest labour tribunal. In *Chauke & Ors v Lee Service Centre CC t/a Leeson Motors*,[34] the Labour Appeal Court constructed a theoretical foundation for the justification of the employer's action in treating the employees' misconduct as a collective issue and responding to that accordingly. The Court held that to insist that employees should, after repeated collective confrontations, in response to repeated collective action, have been afforded further step of individual hearings, would impose an unjustifiable element of formality upon the requirement of a hearing, which in this case would have been without any demonstrable purpose.[35]

In coming to the conclusion that the employer could not be blamed for treating the misconduct as a collective issue, the court had approached the problem from two angles, a formulation which no doubt takes a cue from the Appellate Division's earlier approach with regard to collective dismissals in strike situations.[36] The first category

in the court's formulation is where one of only two employees is known to have been involved in "major irreversible destructive action" but management is unable to pinpoint which of them is responsible for that act. In this instance, the employer may be entitled to dismiss both of them including the innocent one, in so far as all avenues of investigation have been exhausted. The rationalisation here is that of operational requirement, namely that action is necessary to save the life of the enterprise. The second category represents dismissal on the ground of misconduct where management may have sufficient grounds for inferring that the whole group is responsible for the misconduct or are involved in it. In postulating a two-fold justification in this latter regard, the Court created an implied duty on an employee in such a group including the actual perpetrators, to assist management in bringing the guilty to book,[37] a duty akin to that of trust and confidence essential in the employment relationship, a breach of which in itself justifies dismissal.[38] In effect, the price the innocent pays in this circumstance, is for exercising his or her right to remain silent. As a second justification in this category of misconduct is the inference of involvement whereby the employer is entitled to infer that all employees either participated in the misconduct or lent their support to it positively or passively.[39] In both of these instances, the employer is entitled to discipline the employees for misconduct as a collective group.

Furthermore, the employer is not required to refrain from disciplining employees guilty of misconduct in group situation because other culprits could not be identified.[40] Take the case of *Morkels Stores(Pty) Ltd v Woolfrey N O & Anor*[41]. The employer had held some 50 disciplinary enquiries resulting in the dismissal of nine employees (including the employee in this case) for intimidation during picketing. Although the Commissioner found that the employee had breached picket rules he nonetheless found that the employer had acted unfairly because the entire group of workers had been equally guilty. The Labour Court held that the employer was permitted to take particular steps against individual employees who had perpetrated specific acts of misconduct but that it could not have been expected to take collective action against all the strikers because, in the circumstances, it had not been able to identify all the

perpetrators. It was equally held in *Mabinana & Ors v Baldwins Steel*[42] that the only basis of the employees' claim that they had been selectively dismissed was that the employer could have identified more culprits but that the failure to identify other members of the group is not in itself indicative of bad faith or ulterior purpose. Further that witnesses who could have identified other culprits were not called at the disciplinary enquiry could not be held against the employer. In any case, the employees' attack on the disciplinary procedure could not be permitted as they had indicated in the court a quo that they do not allege procedural unfairness.

The Labour Appeal Court rejected the dismissed employees' argument in *SACCAWU & Ors v Irvin & Johnson*[43] to the effect that by not dismissing some of the employees who had also participated in the demonstrations, the employers had applied discipline inconsistently. The court held that too much emphasis was placed on the so-called 'party principle' which is simply an element of disciplinary fairness whereby every employee must be measured by the same standards and recognises that discipline must not be capricious. Particularly pertinent to the discussion in hand is the court's ruling that the employees out of the 39 charged with misconduct were not found guilty because they were not adequately identified from the photographs taken from the demonstrations which served as the only evidence since the employees were not forthcoming with evidence for fear for their lives. The fact that those employees were not punished and they doubly deserved to be punished does not mean that they should have escaped the same fate.

5.2.2.1 Must the Employer hear the Striking Workers?

In answer to this question McCall J in *Plascon Ink & Packaging Coating (Pty) Ltd v Ngcobo & Ors*[44] said:

> ***Although it is accepted that it is generally necessary to observe the audi alteram partem rule and to afford individual employees the opportunity of a hearing before dismissing them for misconduct, there is no such general principle with regard to***

the dismissal of workers engaged in an unlawful strike, after they have been given a reasonable ultimatum.

There is a greater similarity between the above reasoning of the South African Labour Appeal Court and the decision of the Supreme Court of Mauritius in *G.Nadal v Longtill (Mts) Ltd*[45] In the latter case the respondent pleaded that the appellant was dismissed for gross misconduct which it particularised as follows: "plaintiff and approximately sixty other workmen took part in a concerted stoppage of work on 11 May 1979, refused to work in spite of their being requested to do so; they further disturbed a site meeting which was in progress and later when again requested to resume work .failing which they would be dismissed, they became agitated and abusive." The learned Magistrate, after hearing the case concluded that the conduct of the appellant amounted to gross misconduct warranting his summary dismissal. On appeal, the Supreme Court upheld the decision of the lower court and stated:

"He (the appellant) participated in a concerted stoppage of work although told that his grievances would be heard by the personnel officer later in the day and systematically refused to resume work though he was told that his name would be recorded and he would be sacked...It can hardly be contended that, in those circumstances, his employer had to allow him a hearing before sacking him."

The ruling of the court clearly stipulates that the offence of the appellant is manifestly clear that the respondent employer, on the facts known to it, took the view that whatever explanation the employee would advance, if ever a hearing would have taken place, it would have made no difference.

In South Africa, this was the line of thought taken by Goldstein in *NUMSA v Haggie Rand Ltd.*[46] He said:

"...to expect management to emasculate the ultimatum by subjecting its threat of dismissal to a hearing is to demand of it to sheathe the sword and to render it ineffective or virtually so. And that is not fair. There is also something quite

artificial and unacceptable in requiring an employer who is directly affected by the flagrant, unmistakable misbehaviour of an employee to conduct an enquiry himself into such misbehaviour after such employer has himself deemed it necessary to issue a dismissal ultimatum as a result thereof."

The recent case that caused a considerable stir in the law of mass dismissal of striking employees is *Maluti Transport Corporation Ltd v MR TAWU & Others*[47] where the individual respondents were dismissed after they went on strike in sympathy with workers who had been dismissed for participating in an overtime ban. The employer contended that the strike was illegal, not functional to collective bargaining and in violation of the peace clause in the collective agreement and a court interdict.

Although the majority[48] would not condone the conduct of the workers during the strike as acceptable behaviour, and while appreciating the fact that the employer was clearly entitled to bring matters to a head at that stage, they considered that the crucial question was whether it went about it in a proper manner. The majority found that: (a) prior to the dismissal of the 39 employees, they were given an ultimatum to work overtime; (b) the ultimatum did not specify the sanction that would follow upon non-compliance; (c) at the time when the 39 employees were instructed to work overtime it was known to the employer that the entire workforce had decided not to work overtime; and (d) following upon their failure to work overtime, the 39 workers were dismissed without a further hearing. It was held that the failure to state in the ultimatum that it intended to dismiss the 39 workers if they failed to work overtime was a factor to be considered in assessing the ultimate fairness of the dismissal. The Court accordingly upheld the Industrial Court's decision that there was no urgency for dismissing the 39 employees without a hearing. It was also held that there was no good reason for the employer to change its mind on the date it set for return to work by the rest of the employees so that its ultimatum to the workers to return to work earlier than the original date was unjustified and that the subsequent dismissal of the workers for not doing so was unfair.

In a strong dissenting judgment, Conradie JA held that the conduct of the workers during the strike was "defiantly illegitimate" from beginning to end. As for the 39 workers, they could not expect any more final written warnings, having received such warnings previously and paying no heed to them. "It is inconceivable that these employees could for one moment have thought that management would try another warning before resorting to dismissal. The only possible sanction if they persisted with their conduct was dismissal. It was not necessary to spell it out. In this confrontation everyone knew where the lines had been drawn."[49] He disagreed with the majority view that the 39 employees should have been given individual disciplinary hearings and that the failure of the employer to have listened to each one individually before dismissing him made the dismissal unfair. These hearings would have given each employee an opportunity to state why he felt compelled not to work overtime. Conradie JA could not see the purpose such disciplinary hearing would serve since both the employees and the employer knew what the issues were and why the employees refused to work overtime. In his opinion, it is not fair to suppose that the holding of individual disciplinary hearings in the circumstances "would have occurred to a reasonable employer", nor "would it be fair to suppose that it might have occurred to a reasonable employer that if it were to hold an individual enquiry the employee under investigation might collapse, break ranks with his fellow strikers and undertake to resume his overtime work. If he did not, he would be dismissed, there was no need to even debate this sanction at a disciplinary enquiry. If a disciplinary enquiry could accomplish nothing useful I do not believe that it needed to be held." [50] Surely, where employees engage in collective industrial action, they should be dealt with collectively and not to treat the employees individually because they were individually instructed to work, therefore, it would be unfair to deal with them collectively. There was clear evidence that the mood of defiance was such that no employee could be persuaded to attend a disciplinary hearing and there is no scope for finding that disciplinary enquiries should have been held. Accordingly, the dismissal of the 39 employees was not unfair. And on the dismissal of the rest of the workers, Conradie JA held:

> ***I would have said that, as a matter of fairness, the appellant was, after the uproar on 7 November, entitled to dismiss the employees immediately after having given adequate ultimatum. Its initial decision not to do so was in the nature of an indulgence. It had not even issued an ultimatum to the employees to return to work on 23 November. It was evidently holding its options open. To hold that the appellant was bound by the indulgence to the extent of not being able to withdraw it without showing good cause, is not, in my opinion, a conclusion distated by the requirements of fairness. It has, in any event, shown a good reason for what it did. In my view the appellant has convincingly demonstrated that it followed a fair procedure in dismissing the second group of strikers as well.***[51]

Like Froneman DJP. Conradie JA held that "it goes against the grain to come to the assistance of strikers who had so grossly misbehaved" however, unlike the Deputy Judge President. the Judge of Appeal did not feel "impelled by the inexorable pressure of the facts or the law (in which I include fairness) to come to their assistance."[52]

It is not clear how the majority decision in Maluti Transport would influence the development of the law in the code era. One would therefore not be surprised to find decisions based on the code regime not differing too significantly from those earlier cases from the Labour Appeal Court and the Supreme Court of Appeal. We have already seen that Benjamin AJ held in Fibre Flair[53] that a hearing was necessary in the circumstances of that case but one would not be surprised to find Conradie JA's type of approach in future cases. Indeed. the indications from the Labour Court are that may well be the trend. Jajbhay AJ was somewhat echoing those sentiments when in *Marapula & Ors v Consteen (Pty) Ltd*[54] he observed that "despite its collective nature, the dismissal of striking workers is a dismissal nonetheless, just as all other dismissals. it operates to terminate the services of the individual. The Code of Good Practice in my opinion does not contemplate a separate enquiry." But it is the judgment of Revelas J in Malcomes Toyota on the question whether a hearing should be held in the circumstances of an unprotected strike that underscores the prevailing thinking:

> ***In a strike situation, particularly an unprotected strike, where employee are warned of dismissal in an ultimatum, it would hardly make sense to conduct a hearing just before the dismissal is imposed. Apart from the fact that it promises to be very impractical to have hearings during an unprotected strike about participation in the strike itself, a requirement for disciplinary hearings to be held prior to taking action during an unprotected strike would mean that the employer's endeavours to bring an end to unprotected action is seriously hampered. A requirement to have hearings after the dismissal had already taken place, would be, in my opinion, tantamount to the employer second-guessing its own decision. Such a process could not serve in any meaningful way to resolve the issue at hand...I do not agree that all the principles applicable to dismissal for misconduct as set out in the Code, should be followed in the case of dismissal for participation in unprotected action. The legislator has deemed it fit to deal with these matters separately.***[55]

The judge further held that the reasonable step the employer should take in the circumstances of this case would be to invite the employees to show that there was a good reason for their participation in the unprotected strike, such as intimidation and that if they were given the opportunity of providing an explanation, they would have so stated. None of the employees had made any such case since the Act does not require the employer to follow this course or hold any hearing for dismissals following participation in unprotected strikes, there is no reason to find that the dismissal was procedurally unfair simply because no such process had been followed.[56] It would seem that where the misconduct arises from improper behaviour of employees engaged in a protected strike, such misconduct would call for a hearing, and investigation before any disciplinary action is taken against the employees and the collective treatment should not be allowed to interfere with the principle that only the offenders should receive punishment for their conduct after it has been ascertained that they committed those acts. This would maintain the line of demarcation drawn by the law on protected and unprotected strike.

5.2.2.2 The `Crisis Zone' and Exemption from Hearing striking Employees before Mass dismissal.

The `crisis zone' is a unique situation exemplified in the South African law of unfair dismissal which anticipates an instance of overriding extremity where the need for a hearing may not be necessary. This concept is still foreign to the Mauritian Labour Legislation. The South African approach to deal with exceptional circumstances where the employer is exempted from conducting a pre-dismissal hearing before terminating the services of striking employees `en masse' may be regarded as a matter for consideration in future for Mauritius.

In the case which laid the foundation for this exception, *Lefu v Western Areas Gold Mining Co Ltd*,[57] the employer's mine was racked over a two-day period by a major riot in which nine people lost their lives, 349 were injured and production losses and damage to buildings and equipment totalled millions of rands. As the situation cooled, the employer took drastic action. It isolated 205 employees whom its officials had `positively identified' as having been amongst those who had `encouraged, incited or actively participated in the violence', and sacked them summarily. Many employees disputed the fairness of this action: they said, had been wrongly identified; or explanations were possible for what they had allegedly been seen doing, or their actions were mitigated by various considerations. None of this could be brought forward on the day they were dismissed, since they were bussed to their migrant homes almost immediately.

In court the employees urged that the summary procedure adopted raised great risks that substantive unfairness had been perpetrated. They should have have been accorded some form of a hearing before they were dismissed. But the argument was rejected:

> ***(A)cceptance of this submission would involve adopting an armchair approach to the problem and furthermore it would not take sufficient account of the fact...that a tense situation prevailed whilst the dismissals***

> ***took place and that the dismissal of some 205 persons out of a work-force of some 14000 black employees may have eliminated fresh unrest."***[58]

The court relied for this approach on the `widespread unrest which caused loss of life and damage to property and placed other lives and property in danger':

> ***Faced with the responsibility of maintaining law and order on the mine, a situation caused by the peculiar circumstances of the mine where the social community consists of employees, it cannot be said that the respondent was obliged to hold a hearing in respect of the applicants before terminating their services."***[59]

There are criticisms to be made of the Lefu judgment. Its endorsement of summary procedure occurred not amidst the tension of a post-riot lull but in the reflective atmosphere of court proceedings - where, it may be argued, it is important that considerations of fairness should be decisive. The court was plainly anxious that its finding should not be derided as that of an `armchair' or academic critic of the harsh procedures which might be required in the harsh world of mining discipline. But would insistence on elementary fairness have been evidence of an academic approach? One way of avoiding harm to both the employer - if the workers' continued presence on the mine really posed a threat of renewed rioting - and to the employees themselves would have been to suspend them and to institute proper procedures at a later point. This would admittedly have been cumbersome and probably expensive, since the sacked workers were migrants who would have had to be transported back to face the disciplinary proceedings. But no reason is given in the judgment for rejecting the suspension option. And the deputy president of the industrial court himself later raised this suggestion in answer to a similar argument by a mine:

> ***If in fact the respondent considered at that stage that the presence of the applicants on the mine constituted a threat to disrupt workings at the mine by further acts of intimidation or violence at the mine no reason existed why after consultation with union officials these particular applicants' services***

could not by agreement have been suspended until a date when the dust caused by the strike had sufficiently subsided to grant them a fair trial. [60]

No reason indeed: though this latter case may well be distinguishable from Lefu[61] in that its facts are not as extreme. This point is indeed the saving grace of the Lefu doctrine - that it may be applied only in cases of overriding extremity. In a series of cases argued shortly after Lefu the presiding officer in that case established the limits of the exception. [62] Here the same employer sought to invoke the same circumstances to justify the absence of a hearing in the case of employees who were sacked some weeks after the riot was over. The argument failed. Given the mine's organizational resources, it could not claim to be unable to handle several hundred enquiries over a period of several weeks, and indeed it appeared from the company's own depositions that enquiries had been held in the case of certain other employees allegedly involved in the subsided violence:

I am unable to hold... that the situation which prevailed when Lefu and his co-applicants were dismissed was in any way comparable to that which prevailed when the present applicants were dismissed. There is no justification for holding that because the charges are similar the respondent may dispense with the procedural formalities which generally apply even once the situation had returned to normal.[63]

It is thus evident that Lefu exists chiefly to show that the hearing requirement is not immutable: once that has been established the clearest facet of the decision is that the exception it creates will be afforded employers only in the most exceptional circumstances. Lefu is often invoked but the attempted analogy is almost invariably rebuffed. [64] So far as is known it has never actually been applied in another case, though the exception it recognizes has been widely accepted. Both the existence of the Lefu exception[65] and the chariness with which attempts to rely on it are treated reflect the general position in administrative law. [66] The leading South African writer on the subject has argued that the 'exceptional circumstances' proviso to the rules of natural justice should be abandoned: sufficient flexibility is retained if it is borne in

mind that procedural fairness should not be applied outside its 'proper limits'. [67] It may well not be inappropriate for a reformulation along these lines to take place in the industrial court's jurisprudence.

The words of Sir J.Donaldson MR in [68] may be quoted as an apt summary of the 'crisis zone' situation. He said:

> ***"...no amount of industrial warfare, and no amount of heat can of itself justify failing to give an employee an opportunity of giving an explanation of his conduct. What industrial warfare may do is to create a situation in which conduct which would not normally justify dismissal because conduct which does justify dismissal, and if there is no possibility of the employee giving an explanation of conduct which is alleged, or if it is plainly admitted, then there may be no cause to ask him for an explanation."***

5.2.3 Are Executive Employees entitled to Procedural Fairness when dismissed for Misconduct?

It has been a strong contention on behalf of companies which have dismissed managerial or executive level employees that they are not entitled to pre-dismissal hearing either because the Labour Relations Act do not apply to them or because it would be inappropriate for the court to lend assistance to high level employees.

The Labour Act 1975 of Mauritius seems to provide an umbrella protection to every employee against dismissal based on unfair procedures. For instance, in *Sentinelle Ltd v David*[69] considering the position of an editor of a newspaper who was dismissed for failing to carry out an instruction of the editor-in-chief, the Supreme Court held:

> ***"...there is no compliance with the provisions of the law requiring an employer to give the employee an adequate opportunity to answer the charge if the hearing resolves itself into an interview between the employee and the person whose orders were disobeyed, that person not being the employer."***

Thus the fact that Section 32(2)(a) of the Labour Act is applicable to an editor of a newspaper, it means that the section would certainly be applicable to any other employee in an organisation. But the Industrial Court had also this to say in *Goder v Bata Shoe Co.Ltd*:[70]

> ***"Summary dismissal for gross misconduct is still permissible and a warning may be dispensed with where the employee has made it clear that he does not intend to improve - for example he is at odds with the company's policy or where his capacity is so bad as to be irredeemable or where, as in the case of senior management, the employee already knows exactly what is requested of him so that a warning would be irrelevant".***

It is evident from the Industrial Court's decision that in case of a senior management a warning or procedural fairness may be dispensed with as it is expected of the senior executive to know the company policy and the standard of conduct required of him/her.

In South Africa this is a contestable issue. Although the court in one case maintained that a disciplinary code usually does not apply to managers,[71] it stated in another case (where the dismissal of a director was in issue) that it did not want to prescribe procedural guide-lines and would therefore follow the provisions of an existing disciplinary code which applied to the director. [72] In the absence of a disciplinary code the court will have regard to the rules of natural justice. [73] Normally the employer is not required to give reasons for the dismissal of a senior employee, except where the circumstances of the case are such that fairness so requires (for example, where reasons can indicate that a disciplinary committee was not influenced by its previous decision). [74] As far as warnings are concerned, the court stated in one case that -

'those employed in senior management may by the nature of their job be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement.[75]

In another case, however, the court took account of the fact that a manager had never been told that he had been incompetent or could not get along with the staff. [76] It was, furthermore, explicitly held that even in the case where a manager is to be dismissed, it does not follow that warnings can be done away with. [77]

In many cases concerning the dismissal of senior personnel the court has required, even in cases of alleged incompatibility or incompetence, that a disciplinary enquiry must be held before dismissal. [78] It has been stated explicitly that the dismissal of senior employees does not constitute an exception to the general requirement of a fair hearing. [79] In two cases, however, exceptional circumstances were found to exist which justified a deviation from this general rule that a disciplinary enquiry should have been held, viz where there was indeed a valid and substantive reason for dismissal[80] and where the granting of a reinstatement order would be totally contrary to the interests of the employer, since the dismissed managing director of the employer bank had been involved in illegal transactions. [81] The holding of a fair hearing is not only generally required, but may sometimes be imperative, as in the case where the allegations are of such a nature that they have to be investigated at a hearing. [82] Although a fair hearing or disciplinary enquiry is generally required, it appears that the court adopts a more flexible attitude as to what would constitute such a hearing or enquiry. On a few occassions the court was satisfied that a meeting (or meetings) between the senior employee and other senior personnel of the employer could qualify as a disciplinary enquiry, albeit an informal one. [83] A contrary finding, however, was made where the meeting had another purpose and had not been intended as an enquiry, [84] or where the employer had not raised the allegations made against him with the employee, [85] or where the employer had decided upon dismissal prior to the meeting. [86] In other cases as well the prior decision to dismiss was found to be improper and to amount to procedural unfairness. [87] Previous warnings cannot take the place of a disciplinary enquiry. [88]

In cases where a disciplinary enquiry had been held, the court found that the enquiry had been defective since the dismissed senior employee had not known what the

charges against him had been.[89] or the dismissed employee had been refused access to the notes of the enquiry.[90] or the decision to dismiss had been taken on the strength of the evidence of one witness only.[91] The employee must be heard not only with regard to his version of the facts. but also with regard to an appropriate remedy.[92] In one case the court was dissatisfied with the decision of a governing body that the issuing of a serious warning to a director (as decided upon by a previous disciplinary committee) be replaced with a decision to dismiss.[93] In spite of the senior status of a manager he was nevertheless entitled to representation.[94] In contrast it was on occassion also stated that a manager is usually not afforded representation.[95] In a number of cases the court took cognisance of the fact that representation had been allowed[96] and declared that the refusal to grant representation at further levels of disciplinary proceedings where it had been granted initially was irregular.[97] Impartiality is seen as being of the utmost importance. The court reversed the decision of a second disciplinary enquiry to dismiss a director where it appeared that he was dismissed on more or less the same allegations and factual bases as those which had been in issue during the first enquiry and where the majority of the members of the last enquiry were the same people who took the initial decision.[98] In this regard the court stressed that the applicable test was not whether there had actually been partiality. but whether an impression of partiality had been created.[99]

The granting of a right of appeal to senior employees does not appear to be a sine qua non. A common-sense approach has been followed by the court where the appeal was heard by the same senior person or persons who had taken the initial decision. In such a case the refusal to allow an appeal was not improper.[100] Neither could the employee be expected to lodge an appeal.[101] Having regard to all the above-mentioned procedural guidelines. the court found in a few cases that procedural unfairness had in fact been proved.[102] Finally. it should be noted that the court stated in one case that the usual retrenchment guide-lines should be followed in the case of the retrenchment of a manager.[103]

Apart from minor inconsistencies and minor deviations prompted by a common-sense

approach, it appears that the procedural guide-lines laid down by the industrial court in regard to the dismissal of executive employees do not differ materially from the guide-lines followed when other employees are dismissed. This applies to the principles concerning the applicability of a disciplinary code[104] and the rules of natural justice[105], the reasons for the dismissal[106], warnings[107], a fair hearing[108] and appeals, [109] as well as to the applicable retrenchment guide-lines. [110] It is evident, however, that in certain respects the court reveals a more flexible attitude in the application of these principles where the dismissal of an executive employee is an issue.

Thus, although the industrial court has on at least two occasions declined to exercise its powers in favour of a wronged executive on the ground that to do so would be unfair to the company[111], it has uniformly asserted that in principle its powers extend to the relief of unfairly treated executives and has often exercised them. It has now also been authoritatively established that there is no jurisdictional bar preventing the industrial court from adjudicating the claims of unfairly dismissed senior executives, including directors of companies. Their claims to procedural fairness before dismissal must therefore be assessed in the same way as those of other employees, namely with due consideration of all the relevant circumstances.

5.2.4 Can Waiver or Quasi-Waiver by the Employees to be heard be tantamount to an exception to Procedural Fairness?

The concept of waiver to the right to be heard is explained in *W&J Wass Ltd v Burns*[112] where Sir George Baker explains:

> ***"I am not, I hope, so unworldly as to reject the possibility that if the employee had been asked to explain or mitigate, he would simply have...given the "V" sign with or without an appropriate oral outburst."***

The nearest Mauritian equivalent to this situation occurred in Société Malesherbes v Jamajaye Beelur[113] where the section manager related that four cows had died

apparently by reason of toxic ingestion. A veterinary surgeon was called in to carry out a post mortem examination. The police were also called and the workers employed in the feeding of those animals, including the respondent were detained for purposes of enquiry. After the respondent's release he was asked by the section manager whether he had any explanation to give, he said he had none - it was in those circumstances that he was told that he should not resume work and that a decision was to be communicated to him by letter. The magistrate did not make any definite pronouncement on which of the two versions he was acting upon but he referred to the fact that it was not essential to hold a formal hearing by way of a disciplinary committee, suggesting perhaps that he was accepting the version of the section manager. Thus the Supreme Court held an appeal that:

> ***We are of the opinion that the assumption that the Magistrate was to act on the version of the section manager the very fact of his asking for explanations and the answer given by the respondent that he had none to give complied with the requirements of Section 32(2)(a) of The Labour Act.***

The Supreme Court took this line of reasoning not simply because the employee had waived his right to be heard, but because the facts were verified on investigation by the General Manager and the employee knew of his guilt. The Supreme Court summarised the facts as follows:

> ***In our judgment, this should be all the more for two reasons. Firstly, the General Manager, Mr R. Lambert, who was called to the spot from the main Port Louis office of the appellant on the 26 November 1986 stated:***
> ***J'ai fait mon enquete personnelle parallèlement aupres de tout le monde et principalement auprès de tous les travaileurs de la ferme concernant les moutons aussi bien que les vaches morts ce jour là." And that witness was not cross-examined. Secondly, we are not dealing with some isolated incident occurring in nebulous circumstances but with a series of blatant act of vandalism, so that the respondent cannot but have been fully aware of what was suspected.***

The Supreme Court. therefore. found the dismissal without a proper hearing to be fair because the accused employee had a constructive knowledge of his guilt and he opted to allow the disciplinary action to take place against him without him rebutting the facts or pleading in mitigation.

Similar situation has arisen in the *South African case of Mfazwe v SA Metal & Machine Co.Ltd.* [114] The facts were that a worker had been given a series of warnings about his attitude and speed of work. These culminated in a final warning in terms of which he was threatened with dismissal if these factors had not improved by the end of the day. His supervisor then approached him in order to tell him exactly what was expected of him. The worker confronted him with a tirade, treated him with contempt. clearly showing that he was not interested in participation in the working relationship. The industrial court held that the absence of any formal or informal enquiry before dismissal was not an unfair labour practice:

> ***The conversation between [the supervisor] and the applicant on that specific day immediately prior to his dismissal and after the series of warnings in my view makes it clear that the applicant was treated fairly throughout and that nothing could have been expected of a reasonable employer along the lines of further investigations and enquiries.*** [115]

This decision illustrates that an employee can by his or her conduct abandon or waive the right to a pre-dismissal hearing. Waiver in law occurs when a person with full knowledge of a legal right abandons it. [116] In the employment context it would be unrealistic to apply the full requisites of the legal doctrine of waiver before an employee's conduct could be said to exempt an employer from the hearing requirement. All that should be required is that the employee should indulge in conduct which establishes that the employer can no longer reasonably or fairly be expected to furnish an opportunity for a pre-dismissal hearing.

The cases in which strikes took place and in which the industrial court held that application of the hearing requirement would be unreasonable seem to illustrate this

principle. In the judgment it is sometimes suggested that the reason why the right to a predismissal hearing is not enforced in such cases is the fact that the workers involved are so many or that they are acting in concert or that their stand is collective. [117] None of these reasons can provide support for the denial of procedural justice. The case in question shows, however, that circumstances may exist which entitle the employer to conclude that the workers have abandoned their entitlement to normal pre-dismissal procedure. This may be because they have repudiated their contracts of employment or because they have engaged in other conduct which renders the enforcement of pre-dismissal procedures pointless. Whether the workers do so by concerted action or not is irrelevant, though participation in a mass withdrawal of labour may, depending on the circumstances, furnish evidence of the kind required. The point of concerted action is generally not that it is concerted or that the participants in it are numerous but that its nature is evident: if the employer is justified in regarding it as a repudiation of the contract of employment he or she will not need to hold hearings in order to ascertain the facts.

What is important is that the right to a hearing will not be enforced in South Africa, any more than in England, where to do so would be 'utterly useless'[117] Where a worker's conduct establishes that no purpose would be served by holding a hearing, whether by display of the 'V' sign, by indulging in a contemptuous outburst or by participating in mass action the purpose and nature of which is plain, then the right to a hearing may have been abandoned. The point is illustrated by posing a case where the reason for the withdrawal of labour was not clear. In *Black Health & Allied Workers Union of SA & Others v Garden City Clinic*[118] workers engaged in a work stoppage after the dismissal of a colleague. The reinstatement application of the main body of workers was rejected since it was plain why they acted as they did and also that what they did was illegal, a repudiation of their contracts of employment and 'grossly unfair' to their employer. But this was not clear in the case of all the workers:

> ***The five night workers are on a different footing. It is not clear what their motivation was for acting as they did because a proper enquiry was not***

> *held. It appears they stopped working. Why, we do not know...The housekeeper terminated their services because she believed their actions amounted to a strike or that they supported their colleagues who were on strike. From the papers it is not clear to me that her belief was sound. They may have had other reasons, eg fear of the strikers. This should have been investigated...I do not think that the housekeeper on behalf of respondent should have acted so hastily. I understand her agitation, impatience and concern...she should have realized, however, that exactly that situation most probably would cloud her judgment and that she could jump to unjustified conclusions.* [119]

The night workers had thus not engaged in conduct which indicated that a hearing would be 'utterly useless'. They had not impliedly abandoned their rights to procedural fairness before being dismissed. If the categorization suggested here is accepted it may be said that, unlike their colleagues, whose actions and motives in the strike were beyond dispute, the night workers had not made it plain by their conduct that a hearing would be pointless and thus had not waived their right to its benefits. [120]

The cases discussed above sufficiently exemplify that procedural fairness is not an absolute right available to an employee when he/she is faced with disciplinary charges and liable to face the ultimate sanction of dismissal. There has been obvious similarities adopted by both Mauritius and South Africa in their respective approaches to deal with case where an employee through his/her conduct indicate unwillingness to co-operate with the enquiry or investigation to unearth the truth in the allegation made against him/her. A word of caution would definitely be that as much as procedural fairness is not an absolute right, as it can be dispensed with under special circumstances, denial of it on flimsy grounds would create more disharmony and arbitrariness in the employer/employee relationship.

5.2.5 The Labour Relations Act and Judicial Decisions on Exemption from Procedures in Exceptional Circumstances.

5.2.5.1 The Mauritian Experience

Neither the Mauritian Industrial Relations Act 1973 nor the Labour Act 1975 have made provisions for exceptional circumstances where an employer could be exempted from following procedures during pre-dismissal hearings. However, numerous cases are illustrative of the fact that some misconducts are so manifestly heinous that the need for a disciplinary hearing does not arise.

In the Willoughby College v C. Chukooree[122] the facts were that the respondent, a married man, was a teacher at the appellant's college. The wife of one of the two co-owners of the college was also a teacher at the college. The respondent, it appeared, was having an affair with the wife. The co-owner/employer got wind of it and suspended the respondent. Disciplinary proceedings were instituted against him on a number of charges relating to tampering with attendance registers and other matters. But the charges did not include the behaviour of the respondent regarding the wife. The respondent did not attend the hearing nor did his counsel.

Two reasons militated against the respondent's plea not to dismiss him. Firstly, he was charged with gross misconduct and secondly, his contract of service was a yearly one, and it was due to expire at the end of the year. On a point of technicality, as provided in Section 32(1)(b)(ii)[123], the magistrate of the Industrial Court found that

> ***"since the letter of termination was sent 9 days after the hearing and not 7 days, as required by section 32(1)(b)(ii) of the Labour Act, the `dismissal' of the respondent was unjustified."***

Surprisingly, the Supreme Court took a tangent view on the express charges meted out against the respondent and dealt at length with the implied charge, that is, "the

reprehensible behaviour of the respondent regarding his employer's wife", which the Supreme Court acknowledged that "in the particular circumstances, might have constituted ground for respondent's instant dismissal if only it had expressly been so invoked at the time". With respect, this may be a misdirection, as the Supreme Court deviated from the issue at hand and took upon itself to uncover the facts which though related to the case, were never brought out as heads of argument. It, however, quashed the decision of the lower court.

The significant issue that the Supreme Court has, however, brought into light is that an employer need not go through the disciplinary procedure, once the facts have been reasonably assessed to be true. The employer may thus dispense with a predismissal hearing. The Supreme Court, therefore, held:

> ***One need not be much of a man of the world to understand that the formal process of going through the motions of disciplinary proceedings on the charges that were brought against the respondent was an administrative expedient for not only saving face for the college but also sparing the employer and his wife understandable embarrassment and public scandal. What is clear is that the respondent not only well knew for what reasons his services were being dispensed with but also that these reasons were founded. So much so that he heavily relied on his affair with the wife in an attempt to show that the other charges were trumped up. There would, in the circumstances, have been no need for a hearing in respect of his misbehaviour with the wife since, as it turned out, the respondent heavily relied on that same scandalous behaviour in order to prove his claim.***

In another case, there was no plea that a decision was taken by the employer to dismiss the employee without providing him the advantage of a pre-dismissal hearing. This was due mainly to the gravity and wilful nature of the misconduct. In *L.E.Mouton v A.Bonieux & Co Ltd*[124] there was ample evidence to show that the appellant was caught in the act of removing `mazout' (diesel) from the lorry, which he was instructed to deliver to Mon Desert Alma Sugar Estate. On the same day, the

appellant was asked whether he accepted having taken `mazout' from his lorry, he begged for excuse. Thus, without invoking the rules of procedural fairness before dismissal, the Supreme Court following the dictum expounded in *Harel Fréres Ltd v Jeebodhun*[125], reaffirmed the principle that "whether an employer cannot, in good faith, do otherwise than dismiss a worker is a question of fact with which the appellate court will not lightly interfere unless the conclusion of the trial court is one which no reasonable trial court could have reached." In the present case, on conclusion from facts elicited, the Supreme Court refrained from `disturbing' the decision of the Industrial Court, and held that the dismissal was justified.

A different approach is discussed in *G.Pattar v Compagnie Sucriere de St.Antoine Ltée*[126]. It shows there is no justification for a disciplinary hearing to be held where the plaintiff, by repeated breaches of his contract of employment, had himself brought about the termination of his employment. The Industrial Court held:

> ***It is clear that regardless of the sick leave, local leave, Sundays etc. the plaintiff failed to report for work on repeated occassions, without notification, explanation or permission. Although the law involves a worker to be absent from work for two consecutive days without giving any reason, yet an abuse of it cannot be expected to be tolerated by an employer who has primarily to ensure the efficient running of his undertaking or enterprise. In the case of the plaintiff, I find that the systematic absences have been so excessive that the defendant was entitled to consider that the plaintiff had caused a breach of his contract of employment..."***

This view was reiterated by the Supreme Court in *M. Maissin v Textile Industries Ltd*, [127] where the appellant appealed against his termination of employment on the grounds that he was "neither given an opportunity to give an explanation as to his absence nor had been requested to resume work before the respondent took the decision to terminate his employment." The Supreme Court again held that once the employee, by his own conduct, repudiates the contract, there is no need for the employer to hold any disciplinary hearing. It was stated:

Moreover, once the appellant had absented himself from work for more than a month without good and sufficient cause, as found by the learned Magistrate, he had broken his contract of employment with the respondent - vide section 30(4)(a) of the Labour Act. The respondent was therefore justified in treating that contract as terminated and was not under any legal duty to give the appellant an opportunity of explaining his absence or to request the appellant, given the nature of its own plea, to resume work before terminating his employment. The appellant's complaint in this regard is consequently baseless.

The Mauritian Labour Jurisprudence relating to `unjustified dismissal' due to lack of procedural fairness in the disciplinary hearings, has another provision which gives the employer immunity from holding pre-dismissal hearings before terminating the services of an employee. Section 32

(i)(b)(ii) states:

(i) No employer shall dismiss a worker...

(b) for alleged misconduct unless

(ii) B where the misconduct is the subject of criminal proceedings...

It means that where a misconduct is the subject of criminal proceedings, it is left open to the employer, if he so wishes, to wait for the outcome of the proceedings rather than instituting a parallel internal disciplinary hearing. In *Mauritius Meat Authority v Bissoon Mungroo*[128] where the accused was accused of the criminal offence of swindling and was found guilty, the question was whether there was any need for subjecting the respondent again to a disciplinary hearing. The Supreme Court held that:

The learned magistrate first came to the conclusion that the appellant having opted for the provision relating to the situation where the misconduct is the subject of criminal proceedings(Section 32(i)(ii)B of the Labour Act) there was no necessity for a hearing. We agree and hold that when the alleged misconduct is the subject of criminal proceedings the worker is thus afforded the opportunity to answer the charge against him as contemplated in Section 32(2)(a) of the Act."

In the South African context, the employer should, however, still have regard to the record of criminal proceedings and allow the employee to make representations as to why he or she should not be dismissed. It may be unfair, it is submitted, to subject the employee to a double jeopardy.[129]

Though the Mauritian Labour legislation is deficient in the provisions exempting an employer from holding predismissal hearings, unlike Item 4(4) of the Code of Good Practice in South Africa which has expressly codified exceptional circumstances, the foregoing judicial decisions are evident of the fact that procedural fairness in Mauritius is not a magic concept applicable to each and every situation. There have been glaring instances where the court has made an exception to the rule and condoned employers from holding disciplinary hearings before dismissal due to misconduct.

5.2.5.2.2 The South African Experience

The South African law of unfair dismissal has the advantage and support of both the Labour Relations Act and the rich resource material providing instances of exemption from procedures before an employer decides to dismiss an employee.

Section 4(4) of Schedule 8 of the Code of Good Practice in the Labour Relations Act 1995 expressly provides:

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

Though the Code does not state what these exceptional circumstances are, the case of Mjaji and Creative Signs[130] seems to give adequate direction in this regard.

The facts of the case were that the employee was dismissed after putting his hand up the employer's wife's dress and touching her bottom. The employer/husband confronted the employee with the allegation, gave him his notice pay and a week's

leave pay. In defence to a claim of unfair dismissal, the employer contended that the previous warnings given to the employee and the informal procedures followed prior to his dismissal were sufficient to justify procedural fairness. Holding that the employee's dismissal was both substantively and procedurally fair, the Commissioner found in respect of procedural fairness that as much as no formal hearing was held, the employee was informed in no uncertain terms the offence against him, was invited to respond and the decision to dismiss him was communicated to him verbally. Although there was evidence that the employee was not offered the assistance of a fellow employee, the Commissioner was prepared to find that in spite of any shortcomings in the procedure followed there was a substantial compliance with a fair procedure. In any event, the employer was entitled to dispense with the pre-dismissal procedures given the following exceptional circumstances of the dispute, viz:

- the conclusive proof of the assault;
- the serious nature of the misconduct; and
- the fact that more formal and exact procedures would not have brought about a different result than the informal procedures did.

The case is a good illustration of a situation where the employee could be said to have been caught in the act somewhat resembling that often cited example of Lawton LJ where a worker was seen on the shop floor by the works manager and others to stab another man in the back with a knife. In such a case, the procedural defect will either be superfluous or unimportant in comparison with the substantial merits of the case.[131]

In *Hayward v Protea Furnishers*[132] no threat or danger to the company was foreseeable, the employee having been suspended prior to the dismissal. Although the hearings scheduled in two separate occasions were both postponed, there was no evidence that the employee was terminally ill or had no chance of recuperating or had refused without good cause to attend and participate at a hearing when an opportunity for him to do so was granted yet the company chose a convenient path to deviate from following proper procedure thereby dismissing the employee without affording him an opportunity of a fair hearing. There was equally nothing exceptional in the

circumstances of *Mthombeni v HOSPERSA*[133] to constitute the exceptional circumstance contemplated by the code to justify the employer not holding an enquiry before dismissal for alleged misconduct. The Commissioner rejected the union/employer's argument that the dismissal was procedurally fair where the provincial secretary of the union was accused of becoming involved in "worker politics". He was simply given a letter setting out the complaints against him and invited to respond. The Commissioner held that even if the provincial executive of the union could not hold the enquiry because of their involvement in the matter, the head office of the union ought to have done so perhaps by engaging an outsider to do it on its behalf. The alleged turmoil in the union at the time could not have constituted exceptional circumstances whereas a proper and impartial procedure would have "cooled temperature in the union by helping to re-establish constitutionality." [134]

The so-called crisis-zone situations apart, there are other circumstances where the employer's failure to hold an enquiry may not necessarily lead to a finding of procedural unfairness. [135]

A situation may arise where the failure to hold an enquiry is the fault of the employee and not that of the employer such as where the employee fails to turn up for the enquiry or hearing but even here, the lack of an enquiry will not be excused if the employer fails to give the employee a second chance. [136] Another example is where, as in Slagment[137], the employees imposed some stringent conditions on their participation in the enquiry. [138] or where the employee unjustifiably refuses to participate in the enquiry, or where an opportunity is offered but the employee declines to avail himself of that opportunity to present his case[139], or where the employee and his representative walk out of the disciplinary hearing. [140] Bearing in mind that fair procedure does not always mean that an oral hearing must be held in every case[141], it follows that there are circumstances where oral hearing or a hearing at all may not be necessary such as where the parties are sufficiently aware of the respective issues involved and a fair opportunity to address them. [142] Another instance

is where the employee had repudiated his contract of employment. Even here, he must have absconded with a view not to return or would by his utterances or conduct evinced a clear intention not to continue with the employment[143] or must have been in desertion or absent from work for an unreasonable period of time[144].

It is not every termination of employment that amounts to dismissal for it is obvious that a termination which falls outside those five categories laid down in the Act[145] will not be protected by the law of unfair dismissal. For instance, it is not a dismissal where an employment contract is terminated on the ground that the employee has reached the normal retirement age[146] hence an employer is under no obligation to consult the employee before exercising his right to retire the employee who has reached or after the normal or agreed retirement age in accordance with s187(2)(b) of the Act. Surely, the statute has itself pronounced on the fairness of that termination. [147] Again, where the dismissal is automatically unfair, [148] and it is clearly established that a particular dismissal fits into that statutory description, there will be no need to enquire further as to whether it was effected by a fair procedure. A fair procedure is required where there is a dismissal and such dismissal is based on employee's misconduct or incapacity in the form of poor work performance or physical inability such as ill health or on the ground of operational requirements of the employer.

There are other instances where the court has the discretionary power to refuse relief to an employee who has been dismissed without any disciplinary hearings.

In *Stevenson v Sterns Jewellers (Pty) Ltd*[148], for instance, the employee, who had been appointed as managing director, was dismissed without a hearing. The court made its decision `in accordance with equity based on the particular circumstances' of the case. [149] The court emphasized that its decision was not based on the `misconduct/hearing' concept (by which it appeared to mean the traditional notion that if an employee is dismissed for misconduct a prior hearing will almost always be necessary), `but rather on the equities of the case considering all the circumstances referred to'[150]. These circumstances included the brief period of service with the employer (three weeks; the

generous offer of three months' notice pay; the consideration that `life at the top' may often `involve quick decisions that may ex post facto be deemed harsh'; the unlikelihood of a meaningful settlement; and the conception that, having regard to the applicant's senior management position. it could not be said overall that he had been treated unfairly. [151]

What is important about the Stevenson judgment is that it stresses that lapses in procedure are not as a rule to be countenanced. The decision was not based on a traditional approach to misconduct but on the notion that, notwithstanding the absence of fair procedure. it could not be said that the applicant had been unfairly treated. Another way of looking at this decision would be to say that in all the circumstances it would have been an unfair exercise of the court's statutory power to reinstate the sacked managing director. This was indeed the perspective adopted in *Maubane v The African Bank Ltd*[153] where the applicant was also a peremptorily sacked managing director. Again. the court made it clear that although it could not condone the absence of an enquiry it did not consider that it would be a just exercise of its jurisdiction to grant the applicant relief.

> ***In the view of the court it would indeed be inappropriate to reinstate the applicant. This is not because the exceptional circumstances of this case are such that it cannot be reasonably expected of the respondent that it should have provided an opportunity to the applicant to state his case prior to his dismissal...Nor is the case similar to that in Stevenson...where the decision was not based on the "misconduct hearing" concept but rather on the equities of the case considering all the circumstances...Rather the court in this case has in mind the observation of Nicholas AJA in Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court & others (1986) 7 ILJ 489(A) at 495E that the legislature must be presumed to have intended that the powers [of the court] would be exercised reasonably and equitably, and with due regard to the interests not only of the employees but also of the employers."*[154]

The court was therefore satisfied that to grant reinstatement would be to disregard the interests of the employer `to an extent that would be most unfair'. [155] The perspective adopted in Maubane. as pointed out in the passage quoted above, is somewhat different from that in Stevenson. In Stevenson, the decision is ultimately rooted in the notion that. all things considered and in the exceptional circumstances of the case, the employee was not treated unfairly despite the denial of a hearing. In Maubane the decision was based on the prejudicial unfairness that a reinstatement order would have inflicted on the company. again despite the denial of due process to the employee. But the difference of perspective is not substantial. In both cases the court recognised that breach of a right had occurred but refused to remedy it because the overall dictates of fairness pointed the other way.

In *Rostoll & 'n ander v Leeupoort Minerale Bron (Edms) Bpk*[156] the court adopted a not wholly dissimilar stance in the case of one of the applicants whom it found had been dismissed for good reason but without the benefit of a hearing. The court decided to withhold interim relief despite the procedural unfairness, which it refused to condone[157]. because it took the view (criticized in the following section) that its statutory mandate in terms of section 43 of the LRA precluded it from granting relief. But the grounds for the refusal of relief here were narrow and technical rather than broad and equity-based as in the case of the other two decisions. It is doubtful whether Rostol offers either a useful or enlightening precedent.

There has been instances where the Courts have held in consonance with the Code's exception to the requirement that an ultimatum or indeed a hearing or both may be dispensed with. [158] Such exceptional circumstances have been found to exist where the ultimatum will not produce the result for which it was intended, that is, collective negotiations and collective settlement of disputes. The question in *NUMSA v Vetsak Co-operative Ltd & Ors*[159] was whether the issuing of an ultimatum by the employer and the subsequent dismissals of the workers who failed to respond thereto constituted an unfair labour practice. The majority of the Court laid down in this case that whether a strike be lawful or unlawful. there reached a point when the employer was

in fairness justified in dismissing the striking employees, not for striking but for prolonged absenteeism. [160] However, the employer's level of tolerance will depend on its economic vulnerability. The point was taken further in *NUM v Black Mountain Development Company (Pty) Ltd*[161] where it was held that there came a time when the process of negotiation must be acknowledged to have failed so that an ultimatum and, in the absence of compliance, termination of the strikers' employment would be justified. When this point is reached, fairness dictates that dismissal is justifiable. The ultimatum given in this case was neither premature nor unfair.

Neither that point of despair on the part of the employer had been reached nor did any exceptional circumstance exist to justify the dismissals in *NUMSA & Ors v Fibre Flair CC t/a Kango Canopies.* [162] The employees had been issued with written final warnings for "misconduct due to withholding labour collectively and unprocedurally" and were warned of possible disciplinary action. The workers, after serving notice on the employer, however took part in a national protest over the Employment Standards Bill but for only a 35-minute duration. Those of them on final warning were summarily dismissed, without any disciplinary enquiries, although they were advised that they could re-apply for re-employment at lower wages and could lodge an appeal within 48 hours. Benjamin AJ rejected the employer's contention that an enquiry in the circumstances would serve no useful purpose and went on to find that the dismissal was procedurally unfair for the following reasons:

- the employees were working at the time they were dismissed;
- there were no exceptional circumstances present that made it impossible or impracticable for an enquiry or investigation to be held before the dismissal; and
- the employers were unreasonable in not allowing the union to lodge an appeal six days after the dismissal when it sought to do so. [163]

Although the contents of the Code in disciplinary matters generally and the question of issuing an ultimatum in particular are derived from the law and practice of labour relations under the past labour dispensation, and the present code is thus a codification of those principles and practices. it has nonetheless been held that under the current labour dispensation. non-compliance with an ultimatum to return to work is viewed in a more serious light than was the case under the 1956 Labour Relations Act. Reveals J held in *NUMSA & Ors v Malcomess Toyota, a Division of Malbak Consumer Products (Pty) Ltd*[164] that the protection against dismissal following participation in unprotected strike action is now limited. This limitation is demonstrated by the introduction of the code into the Act which now classifies this type of conduct as "misconduct."

5.3 Conclusion

Although a full and proper hearing conforming with the various requirements of procedural fairness is normally indispensable. if subsequent disciplinary action against an employee is to be deemed fair. it is found that it is not an absolute requirement, as the judicial decisions in Mauritius and South Africa evidently have shown that there are 'exceptional circumstances' where the employer cannot reasonably be expected to comply to all the requirements and may dispense with the pre-dismissal procedures.

The chapter analysed those circumstances in which the courts have condoned the employer's failure to hold pre-dismissal hearings. Some of the circumstances were such that. objectively speaking. the employer could not have expected to hold one where the employer is compelled to dismiss instantly. in order to protect lives and property or to give effect to an ultimatum. and where the employees have by their conduct abandoned or waived their right to hearings or where the employees have admitted their guilt. The chapter also looked at situations where the employees concerned are of senior status. In Mauritius and South Africa the legal position remains the same. The right to procedural fairness is extended to all employees irrespective of their status or seniority. Another exception to procedural fairness that

the chapter considered was whether it was necessary to hold disciplinary hearings where the employee has been charged with the same offence in the criminal courts. Judicial decisions show that where the employee has already been convicted, it is possible for the employer to rely on the criminal court's finding, thereby dispensing of his own disciplinary procedures.

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[1]*Knoetze v Rustenburg Platinum Mines Ltd (1985) 6 ILJ(IC) at 425D: The applicant, dismissed without a formal enquiry, admitted an assault on a fellow worker and did not deny that he had earlier admitted to one of the respondent's deponents that the assault had been unprovoked. "An enquiry would thus have brought nothing further to light. Consequently, I am of the view that there was no prejudice to the applicant, and that his dismissal took place after consideration of all the relevant facts."*

[2]*General Workers Union & Another v Dorbyl Marine (Pty) Ltd (1985) 6 ILJ 52(IC) at 58 A-B*

[3]*(1987) 8 ILJ 156 (IC) at 164-5*

[4]*Ibid*

[5]*(1973) 1 ALLER 145*

[6]*Ibid at p149*

[7]*Carr v Alexander Russel Ltd (1976) I.R.L.R 246*

[8]*Lowudes v Specialist Heavy Engineering (1976) I.R.L.R.246*

[9]*(1979) I.L.R 347*

[10]*(1987) 1 ALLER 974 (HL)*

[11]*The Code of Practice issued by the Advisory, Conciliation and Arbitration Service and its legal effect are set out in Elias & Others, Labour Law - Cases and Materials 1980 at 580-5*

[12]*(1987) 3 WLR 1153 (HL) at 1163 E-F*

[13]*The Medine Sugar Estate Co.Ltd v I.Woodally 1993 SCJ Record No.4691*

[14]*1984 SCJ: In Bundhoo v Mauritius Breweries (1981) SCJ 140, the Supreme Court held that "Failure to grant a hearing would amount to an unjustified termination of employment. The hearing need not be conducted with the formality and all the exigencies appropriate to a court of law", See also Tirvengadum v Bata Shoe (Mts) 1979 MR 133*

[15]*Section 43 and Section 46(9) of the 1956 Labour Relations Act; See also Brassey et al. The New Labour Law (1987) at 198-9*

[16]*National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369 (IC) at 378 H-I*

[17]*(1986) 7 ILJ 334 (AC) at 337 G-H*

[18]*Rikhotso & Others v Transvaal Alloys (Pty) Ltd (1984) 5 ILJ 228 (IC) at 242 F-H: See also Metal & Allied Workers Union v BTR Samcol (1987) 8 ILJ 815 (IC) at 833 D-E*

[19]*(1987) 8 ILJ 156 (IC); See also Leboto v Western Areas Gold Mining Co.Ltd (1985) 6 ILJ 299 (IC) at 302 H and 303A. In this case it was held that the employer was not justified in denying procedural fairness to about 200 employees who were dismissed over a period of some weeks after a severe riot.*

[20]*Ibid at 164 F-H*

[21]*1984 SCJ Record No 3377*

[22]*(1998) 19 ILJ 1441 (LAC) at 1446 para.27*

[23]*Per Grogan AM in NSCAWU v Coin Security Group (Pty) Ltd t/a Coin Security (1997) 1 BLLR 85 (IC) at 91F-G. See also NUM v Durban Deep Roodepoort Ltd (1987) 8 ILJ 156 (IC).*

[24]*See Van Niekerk, `Dismissal of the innocent: derivative misconduct' (1999) 14(6) Employment Law 15*

[25]*(1997) 9 BLLR 1246 (CCMA)*

[26]*See Librapac CC v Moletsane NO & Ors (1998) 19 ILJ 1159 (LC). The Labour Appeal Court decision in this case (1999) 6 BLLR 540 (LAC) turned on condonation for late review and enforcement of arbitration award.*

[27]*(1998) 19 ILJ at 1166 para 38*

[28]*SACCAWU v Cashbuild Ltd (1996) 4 BLLR 457(IC); SACCAWU v Pep Stores (1998) 19 ILJ 939 (CCMA)*

[29]*SACCAWU v Pep Stores (1998) 19 ILJ 939 (CCMA) at 946G*

[30]*(1998) 19 ILJ 868 (LC); (1998) 4 BLLR 408(LC). In Jacklens & Ors v Pep Stores (1999) 6 BALR 673 (CCMA), the employees were made aware of stock losses through counselling, cautions, warnings that they would be held individually and collectively responsible for any further shrinkage. Their union was involved in attempts to curb further shrinkages. When all these yielded no positive result, the employer summoned the employees to a disciplinary hearing and dismissed them. The Commissioner affirmed the*

dismissals.

[31]*Per Pretorius AJ (1998) 19 ILJ 868 (LC) at 872-3 para 19*

[32]*(1987) 8 ILJ 97D*

[33]*(1997) 18 ILJ 84D*

[34]*(1998) 19 ILJ 1441 (LAC)*

[35]*(1998) 19 ILJ 1441 (LAC) at 1451 para 46*

[36]*See e.g. NUMSA v Vetsak Co-operative & Ors (1996) 6 BLLR 697 (A) at 717G-H with the famous theme: "The workers acted collectively. Vetsak responded collectively". See also Professor Brassey's popular aphorism: "the collective must be dealt with collectively" in MAN Truck & Bus (SA) (Pty) Ltd v United African Motor & Allied Workers Union (1991) 12 ILJ 181 (Arb) at 192F-H: Zondi & Ors v The President of the Industrial Court & Anor (1997) 8 BLLR 984(LAC) at 1002A-D*

[37]*This effectively overrules the decision of the Commissioner in FEDCRAW & Ors v Librapac CC (1997)9 BLLR 1246(CCMA) discussed, supra*

[38]*In his judgement, Cameron JA (1998) 19 ILJ 1441 at 1447 para 31 states: "Where a worker has or may reasonably be supposed to have information concerning the guilty, his or her failure to come forward with the information may itself amount to misconduct." By so holding the court has introduced a new implied term in the employee's contract of employment thus placing an additional burden on the employee, that is, the duty to disclose any information relating to the conduct of other employees known to him or of which he is reasonably expected to know if such conduct has any bearing on the employer's business and failing to do so, he faces disciplinary action. This duty was previously placed on the shoulders of management personnel and not on subordinate employees. The Labour Appeal Court was obviously following the footsteps of the English House of Lords decision in Malik & Anor v BCCI (1997) 3 ALLER 1 where a new implied term in the contract of employment to the effect that an employer would not conduct his business in such a manner as to destroy the relationship of trust and confidence between him and the employee was created by their Lordships.*

[39]*This line of reasoning was initiated in FAWU & Ors v Amalgamated Beverage Industries Ltd (1994) 15 ILJ 1057 (LAC) at 1063B*

[40]*CF Federated Timers (Pty) Ltd v Lallie NO & Ors (1999) 20 ILJ 348 (LC) where Maserumule AJ refused to interfere with the Commissioner's findings that the employer's failure to observe the events of the day when approximately 50-60 striking employees marched casual workers out of the premises of the employer could not be relied upon to justify the dismissal of the two identified employees and the consequent non-discipline of the third unidentified for physically manhandling some of the casual workers. This conclusion was prompted by the fact that the third employee could neither be identified by reference to a video film which was viewed by the Commissioner nor by one of the managers who personally witnessed the incident.*

[41]*(1999) 29 ILJ 572 (LC)*

[42]*(1999) 5 BLLR 453 (LAC)*

[43]*(1999) 20 ILJ 2302 (LAC)*

[44]*(1997) 18 ILJ 327 (LAC) at 338F*

[45]*1984 SCJ Record No.3377*

[46]*(1991) 12 ILJ 1022 (LAC) at 1028 G-1029A*

[47]*(1999) 8 BLLR 886 (LAC)*

[48]*Per Froneman DJP. Nicholson JA Concurring*

[49]*Supra note 47 at 888-889 para 49*

[50]*Ibid at 899 para 50*

[51]*Ibid at 950 para 68*

[52]*Ibid para 70*

[53]*NUMSA & Ors v Fibre Flair CC t/a Kango Canopies (1999) 20 ILJ 1859*

[54]*(1999) 20 ILJ 1837 (LC) para 53*

[55]*NUMSA & Ors v Malcomess Toyota, a division of Matbak Consumer Products (Pty) Ltd (1999) 20 ILJ 1867 (LC) at 1833 para 119, 120 and 122*

[56]*Ibid at 1883 para 121*

[57]*(1985) 6 ILJ 307 (IC)*

[58]*Ibid at 313 G-H*

[59]*Ibid at 313 D-F*

[60]*National Union of Mineworkers & Others v Transvaal Navigation Collieries & Estate Co.Ltd (1986) 7 ILJ 393 (IC) t 397 B-C*

[61]*(1985) 6 ILJ 307 (IC)*

[62]*Leboto v Western Areas Gold Mining Co.Ltd (1983) 6 ILJ 299 (IC)*

[63]*Ibid at 303 F-G*

[64]*A good instance is National Union of Mineworkers & Others v Durban Roodepoort Deep Ltd (1987) 8 ILJ 156(IC) at 163-4. An example of a case where comparison with Lefu can at best be described as far-fetched but where it was none-the-less invoked by the employer is Mfazwe v SA Metal & Machinery Co.Ltd (1987) 8 ILJ 492 (IC) at 492-3*

[65]*R v Ngwevela (RJU(1) SA 123(A) at 131H where it was held that rules of natural justice would apply unless "there are exceptional circumstances which would justify non-application*

[66]*Judicial suggestions that cry of `emergency' will not justify disregard of the requirements of procedural fairness where an alternative procedure can be devised to enable the affected person to state his or her case properly include Dlamini v Minister of Education and Training & Others 1984(3) SA 255(N) at 261 C-D*

[67]*Baxter Administrative Law (1984) at 571 n 230, 579 n 276 and 593 n 363*

[68]*(1988) 1 RLR 215 at 218 para 20*

[69]*(1987) SCJ 201*

[70]*(1984)(IC) Labour Laws of Mauritius Venchard L.E. and Angelo A.H. Eds. p634*

[71]*(1987) 8 ILJ 537 (IC) at 544 H-I*

[72]*Rossouw v SA Mediese Navorsingsingsraad (1) (1987) 8 ILJ 660 (IC)*

[73]*Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd (1987) 6 ILJ 356 (IC) at 356F*

[74]*Supra note 72 at 668 I - 669 D*

[75]*Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318 (IC) at 324H*

[76] *Larcombe v Natal Nylon Industries (Pty) Ltd, Pietermaritzburg (1986) 7 ILJ 326 (IC) at 331 B-C*

[77]*Bissessor v Beastores (Pty) Ltd t/a Game Discount World (1986) 6 ILJ 334 (IC) at 336 I-227I. See also Beck v Foschini Stores (Pty) Ltd case No NH 13/2/303 unreported judgment delivered on 11 February 1987 in which the court took account of the fact that the manager had received two written final warnings.*

[78]*Supra note 76 at 330 A-B. 330F-331A. 331D-E*

[79]*Maubane v The African Bank Ltd (1987) 8 ILJ 517 (IC) at 521-522A; See also Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318(IC) at 326 I where the decision might leave the impression that the equities of the case would imply that a disciplinary enquiry in the case of senior personnel is not required. Apart from the fact that such a view is not substantiated by later decisions of the court, it may also be argued that an informal enquiry was indeed held.*

[80]*Rostoll & 'n ander v Leeuport Minerale Bron (edms) Bpk (1987) 8 ILJ 366 (IC) at 376A. At 376 c it is stated that the condition is that the employee should not have been prejudiced by the absence of an enquiry.*

[81]*Supra note 79 at 522 E*

[82]*Long & Another v Chemical Specialities TVL (Pty) Ltd. (1987) 8 ILJ 523 (IC) at 536 A-D where ulterior motives could have been the reason for the dismissal.*

[83]*Erasmus v BB Bread Ltd.(1987) 8 ILJ 537 (IC) at 544.*

[84]*Supra note 76 at 330 I-331A*

[85]*Gammie v R.H. Johnson Crane Hire (Pty) Ltd case no NH 13/2/1393; unreported judgment delivered on 5 November 1986*

[86]*Hatton v Murray & Roberts Civil (Pretoria) Ltd & Another. Case no NH 13/2/2508; unreported judgment delivered on 26 November (1987) at 2-3*

[87]*Supra note 85 at 11; See also Coetzee v Georg Kopp Investments (Pty) Ltd t/a Competition Motors & Engineering Case no. NH 13/2/531, unreported judgment delivered on 29 July 1987. (An offer to hold a disciplinary enquiry subsequent to dismissal was rightly refused by a director where the employer refused to reinstate him pending the holding if such enquiry.*

[88]*Brown v Oak Industries (SA) (Pty) Ltd (1987) 8 ILJ 510 (IC) at 516 H.*

[89]*Bassett v Servistar (Pty) Ltd (1987) 8 ILJ 503 (IC) at 507 G-I*

[90]*Ibid at 507 G-I*

[91]*Ibid at 508 C*

[92]*Ibid at 509 C-D*

[93]*Supra note 72 at 658 E*

[94]*Supra note 89 at 507 D-G*

[95]*Supra note 83 at 545*

[96]*Ibid at 545 J-546A*

[97]*Supra note 72 at 658 G-I*

[98]*Ibid at 665 I-J, 666H*

[99]*Ibid at 662 F-G, 666J-667A, 667D-668D*

[100]*Supra note 82 at546C*

[101]*Supra note 72 at 659 C-D*

[102]*Supra note 76 at 331 D-E*

[103]*Oosthuizen v Ruto Mills (1986) 7 ILJ 608 (IC) AT 611F; 611 I-612A*

[104]*Brassey et al. The New Labour Law, 363-4 at a*

[105]*Ibid at 408-9*

[106]*Ibid at 409-10*

[107]*Ibid at 410-12*

[108]*Ibid at 412-19*

[109]*Ibid at 419-20*

[110]*Ibid at 379-96*

[111]*Supra note 75 and Supra note 79*

[112]*1982 IRLR 283 (CA)*

[113]*1990 SCJ Record No.4438*

[114]*(1987) 8 ILJ 492 (IC)*

[115]*Ibid at 493 G-H*

[116]*On waiver in contract see Christie, the Law of Contract in SA (1963) Ch.12 at 431-8; Wille & Millin, Mercantile Law of SA (18 ed.1984) at 163-4*

[117]*Rikhoto & Others v Transvaal Alloys (Pty) Ltd (1984) 5 ILJ 228 (IC) at 242 F-H; Metal & Allied Workers Union v BTR Sarmcol (1987) 8 ILJ 815 (IC) at 833 D-E*

[118]*Polkey v A.E. Dayton Services Ltd (1987) 1 ALLER 974 (HL)*

[119]*(1987) 8 ILJ 462 (IC)*

[120]*Ibid at 465-6*

[121]*On waiver of an entitlement to natural justice in Administrative law see Baxter L. Administrative Law (1984) at 591-2*

[122]*1989 SCJ Record No.4465*

[123]*Section 32(i)(b)(ii) of the Labour Act 1975 provides: No employer shall dismiss a worker*

> *(b) for alleged misconduct unless -*
> *(ii)the dismissal is affected within 7 days of*
> *(c) in every other case, the day on which the employer becomes aware of the misconduct.*

See also Bata Shoes (Mts) Ltd v Mohassee (1975) MR 146 where it was held that under Section 6(2) of the Termination of Contracts of Service Ordinance, 1963, an employer may not dismiss a worker for alleged misconduct unless such dismissal is effected within seven days after the employer becomes aware of such misconduct. What the employer must, under the section be aware of is the employee's misconduct, that is to say, not merely of acts or omissions and circumstances that may constitute misconduct but of acts or omissions and circumstances which would allow an employer, upon a reasonable view, to reach the conclusion that the employee had been guilty of that type of gross misconduct which alone entitles him to dismiss an employee summarily; what section 6(2) requires is that the dismissal be affected within seven days after the employer is in possession of such information as ought to satisfy a reasonable employer that the worker is guilty of misconduct. The time operates from that moment.

[124]*1984 SCJ Record No.3443*

[125]*1981 MR 189*

[126]*1979 (IC) Case No 35/79*

[127] *1993 SCJ Record No 4721*

[128] *1991 SCJ Record No 4608*

[129] *Randburg Town Council v National Union of Public Service Workers & Others (1994) 15 ILJ 129 (LAC)*

[130] *(1997) 3 BLLR 321 (CCMA)*

[131] *CA Parsons Ltd v Mclaughlin (1978) IRLR 65. See also Anderman, Labour Law: Management Decisions & Workers Rights (2ed) 142-143*

[132] *(1997) 5 BLLR 632 (CCMA)*

[133] *(1999) 7 BALR 792 (CCMA)*

[134] *Ibid at 795A*

[135] *See further Grogan, Workplace Law (1999) 147; Le Roux & Van Niekerk, The South African Law of Unfair Dismissal (1994) 174-6.*

[136] *In Henn v Eskom (1996) 6 BLLR 747 (IC), although the employee was absent from work due to stress related illness for a period of 5 months in 2 years and his dismissal was principally due to his refusal to return to work after he had been given clear instruction to do so constituted insubordination, the Industrial Court found the dismissal to have been procedurally unfair because the employer had not adequately consulted the employee regarding his illness, or taken it into account at the appeal stage. A hearing was never held although this could have been remedied by a full appeal, the employee was never given a chance to lead evidence or state mitigating factors even at the appeal stage. The dismissal was held to be procedurally unfair. See also Sibiya v NUM (1996) 6 BLLR 794 (IC); Sondarha & Ors v Crichley Dairy Indwe (1996) 9 BLLR 1186 (IC).*

[137] *Slagment (Pty) Ltd v BCAWU & Ors (1994) 12 BLLR 1 (AD).*

[138] *Reckitt & Coleman SA (Pty) Ltd v CWIU & Ors (1991) 12 ILJ 806 (LAC) at 813B-D; Maphopa v FAWU (1994) 11 BLLR 48 (IC) at 55A-C.*

[139] *Anglogold Ltd v NUM obo Macucule (1999) 8 BALR 971 (IMSSA).*

[140] *TWU obo Mabele v Autonet (1999) 9 BALR 1164 (IMSSA).*

[141] *Director: Mineral Development, Gauteng Region & Anor v Save the Vaal Environment & Ors 1999(2) SA 709 (SCA) at 718J; Chauke & Ors v Lee Service Centre CC t/a Leeson Motors (1998) 19 ILJ 1441 (LAC) at 1451 para 46; Majola & Ors v D & A Timbers (Pty) Ltd (1997) 18 ILJ 342 (LAC).*

[142]*Council for Industrial & Scientific Research v Fijen (1996) 6 BLLR 685 (AD).*

[143]*Ngindana v Grahamstown Municipality (1994) 11 BLLR 68 (IC).*

[144]*South African Breweries Ltd v FAWU obo Hlatshwayo (1998) 6 BALR 782 (IMSSA).*

[145]*S186 defines dismissal as constituting five categories of termination, namely: (a) termination by notice; (b) termination of fixed term employment with reasonable expectation of renewal; (c) refusal to allow an employee to resume work after maternity leave; (d) selective re-employment; (e) constructive dismissal.*

[146]*Badenhorst v GC Baars (Pty) Ltd (1995) 16 ILJ 1596 (IC); (1995) 10 BLLR 19 (IC) at 26; Schmahmann v Concept Communications Natal (Pty) Ltd (1997) 18 ILJ 1333 (LC). This issue has been extensively considered in the judgment of Zondo J in Schweitzer v Waco Distributors (A Division of Voltex(Pty) Ltd) originally reported in (1998) 10 BLLR 1050 (LC) but now replaced with (1999) 2 BLLR 188 (LC).*

[147]*In Schweitzer v Waco Distributors, supra. The Namibian Labour Court decision in Namibian Development Corporation v Visagie (1997) 18 ILJ 657 (LCN) is to the same effect.*

[148]*S187, Labour Relations Act 1995.*

[149]*(1986) 7 ILJ 318 (IC)*

[150]*Ibid at 325*

[151]*Ibid at 326 E-F*

[152]*Ibid at 325 A-F*

[153]*(1987) 8 ILJ 517 (IC)*

[154]*Ibid at 521-2*

[155]*Ibid at 522F*

[156]*(1987) 8 ILJ 366 (IC)*

[157]*Ibid at 373 G and 375 E-F*

[158]*In Dube & Ors v Nasionale Swiesware (Pty) Ltd 1998 (3) SA 956 (SCA) at 969F, it was held that there is a limit to which courts would insist on the giving of an ultimatum or holding of a hearing.*

[159]*(1996) 6 BLLR 697(AD). See the article by Fabricius, "The Dismissal of Strikers: A New Value Judgment? National Union of Metalworkers of South Africa v Vetsak Co-op Ltd & others (1996) 17 ILJ 455(A)'*

[160]*See also per Ngcobo AJP in Triple Anchor Motor (Pty) Ltd & Anor v Buthelezi & Ors (1999) 20 ILJ 1527 (LAC) para 36.*

[161]*(1997) 4 BLLR 355 (A).*

[162]*(1999) 20 ILJ 1859 (LC)*

[163]*Ibid at 1863-1864 para 17.*

[164]*(1999) 20 ILJ 1867 (LC) para 107.*

CHAPTER 6

Conclusion and a Proposal Towards a Mauritian system of Legal Regulation of Procedural Fairness within the Context of Dismissal for Misconduct Comparative to the South African Unfair Labour Practice Proceedings.

6.1 Conclusion

In looking for an apt conclusion for this legal treatise an important question needs to be answered. What was the rationale for this research?

The topic under research was: The Mauritian Law of Procedural Fairness within the context of dismissal for misconduct. A comparative study with the South African Doctrine of unfair labour practice. The focal points of the theme were:

a) to discuss and critically examine, from a comparative perspective, the concept of procedural fairness in Mauritius and South Africa within the limits of unfair labour practice jurisdiction; and
b) to make proposals towards a legal regulation of procedural fairness within the context of dismissal for misconduct in Mauritius.

In the treatment of the subject matter some interesting common features as well as, I would not say differences, but, unique legal concepts to suit the respective labour law jurisdictions, related to the application of procedural fairness to pre-dismissal hearings in Mauritius and South Africa, have been highlighted. They are discussed as follows:

6.1.1 Common to both countries are the basic principles that regulate the employment relationship. The common law contract of employment has its basis on the general principles of contract which gives either party

(employer/employee) to terminate the contract by giving the required notice. But an employee can always be dismissed with notice on no notice at all. It means that, as was stated in Raman Ismael v United Bus Service[1], the employer has the inherent discretionary power under the common law to dismiss the employee at will more specially, as Grogan[2] has put it, where the employee is charged with gross dismissible misconduct which in legal parlance, is a breach of a vital term of the contract, irreparably damaging thereby the mutual trust and working relationship between an employer and an employee.

Within this developed doctrine of dismissal due to misconduct, lies in both countries a juridical foundation which is concerned with the concept of abuse of disciplinary power by the employer and the prevention thereof. Imbibed with this trend of thought, and with a view to bring relief to unfairly dismissed employees, both countries have infused into their respective labour jurisprudence the administrative law principles of natural justice. It effectively means that the courts of both countries have, beyond the strict common law rules the unfair dismissal introduce the public law remedy to rationalize the decision of an employer in this regard. Thus for methodological reasons, the courts have set two broad requirements to make a dismissal fair, namely, that the termination of the contract must not only be substantively fair, but it must also be procedurally fair. Hence to justify a dismissal, the employer needs not only have a good reason, he must also establish the facts through a fair procedure.

But the problem that both countries had to address was that procedural fairness which derives its source from the rules of natural justice, namely, audi alteram partem rule and nemo index in sua causa, have no place in the realm of the common law principles of contract. It has no provision for, in case of gross misconduct, to provide an opportunity to an employer to be heard so as to rebut the allegations or plead in mitigation.[3] In Thandroyen v Sister Annucia of another the court had, therefore, stated:

> *"... the principles of natural justice will only apply if the parties have imported them into their contract. To give effect to this provision in contract, the parties should have provided specifically something in the nature of a tribunal to decide matter affecting their relationship. But if the contract has no such provision, then the affected party (the employee on dismissal) will have no recourse to any public law remedy."*[4]

Bulbulia M. however is of the opinion that "it should be borne in mind in this context, that failure by the employer to observe the requirements of a procedure forming part of the employee's contract is a breach of that contract and may be an unfair labour practice."[5]

Thus the prevailing legal position under the common law principles of contract in Mauritius and South Africa is that, unless the parties have specifically agreed upon setting a tribunal to discuss pre-dismissal issues, there is no obligation on the employer to warn the employee before finally dismissing him/her, or to conduct an enquiry before dismissal; or to grant the employee an opportunity to improve his/her conduct or performance; or to consider alternatives of dismissal; or to provide reasons for dismissal. But if there is such a provision, then the court will compel the employer to adhere to it.

Having identified the deficiency of the common law principles of contract, the research focused on an important question, i.e., how did the Mauritian and South African labour jurisprudence circumvent this deficiency of the common law principles, and provided relief to employees whose dismissals have been procedurally unfair?

In *Martin v Murray*[6], Marais J. seemed to understand the predicament, but shifted the onus to find a solution beyond the common law principles to statutory provisions. He said:

> *Truisms about the innate dynamic capacity of the common law to accommodate changing societal mores and policy in an evolutionary manner provide no justification for the propounding of an aggressively intruisive philosophy of*

judicial interventionism in the common law relating to employment. The common law does not swing about like a weathervane in whatever direction any passing gust wind may blow. The legislature is the only institution which can respond quickly and effectively to frequently fluctuating circumstances of socio-economic nature.

The Mauritian law of "unjustified dismissal", therefore, found remedy in the form of sections 109-112 of the Industrial Relations Act 1975 and section 32 of the Labour Law Act 1975 where the principles of procedural fairness have been enshrined which makes it mandatory on the employer to adhere to the requirements of natural justice and to give the employee a fair opportunity to "answer any charge made against him."[7]

In South Africa this intervention into the law of unfair dismissal was effected by the introduction of the unfair labour practice concept into the Labour Relations Act 94 of 1979 by stating that an unfair labour practice was `any labour practice which in the opinion of the industrual court is an unfair labour practice'. With the task of defining the concept being left to the industrial court, the latter was mandated to develop and ensure compliance with fair employment standards. From the influences of the common law, the ILO Recommendations and Conventions, the industrial court, therefore, in its pre-occupation to provide procedurally fair-pre-dismissal rights, evolved a series of strict and quasi legal requirements which were enumerated in *Mahlangu v G M Neltak, Gallant v CIM Delta.*[8]

Unlike South Africa, Mauritius did not set a series of strict and quasi-judicial requirements for procedural fairness. What it did, in fact, established were the minimal but important requirements which essentially concerned themselves with the legality of the means or the manner used by the employer in reaching the decision rather than the correctness of the decision itself. Although the decision might have been correct in given circumstances, nevertheless it was unfair as it was made by a biased tribunal[9] and without affording the dismissed employee an opportunity to present his/her case and to challenge prejudicial allegations against him/her.[10] In the first instance, its was decided, the employee must be informed of the charge by being

given a proper notice.[11] The employer should allow cross examination of witnesses[12], and should not deny the employee of the right to be represented.[13]

Thus with the advent of the Industrial Relations Act and the Labour Act in Mauritius, and the unfair labour practice concept in the Labour Relations Act in South Africa, though the common law remains the primary source which governs the contract of employment and its termination due to the misconduct of an employee, the arbitrary power of the employer to dismiss at will has become subject to judicial scrutiny, and has made the relationship between the employer and the employee a partnership where equity and fairness play a predominant role. On the basis of proper interpretation of these statutes the courts now refrain from treating misconduct as a criminal offence, and have become more sensitive to the wider social and economic implications of their decisions. The courts have also become mindful of the fact that a large number of employees associate together in trade unions with the aim of providing a framework within which disputes are resolved either by negotiation, arbitration or determination, and they are therefore entitled to assistance from their union representatives during predismissal hearings.

These rights, as entrenched in the Constitution of both countries[14], have regulated to a greater extent, the disciplinary procedures at the workplace. While in Mauritius any deviation from the procedural rules the court has termed it `unjustified dismissal, in South Africa any conduct by the employer which is contrary to the principles of equity and fairness, is commonly known as unfair labour practice. Although different terminologies might have been used to denote concept of procedural fairness, there is, however, a distinct parallelism in the substance and application of the concept in Mauritius and South Africa.

Thus from the decided cases, the labour jurisprudence of both countries have sought to establish whether or not the manner of dismissal is germane to the question whether a dismissal is fair or unfair when the employer has failed to follow fair procedures during pre-dismissal hearings. The courts of both countries have emphasized that the essence of fair procedure is the conduct of an investigation, an enquiry which will

enable the employer get to the root of the matter, and if there be an allegation of misconduct or poor work performance, whether the employee committed the act or whether he was indeed incompetent. After all, it is he, the employer, who bears the onus of establishing that the misconduct in fact occurred or that the employee was incompetent if he relies on any of these grounds as justification for the dismissal.[15] In any case, an investigation will enable the employer to hear the other side of the story. This requirement which, at common law, is sometimes referred to as the audi alteram partem rule is designed to facilitate accurate and informed decision making.[16] At least it "satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power.[17] It is about mutual respect, understanding and discipline in modern industrial relations. It is about predictability, harmonious personnel relationship, and a sound recipe for industrial peace. That the right to be heard is so vital to the adversary system of adjudication is epitomized by the speech of Megarry J. who once said: "As everyone who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a charge."[18] Hence, all that the courts are trying to impress upon is that the ideals of procedural fairness can only serve its purpose at the best when an employer makes a reasoned decision based on consideration of relevant matters and discarding the irrelevant ones.[19]

In the application of these requirements the courts in Mauritius and South Africa have found that disciplinary proceedings can range from completely informal to formal in nature. In cases, specially where it is a small business or it involves a domestic servant, the concept of procedural fairness requires less than trial-court peculiarities. In this context Asimow has provided different adjudicatory models where hearings could be described either as a full-scale formal adjudication, or informal type, or where the need for an enquiry is entirely dispensed with because the situation is characterized by an extraordinary need for speedy and routine disposition. In fact,

many of the cases decided in Mauritius and South Africa are quite illustrative of types of models that are suitable for different circumstances.

Inspite of the distinction in the degree of formality, it appears, particularly in South Africa that "many employers took the prudent view and invested their disciplinary procedures with the trappings of a judicial process."[20]

In adopting or adapting such a process that manifests clearly in the South African law of procedural fairness, the Mauritian jurisprudence has to note the uncertainties that the South African system is riddled with. Employers, for instance, have allowed legal representation not because it was fair, but because they feared the sanction of the Industrial Court if they did not allow it. As a result technicalities and point-taking normally associated with a judicial process, have crept into disciplinary hearings. Procedure was thus followed for the sake of procedure:

> ***`The elaborate procedures with which employers were expected to comply in the workplace therefore served little purpose other than to satisfy the court that its procedural guidelines had been followed prior to dismissal. The result was the insistence on procedure for the sake of procedure ...'***[21]

It is perhaps wrong to state, as inferred in the above question, that the Industrial Court consistently called for formal procedures since Industrial Court judges often warned against it.[22] However, the Court did broadcast confusing signals and perhaps as a result of this inconsistency, more than anything else, employers have developed formal procedures.

There also seems to be a common approach to the courts understanding with respect to remedies for non-compliance of procedural fairness in predismissal hearings in Mauritius and South Africa.

In *the Medine sugar Estate Co. Ltd v Wodally*[23], for instance, the Supreme Court of Mauritius stated:

"It must be recalled that Bundhoo v Mairitius Breweries Ltd 1981 MR 15 was a case where the court held that although, in certain circumstances, an employer may be justified in terminating the employment of a worker whose conduct is suspect in some serious measures, nevertheless where no hearing is granted to the worker in order to give him an opportunity to dispel the suspicion, then there is a violation of section 32 (2) (a) of the Labour Act justifying the grant of severance allowance at a punitive rate."

From the reasoning of the court, it is shown that an employee's dismissal though substantially fair but procedurally unfair, the aggrieved employee may not be reinstated but may be granted severance allowance at a punitive rate.

In South Africa, although the court has favoured the above question, it has remained quite undecided in varying circumstances. No clear guidelines have emerged from the industrial court jurisprudence concerning what does it regard as an appropriate remedy where a dismissal is found to be substantially fair but procedurally unfair.

In *National Automobile and Allied Workers Union v Pretoria Precision Castings (Pty) Ltd*[24] the workers were reinstated with six months' pay period since dismissal but in *De Villiers v Fison Pharmaceuticals (Pty) Ltd*[25], where the procedure was held to be grossly irregular, reinstatement was nevertheless not ordered since the court felt the employer had good reason to dismiss. The court only ordered payment of compensation. In *National Union of Metalworkers of SA & another v Barlow Tractors Co.*[26] the court awarded compensation for the period of the employee would have remained in employ if the respondent had followed proper procedures. Since the amount could not be calculated mathematically the court awarded the sum of R80,00. This approach was also echoed in *Farmec (Edms) Bpk h/a Northern Transvaal Toyota v Els.*[27] In this case the court did not award any compensation, since, the court held, if a fair procedure was followed, it would have been on the same day of the original dismissal and a fair procedure would still have resulted in dismissal. The employee thus suffered no damages as a result of the unfair procedure. These orders seem to contain something of what was later envisaged in section 194 of the LRA. In *Misch v Edgard Retail Trading (Pty) Ltd.*,[28] the Industrial Court ordered neither reinstatement

nor compensation, but merely issued a declaration to the effect that an unfair labour practice was committed since the dismissed employee could not prove any patrimonial loss as a result of her procedurally unfair dismissal.

6.1.2 Shortcomings in the Mauritian Law of Procedural Fairness

Since the Mauritian labour jurisprudence has not created an unfair labour practice jurisprudence, the court has solely relied on the limited provisions of the Industrial Relations Act and the Labour Act. Thus many contentious issues implicit in the application of procedural fairness to pre-dismissal hearings are either inadequately answered or are left unresolved.

Crucial elements of procedural fairness such as the employer's knowledge existed at the time of the dismissal (the test of reasonableness); rejection of any approach involving hindsight and hypothesis; absolute affirmation of the principle that there is a lack of equity and fairness inherent in the failure to accord an employee pre-dismissal fairness, and of the principle that the question whether a dismissal is fair cannot be judged without considering the manner of the dismissal. Besides these important procedural requirements, neither the industrial court nor the supreme court of Mauritius have given sufficient direction on what they would consider as `exceptional circumstances` where the employer would be exempted from holding disciplinary hearings.

In addition to the above, during the course of discussion in the aforegoing chapters, there are certain distinct and significant departures from the orthodox principles that have emerged in the South African labour jurisprudence of which the Mauritian law of procedural fairness has to take cognizance. No doubt, with intelligent and wise borrowing, Mauritius will be able to institutionalise a guiding standard on procedural fairness within the context of dismissal due to misconduct. The principles discussed are:

(a) Initially, the South African common law principles distinguished between a `pure master and servant' relationship and an ordinary

master and servant relationship. The purpose of this distinction was to categorise employees who are governed by statutes and those governed by the common law principles. The right to natural justice, it was held, is only applicable to statutory employees, while in relation to other common law employees not governed by statute, such right is not readily available. But since the decision of Administrator, Transvaal v Zenzile and others[29] there is no such distinction between the two types of employees, and procedural fairness is applicable to both in cases of dismissal far misconduct or otherwise.

(b) The South African labour jurisprudence does not make any difference between a summary dismissal and dismissal on notice for procedural fairness to be applied. It is only under exceptional circumstances that procedural fairness can be dispensed with.

(c) In the early stages of legal development the rules of natural justice had application only to judicial and quasi-judicial proceedings in which the authority concerned was required by law to act judicially. Thus the rules of natural justice were held not to be applicable to situations where the administrative body was acting in a purely administrative capacity. However, since the decision of *Administrator, Transvaal & others v Traub & others*[30] the classification of judicial, quasi-judicial and administrative function of a deciding authority was rejected. Corbett C J said: "it was artifical reasoning based on the `classification' approach that led to some of most unfair denials of natural justice. The requirements of procedural fairness are, therefore, applicable to judicial, quasi-judicial as well as administrative function of an adjudicating authority.

(d) Since the landmark decision of Traub the court has broken away the right-privilege dichotomy in administrative decision making, and paved the way towards a more flexible and satisfactory approach to the application of the rules of natural justice. Against this background, the current labour relations practice in South Africa has developed to the point where an employee can claim legitimately an expectation to be heard before he is deprived of his livelihood, either by notice or otherwise. Hlophe has summarized this aspect of the law clearly in his article, 'The Doctrine of Legitimate Expectation and the Appelate Division':[31]

"Thus an employee ... can use the legitimate doctrine to protect his employment where a long standing employment practice has been breached or when certain assurances have been made by the employer".

(e) Another point, which may not necessarily be a unique feature of the South African labour jurisprudence but may necessarily be called when compared with the Mauritian law of procedural fairness, is that court in South Africa has focussed quite extensively on whether or not procedural fairness is applicable to situations where employees are charged with collective guilt and sentenced to collective sanctions on this issue, the court has, however, taken quite a stern position when employees are dismissed 'en masse', specially during a strike situation, without being given an opportunity to be heard individually or in a group. It was held in *NSCAWU v Coin Security Group (Pty) Ltd t/a Coin Security*[32] that the "employer cannot dismiss the workers collectively because the concept of collective guilt is wholly foreign to our system and repugnant to the requirements of natural justice".

This position has not been well canvassed in the Mauritian labour jurisprudence.[33] The decision stated above in the NSCAWU case is no doubt a way forward for the Mauritian law of procedural fairness so as to make it more dynamic and expanded in perspective..

(f) There is still vagueness and confusion surrounding the legal position whether or not an employer has a duty to provide an opportunity to a senior executive before dismissing him or her for misconduct. The Mauritian court has given very little direction on this matter. It is, however, presumed that an employee at a higher level of management should be proficient in his/her job and be thoroughly conversant with the company's policy and code. Failure to adhere to any of these may lead to his/her instant dismissal, mostly without a hearing. But the South African court has provided adequate protection to a senior executive in *Basset v Servistar (Pty) Ltd.*[34] Rees SC said:

> ***Basset was not informed of the charges against him at the beginning of the enquiry and could not have been expected to know what the charges, were. Basset, although a senior employee, was not allowed assistance at the enquiry and was not permitted to tape record the proceedings; the company refused Basset a copy of the record of the proceedings; he was not given a proper opportunity to address the enquiry on the appropriate penalty and his part service and other mitigating circumstances were not taken into consideration. The termination of Basset's employment was thus prima facie substantively and procedurally unfair.***

These unique features in the South African labour jurisprudence are quite consistent with the modern approach to workplace governance which can effectively enrich and benefit the Mauritian law of `unjustified dismissal`.

6.2 Proposal Towards a Mauritian System of Legal Regulation of Procedural Fairness within the Context of Dismissal for Misconduct Comparative to the South African Unfair Labour Practice Proceedings.

Before conceptualizing and formulating a proposal of this nature, it is important to understand the form and structure of the foundation on which such a proposal is going to be laid. As the subheading indicates, the structural form of the proposal should be conceived to reflect the South African unfair labour practice proceedings. Hence, a brief note on the doctrine of the unfair labour practice will give a greater insight into its scope and limit of application.

From a glance at the Labour Relations Act of 1979, 1988 and 1991, it is clear that the doctrine of unfair labour practice is not exclusive to the law of unfair dismissal, but is an all pervasive concept that is applicable to every situation in the industrial relations practice that is deemed to be unfair. In the present context, to give a proper dimension to the proposal the concept has to be modelled within the limits of procedural fairness applicable particularly to dismissal for misconduct.

It is also to be noted that, unlike the 1956 and 1988 Labour Relations Act, the 1995 Labour Relations Act does not contain and provide an 'opentextured' definition of unfair labour practice. Instead item 4 (1) of the schedule and of the Code of Good Practice has set out the requirements for a fair pre-dismissal procedure reflecting whereby the content of the doctrine of unfair labour practice which the court has, during the course of their numerous judicial decisions, given substance. Put it in a different way, item 4 (1) has codified the requirements of procedural fairness which is nothing else but the substance of the doctrine of unfair labour practice that has been enriched and articulated by the industrial court for decades.

The Code of Good Practice in the present study, can very well serve as a point of departure in establishing a situation for a Mauritian system of legal regulation of procedural fairness within the context of dismissal for misconduct.

Therefore, in formulating the proposal the following aspects need careful examination:

(i) **The general format of items 4 (1) of the Code of Good Practice**

(ii) **The perspectives of a modern and fair Disciplinary Code.**

(iii) **The advantages and disadvantages of a code similar to item 4 (1) for Mauritius.**

(iv) **A draft proposal for the Mauritian law of procedural fairness in the context of dismissal for misconduct based on item 4 (1) of the Code of Good Practice and the South African promotion of Administrative Justice Act.**

6.2.1 The General Formal of Item 4 (1) of the Code of Good Practice

The drafters of the Code signalled a clear departure from the IC's cumbersome and formalistic requirements for procedural fairness. It indicated this departure by referring to an investigation as opposed to an enquiry. The drafters further emphasized this by stating that the investigation "need to be a formal enquiry". This move towards a less stringent approach was successfully illustrated in *Mjaji v Creative Signs*[35] where the Commissioner established procedural fairness in the absence of a disciplinary enquiry. The *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd and another*[36] is a further case where the interpretation of the Code was accurately applied.

It was also discussed through various cases that the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code, depends on a multifaceted factual enquiry. This enquiry would include, but would not be limited to, the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's workforce, the position which the employer occupies in the marketplace and its profile therein, the nature of the work or service performed by the employer, the relationship between the employee and the victim, the impact of the

misconduct on the workforce as a whole, as well as on the relationship between the employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct "had the effect of destroying or of seriously damaging the relationship of employer and between the parties".[37]

A study of IC cases further showed that requirements for procedural fairness were rigorous and often had a juridic nature. One of the most influential cases, *Mahlangu v CIM Deltak, Gallant v Deltak*[38] illustrated this well and provided employers with a set of requirements, which soon became the "10 commandments for procedural fairness." These requirements placed time consuming obligations of a technical nature on employers. In my opinion the Court became rigid and ultimately counter-productive in its approach to procedural fairness.

A comprehensive search of South African Labour Law Reports for Case Law reflecting the minimalistic approach which was the initial intention of the Code failed to produce strong evidence of this practice. In *Govender v Navanthem Pillay Co.*,[39] *FAWU v Snoek Wholesalers (Pty) Ltd*[40] and *SADTU v Marine Taxis CC*[41] where the employers failed to follow a fair procedure, the CCMA explained its minimal requirement for fairness. It therefore follows that although the Commissioners are stating that they require non-formal procedures, when "push comes to shove" a comprehensive procedure is required. This is illustrated in *Gumede v Colors*,[42] where the employee was caught red-handed committing theft to which she admitted in the presence of the police. The Commissioner however found that "the dismissal was not preceded by a fair procedure and was thus unfair." This case is a typical example of a situation where the employer applied minimalistic requirements set by the Code but the Commissioner was not able to interpret the Code as intended by the drafters. This and other cases to which I have referred in the body of this research, reflect the variable decisions made by the CCMA/LC resulting in inconsistent jurisprudence to date.

One of the reasons for the technically loaded requirements by CCMA Commissioners could be the Collective Agreements by which employers are bound which are more stringent than the Code. Where agreements are in place the employer has a duty to follow these and the

CCMA's requirements of employers (especially smaller Companies) who are not bound by Collective Agreements; yet are required to follow strict procedural requirements. In *Power Rig (Pty) Ltd v Grobler*[43] the Commissioner explained that he was convinced that "considering that the employer is a small business, the dismissal was for a fair reason." He continued that the employer had however failed to follow a fair procedure as required by Item 4 of Schedule 8 of the LRA.

It is expressly stated in the LRA, 1995, that "the form and content of the disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a large business will require a formal approach to discipline."[44] Contradicting results have however unfolded regarding more stringent requirements expected from smaller companies whilst at times larger employers were allowed less technical procedures.

The CCMA has attempted to indicate that the Code determines fairness within the unique circumstances of each case. The Code specifically states that a "rigid approach should not be categorically applied"[45] and categorical statements which ignore the larger context should therefore be avoided. I support this insofar compartmentlising elements for procedural fairness is neither an efficient nor an effective manner for determining procedural fairness, yet I have referred to cases where the CCMA has fallen into this trap. The intention of the Code should be the investigation of the case as a whole, the totality of the employer's actions need to be tested for fairness.

In the two cases cited, the CCMA has successfully applied this requirement. In *FAWU v Snoek Wholesalers (Pty) Ltd*[46] the CCMA found that the employer had "largely followed the provisions of a fair disciplinary procedure." These include adequate notification of the hearing and charge; holding of a disciplinary hearing; allowing representation and the employee a chance to respond to allegations." In *NEWU v Durban Deep Wholesale Meat*[47] the Commissioner stated that "viewed in an overall context" there had been procedural fairness. He further found that on balance, not enough evidence to support a finding of procedural unfairness could be found.

My analyses of CCMA/LC elements acting as a pre-requisite for procedural fairness have provided a somber picture characterized by inconsistencies. The CCMA jurisprudence in many cases reflects the requirements as stipulated by the jurisprudence of the IC. Nevertheless there are cases where Commissioners have accepted a minimalistic approach. Recognition Agreements may be a contributing factor, many cases have shown that this is not always in fact true. I have furthermore tried to identify patterns regarding smaller employers – in some cases my hypothesis regarding less stringent requirements was confirmed, in others not.

6.2.2 The Perspectives of a Modern and Fair Disciplinary Code

It is submitted, in this study, that item 4 (1) of the Code has provided reasonable requirements for a brief pre-dismissal procedure, but it has not covered all aspects of potential and procedural pitfalls, which give the appearance of a mini court trial. In most of the instances, for example, where procedures were held to be unfair, it appears that the unfairness related to the absence of natural justice rather than the requirements of the Code. This illustrates that procedural fairness does not depend on whether the Code as such was observed, but whether a fair procedure was followed according to the rules of natural justice. Thus this attitude of those applying procedural fairness to dismissal cases may be considered as acting against the spirit of the Code.

What is then the spirit of the Code? The commissioners, in numerous cases, have actually appreciated the new order which the drafters of the Code endeavour to introduce. In *Sehomo/D & K Coffin Manufacturers*[48] it was submitted:

> ***According to the Code of Good Practice it is not necessary that there be a formal enquiry. Therefore, I do not think the applicant's contention that what was held was a `discussion' rather than an enquiry is material and I am satisfied that an investigation: as envisaged by the Code was held."***

Similar views were expressed in *Cornelius & others v Howden Africa t/a M & B Pumps*[49] where it was stated:

> ***"it does not matter whether each of the procedural requirements have been meticulously observed. What is required is for all the relevant facts to be looked at in the aggregate to determine whether the procedure adopted was fair. One must guard against the rigid imposition of judicial style proceedings in appropriate situations."***

Thus, following the reasonings of the two judicial decisions, the framework contemplated for Mauritian law of procedural fairness should take into account of not over judicialising the pre-dismissal hearings, but allow greater flexibility in dispensing justice. Hence, in formulating the proposal, the following points may be considered as important since they reflect the sentiments of modern democratic values in labour management:

6.2.2.1 The Terminology

In an effort to give disciplinary proceedings a less judicial countenance, it is suggested that employers endeavour to remove terms normally associated with a court process from their disciplinary codes and replace it with more neutral terms. The following are only examples:

> **Initiator instead of prosecutor; disciplinary investigation instead of trial or hearing notification to attend disciplinary investigation instead of charge sheet; employee instead of accused. Report instead of judgement. Sanction instead of penalty, punishment or sentence.**

6.2.2.2 Procedure for Enquiry

As was mentioned above it would be very difficult to imagine a disciplinary enquiry that is procedurally correct in all respects without it assuming the appearance of a court trial. For that reason it is suggested that the enquiry (both during the initial enquiry and sanction stage)

follows the traditional order of proceedings in a court case viz: opening statements, examination-in-chief, cross-examination, re-examination and closing statements.

It suggested that the following deviations from the traditional procedures be allowed:

1. In general the chairperson should apply the same rules of evidence in respect of leading questions and hearsay. However the chairperson should, depending on the skills of the employee or his representative, allow some leniency in this regard. In cases where documentary evidence is intended to be used, it should be discovered, but once again the chairperson should allow some leniency.
2. Unless the matter is particularly complicated, it is suggested that 48 hours notice of the enquiry is enough.
3. The major shift away from the traditional process, it is suggested, is perhaps in the role of the chairperson. It is suggested that the chairperson take an active role in the proceedings and ask questions, not only for clarification purposes, but also if it is believed that the representatives neglected to ask certain questions. In addition, if the chairperson believes that additional witnesses should be called, he or she should be free to call those witnesses and question them.

Support for this notion has also been expressed in the labour court in South Africa:

> ***'What the Code requires on the part of the employer is an investigation into allegations of misconduct, not the dispassionate court-like hearing by a notionally independent person that was a requirement of the jurisprudence developed by the Industrial Court. An investigation, by definition, requires the active participation of the employer to establish the substance of any allegation of misconduct by the employee concerned.'***[50]

However, the chairperson will have to be careful not to create a perception of bias. In *NUM/CSO Valuations (Pty) Ltd*[51] the chairperson of the disciplinary enquiry made a telephone call to establish certain facts. On arbitration this was held to be unfair. The correct approach for the chairperson, it is submitted, would have been to call the witness and to allow

both parties to cross-examine him. In another matter *Aranes/Budget Rent A Car*[52], the chairperson made observations and expressed criticism during the hearing. On arbitration it was held to be unfair since it created the perception that a finding of guilt was preordained. These comments should have been made in the finding of the chairperson. The following conduct by the chairperson in this case was held to be unacceptable viz:[53] the tone by the chairperson in ruling against cross-examination, the prominent role that the chairperson played in the enquiry – overshadowing the facilitator, sceptical observation, interruptions and cutting short of cross-examination and warnings not to lie before the conclusion of evidence.

In a way the employer is a judge in his own case if the chairperson is also in the employ of the employer and for that reason additional care must be taken to select a chairperson who has minimum previous contact with the employee. This will not always be easy in a small business, but the following remarks (in a judgement where a witness during the initial inquiry acted as chairperson of the appeal hearing) can be used as a guideline to determine whether the particular person should act as chairperson:

> *'The principle seems to be this: while allowance will be made for the unavoidable practicalities of previous contact, personal impression and mutual reaction in the employment relationship, any further feature which precludes the person hearing the complaint from bringing an objective and fair judgement to bear on the issues involved – such as bias or presumed bias stemming from a closed or prejudiced mind or from a family or other relationship – will render the procedure unfair."*[54]

A question that the chairperson should ask him/herself before the enquiry commences, is to what extent he/she will be able to give evidence in respect of the material issues at hand. If he/she can give evidence of that nature the person should not act as chairperson. This may be difficult in a small cash-strapped concern and the courts may look upon such a situation with more sympathy, but an outsider should be commissioned in such a case if possible.[55]

4. No right to internal appeal should be included in disciplinary codes. This only adds to the judicial nature of the proceedings. The appeal function is now in the hands of the CCMA.

Apart from the inquisitorial dimension, the enquiry, however will still be the same as the traditional South African court procedure. That is not to say that a disciplinary enquiry not following the aforementioned procedures and routines will necessarily be held to be unfair. Indeed, as was shown above, commissioners have from time to time held that procedures are fair despite the absence of all these elements. But the simple reality is that it is very difficult to accommodate all aspects of procedural fairness without the process of assuming judicial proportions.

The best that employers can therefore, do at this stage, unless clear guidelines emanate from the CCMA and the courts, is to keep the procedures as brief as possible, to introduce inquisitorial aspects to the disciplinary enquiry and to remove unnecessary procedures, such as appeals, from pre-dismissal codes.

6.3 The Advantages and Disadvantages of a Code Similar to Item 4 (1) for Mauritius

The remarks that follow are not intended to canvass the arguments for and against codification exhaustively, but merely to highlight some important considerations relating to the drafting of a proposal for Mauritius in line with Item 4 (1) of the Code of Practice of the South African Labour Relations Act.

One of the cogent reasons for codifying procedural fairness in the law of dismissal for misconduct, is the principle of legality. This requires that it be relatively easy for employers, employees, trade unions and legal practitioners to ascertain the contents of procedural fairness so that they may know what the law forbids under the sanction of unfair labour

practice, and may conduct themselves in such a way that they do not transgress the norms and standards of procedural fairness.

As the law of procedural fairness has transcended the limits of private law to find remedy in public law, it may be argued that it may as well qualify for codification. This aspect of the law, though did not enjoy primary importance in the labour jurisprudence, can be regarded as 'democraticatisation of the law of unjustified dismissal', in that it should become easily accessible to all employees whose job security is threatened at the workplace.

Another argument in favour of codification of the requirements of procedural fairness is that such codification will afford an opportunity to state the law of procedural fairness as a whole, to regroup the rules and eliminate inconsistencies by systematizing the underlying legal principles.

Because of various discrepancies in the application of the requirements of procedural fairness, one may look at the codification as a measure to create a fixed starting point for ascertaining what procedural fairness is. It will, no doubt, constitute an official and authoritative statement of the rules of conduct which employers will be obliged to conform upon the sanction of their decision being declared unprocedural and, therefore, invalid.

There is one argument, however, that may be raised against the codification of procedural fairness. It is that it causes the courts to lose their power to amend or adapt the law to changing circumstances. According to such critics, codification usually leads to 'ossification' of the law and codification of the rules of procedural fairness, will, therefore, tend to make the rules immutable. This may be one of the strongest if not the strongest argument against codification.

My answer to this argument is that the code can be amended or updated in order to reflect new ideas about the dynamics of procedural fairness. It is to everyone's common knowledge that the parliament in any country has the power to change law after proper research and

deliberation. Adapting law to a changing society is, therefore, more a task for the legislature than for the judge.

In this regard, judicial creativity, it should be understood, is based largely on analogies, and since analogies, through case laws on procedural fairness have their limits, defining and providing broad contents to procedural fairness should be more a legislative than a judicial responsibility. Furthermore, the power of the industrial courts and even the supreme court to identify and remedy the shortcomings in the law is limited. The courts have normally to wait until a suitable set of facts arise before they are in a position to intervene, whereas the parliament is free to change the law whenever it is required.

It should also, however, be considered that the codification will not cause the courts to become mere rubber stamps in a process of mechanical application of the code. The courts will, undoubtedly, continue to play a creative role in interpreting the provisions of the code. As the code will not contain an exposition of each and every rule of procedural fairness down to the finest detail, it will be left for the courts to fill in the details. Finally, it is also a known fact that a code should contain no more than guiding principles and should merely reflect the positive law in a series of clear, simple rules deliberately shorn of countless details.

6.4 A Draft Proposal for the Mauritian Law of Procedural Fairness in the Context of Dismissal for Misconduct Based on Item 4 (1) of the Code of Good Practice and the South African Promotion of Administration Justice Act 3 of 2000.

Disciplinary Procedures for Dismissal due To Misconduct

(1) The management shall ensure that fair and effective arrangement exist for dealing with disciplinary matters. These shall be agreed with the trade unions concerned and shall provide for full and speedy consideration by management of all the relevant facts.

1 (1) A fair disciplinary procedure shall be a formal procedure except in very small establishments where there is close personal contact between the employer and the employees.

1 (2) In order to give effect to fair disciplinary procedures, an employer shall:

(a) notify the employee of the allegations using a form and language that the employee can reasonably understand.

(b) allow the employee the opportunity to state a case in response to the allegations;

(c) provide the employee with a reasonable time to prepare a response;

(d) give an opportunity to obtain assistance of a trade union representative or a fellow employee or a legal representative of his/her choice, in serious and complex cases;

(e) after enquiry, communicate the decision taken, and preferably furnish the employee with written notification of that decision;

(f) inform the employee of any right to review or internal appeal, when applicable, to a level of management not previously involved; and

(g) provide for independent arbitration if the parties to the procedure wish to.

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(1986) MR 18where it was stated: "... it is settled law that the responsibility of ensuring the 'bon fonctionnement' of any enterprise rest, and must rest, with the management however constituted. One of the legitimate means of discharging that responsibility is the power to impose disciplinary measures with a view to sanction and discourage conduct affecting that 'bon fonctionment.'

And in UBS v Gokool 1978 MR it was also held that the employer had an inherent power to suspend a worker as a disciplinary measure for misconduct.

[2] *Grogan J., Workplace Law, 5ed. 2000, Juta & Co., at.132.*

[3] *J.C. Paul v Longtill (Mauritius Ltd). 1983 SCJ Record No. 2/83. It was stated: "it is now settled that an employer who avers having lawfully dismissed a worker must prove not only that he had reasons to do so but that the dismissal was effected in compliance with section 32 of the Labour Act." See also Tayab Ghoorum v A.G. Nab & P. & Co. Lafu SC5 No Record No.; Bundhoo v Mauritius Breweries (1981) SCJ 140; Tirvengadum v Bata Shoe (Mauritius) & Co. (1979) MR 133.*

[4] *1959 (4) SA 632 (N) at 639 F-640 B.*

[5] *Rampresad v B.B. Bread Ltd (1986) 71 LJ 367 (IC) at 373-4*

[6] *(1995) 16 ILJ 589 (IC)*

[7] *Ahmad Valira v Messrs Taylor Smith Stevedoring Co. Ltd. 1977 (IC) G.N. 322/76. It was held that the dismissal having admittedly been effected on the ground of misconduct' the failure to give the plaintiff an opportunity to answer the charge as now provided by section 32 (2) of the Labour Act must in my view be fatal to the defendants." The industrial court further stated: "In the case of Labour v Maurel M.R. 1968 p.170 the court considered the provisions of section7 of the then Termination of Contracts of Service Ordinance and held the view the requirement to give the worker an opportunity to answer the charge against him before his dismissal became finally effective was not mandatory ... section 32 (2) of the Labour Act is drafted differently and have no doubt that the requirement to give the worker an opportunity to answer any charge against him is now mandatory since the section provides that in case of failure to give such opportunity the dismissal shall be deemed to be unjustified.*

[8] *(1986) 7 ILJ 346 (IC)*

[9] *C. Marie v CIE des magasins Populaires Ltee 1989 SCJ Record No. 4205; UBS Co. Ltd v Roheeman 1986 SCJ No. 311*

[10] *Dunlallsingh v Central Electricity Board (1979) MR 191*

[11] *Riviere du Rempart Bus Service Ltd v Ranijan 1979 SCJ No. 347*

[12] *Mamode v Doger de Speville 1986 SCJ No.172; The Medine Sugar Estate Co. Ltd v Wodally 1993 SCJ 173*

[13] *Retreaders Ltd v Marie 1989 SCJ No.376.*

[14] *Section 10 of the Constitution of the Republic of Mauritius, and Section 24 of the Interim Constitution of South Africa and Section 33 of the Constitution of the Republic of South Africa.*

[15] *FGWU & Ors v Design Contract Cleaners (Pty) Ltd (1996) 17 ILJ 1157 (LAC) at 1168B-C.*

[16] *Per Olivier J.A. in M. & J. Morgan Investments (Pty) Ltd v Pinetown Municipality (1997) 3 All CR 280 (SCA) at 290C; per Marcus A.J. in Mtshali v CCMA & Ors (1999) 20 ILJ 2400 (LC) at 2405C.*

[17] *Per Milne J.A. SA Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) at 13B-C. See also per Hoexter J.A., Administrator, Transvaal & Ors v Zenzile & Ors 1991 (1) SA 21 (A) at 37E.*

[18] *John v Rees (1970) Ch 345 at 402.*

[19] *Municipal Council of Port Louis v Local Government Service Commission 1988 SCJ Record No.34694.*

[20] *Woolfrey D.: Pre-dismissal Disciplinary Procedures under the New LRA' 1997 6 Labour Law New and Court Reports.*

[21] *Le Roux and van Niekerk, `Procedural Fairness and the new Labour Relations Act: (1997) 6 Contemporary Labour Law 51 and 55.*

[22] *Ibid.*

[23] *1993 SCJ Record No.4691.*

[24] *(1985) 6 ILJ 369 (IC) at 380B-C.*

[25] *(1991) 12 ILJ 087 (IC).*

[26] *(1992) 13 ILJ 1281 at 1285D.*

[27] *(1993) 14 ILJ 137 (LAC) at 143F.*

[29] *1991) 12 ILJ 259 (A).*

[30] *(1989) 10 ILJ 823 (A)*

[31] *(1990) 5 SALJ325.*

[32] *(1997) 1 BLLR85 (IC) at 91F-G; See also NUM v Durban Deep Roodepoort Ltd (1987)8ILJ 156(IC).*

[33]*Vacoas Transport Co. Ltd v J.J Agathe & 171 Ors. 1986 SCJ Record No. 3839. It was averred in this case that 172 employees were summarily dismissed following an illegal strike. The court adduced mass evidence to determine whether the employees had terminated their employment though procedural fairness was not at issue here, the court, however, took recourse to mass hearing.*

[34]*(1987) 8ILJ503*

[35]*(1996) 7 (2) SALLR1(CCMA)133(LC)*

[37]*Anglo American farms t/a Boschendal Restaurant v Konjwayo (1992) 12ILJ573(LAC)589 G-H; See also Saimaan & another De Beers Consolidate Mines (Finch Mine)(1995) 16ILJ151(IC) at 1563.*

[38]*(1986)7(2)ILJ at 369*

[39]*(191051 1998) Jutastat, CCMA.*

[40]*(02/03/1998) Jutastat, CCMA.*

[41]*(17/06/1997) Jutastat, CCMA..*

[42]*(23/04/1998) Jutastat (CCMA).*

[43]*(23/04/1998) Jutastat (CCMA).*

[44]*Item 3(1) Labour Relations Act, 1995 (Dismissal Code)*

[45]*Item 4(1) LRA, No.66 of 1995*

[46]*Supra note 38*

[47]*11/05/1998 (CCMA)*

[48]*(1998) 12 BALR 1601 (CCMA) at 1608 C-D*

[49]*(1998) 19 ILJ921 (CCMA) at 928C*

[50]*Dadla v Commissioner for CCMA & another (1999) 7BLLR670(LC)at 674 F*

[51]*(1999) 2 BALR 168 (CCMA)*

[52]*(1999) 6 BALR 657 (CCMA)*

[53]*Ibid 670 B-671B*

[54]*SACCAWU obo and Southern Cross Industries (1998)7CCMA7.73 at 9*

[55]*Dairybelle (Cookhouse) and FAWU (1998) 1 ARB 7.7.1 at 1*

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