

AN EMPLOYER'S ABILITY TO SUBSTITUTE A DISCIPLINARY ENQUIRY SANCTION – PART 1

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SUMMARY

It is common practice for employers to appoint an external chairperson to preside over a disciplinary enquiry which has been convened for purposes of investigating allegations of misconduct against an employee. The external chairperson is ordinarily mandated to decide on guilt, and to the extent that there is a guilty finding, to recommend or impose the appropriate disciplinary sanction.

Employers often tend to have expectations that the external chairperson will, after having found the employee guilty of the alleged misconduct, impose a sanction of dismissal depending on the gravity of the alleged misconduct. The expected outcome of dismissal, however, does not always occur. An external chairperson may impose a sanction short of dismissal after considering an employee's mitigating circumstances. An employer's dissatisfaction with the disciplinary sanction may result in the employer instituting an internal review process to review the external chairperson's disciplinary sanction, whilst in other cases, employers may resort to unilaterally substituting the external chairperson's disciplinary sanction with a sanction of dismissal. The employer's disciplinary code and procedure or the collective agreement regulating the disciplinary procedure in the workplace may or may not make provision for the substitution of the disciplinary sanction. In circumstances where there is no provision for the substitution of the disciplinary sanction, the employer's conduct of substituting the disciplinary sanction raises questions regarding the applicability of the "double jeopardy" principle which means, in an employment context, that an employee should not be subjected to more than one disciplinary enquiry on disciplinary charges arising from the same set of facts.

It is, however, a well-established principle that employers who are classified as organs of state can review their own decisions. This includes decisions of

chairpersons who are appointed to preside over disciplinary enquiries and further decide on the appropriate disciplinary sanction. In the latter case, and in circumstances where the organ of state is dissatisfied with the disciplinary sanction, it may institute review proceedings in the Labour Court to review and set aside the chairperson's decision. This recourse is, however, only available to organs of state and not private-sector employers.

This article seeks to determine whether it is permissible for an employer to substitute an external chairperson's disciplinary sanction, and, if so, the circumstances under which an employer is permitted to do so and the procedure which should be followed in such an instance. The article is written in two parts – Part 1 covers the employer's ability to revisit a disciplinary sanction and Part 2 concentrates on the conflicting judgments involving the South African Revenue Service's conduct of substituting disciplinary sanctions, alternative avenues to the unilateral substitution of a disciplinary sanction and the conclusion.

1 INTRODUCTION

It is well-established that an employer has the right to maintain discipline and order in the workplace. This right encompasses the institution of disciplinary measures if it comes to the employer's attention that an employee has allegedly committed misconduct. The rules of natural justice and fairness dictate that before an employee is found guilty of any misconduct, the employee should be provided with an opportunity to be heard in the form of a disciplinary enquiry.

The concept of a right to a fair hearing is encapsulated in the Code of Good Practice: Dismissal¹ (Code of Good Practice), which requires that an investigation be conducted to determine whether there are grounds for dismissal.²

The Code of Good Practice requires that the employee should be provided with an opportunity to state a case in response to the allegations.³ After the enquiry, the employer should communicate the decision taken and preferably furnish the employee with written communication of that decision.⁴ If the decision is to dismiss the employee, the employee should be reminded of his or her right to refer any alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or relevant bargaining council with jurisdiction, or in terms of any procedure established in terms of an existing collective agreement.

The conducting of the investigation into the allegations of misconduct against the employee can be a formal or informal process. A formal process entails conducting a physical disciplinary enquiry where both the employer and employee will respectively call their witnesses to prove or disprove the allegations, as the case may be. In a formal process, a chairperson is appointed internally or externally to evaluate the evidence and decide on guilt or otherwise and further make a recommendation or final finding on the disciplinary sanction to be imposed. On the other hand, an informal

¹ 8 of 66 of 1995.

² Item 4(1) of 8 of 66 of 1995.

³ *Ibid.*

⁴ *Ibid.*

process normally entails the employer requiring an employee to provide oral or written representations in response to the allegations of misconduct, whereafter the employer then considers the representations and decides on the employee's guilt and the appropriate disciplinary sanction, where applicable.

In practice, employers often appoint external chairpersons to preside over disciplinary enquiries about alleged misconduct in respect of their employees. The appointment of an external chairperson to conduct the disciplinary enquiry is, in most instances, determined by an employer's prerogative to make such an appointment. Brassey defines an employer's managerial prerogative as follows:

"The law gives the employer the rights to manage the enterprise. He can tell the employee what they must and not do, and he can say what will happen to them if they disobey. He must, of course, keep within the contract, the collective agreement and the legal rules that govern him. He must now, also make sure his instructions do not fall foul of [the] unfair labour practice jurisdiction."⁵

However, in other instances, the appointment of an external chairperson may be required in terms of a disciplinary code and procedure, collective agreement, or the contract of employment. In such instances, the external chairperson is provided with certain powers and functions concerning the conducting of the disciplinary enquiry.

In instances where the employer exercises its prerogative to appoint an external chairperson, the employer may require the external chairperson to conduct the disciplinary enquiry and decide the guilt of the employee or otherwise, and if there is a guilty finding make a recommendation to the employer on the appropriate disciplinary sanction, which should be imposed on the employee. Alternatively, the employer may delegate its authority to the external chairperson to impose a final disciplinary sanction on the employee, which sanction the employer would then be bound to implement.

In other instances, there may be a collective agreement in the workplace that regulates, amongst other things, the disciplinary code and procedure. The collective agreement may require the appointment of an external disciplinary chairperson to conduct a disciplinary enquiry and further require him or her, upon reaching a finding of guilt, to make a recommendation on the appropriate disciplinary sanction to the employer or delegate the authority to the external chairperson to impose the final disciplinary sanction, which is to be meted out against the employee. Where there is a collective agreement, trade unions are more likely to negotiate for terms that require the external chairperson to make a final determination on the appropriate sanction, because they would likely want to avoid a situation that would permit an employer to interfere with a sanction.

Practically and in circumstances where an external chairperson has been appointed, it often occurs that an employer may be satisfied with an external chairperson's determination on the guilt of an employee but may seek to overturn the chairperson's recommendation on the appropriate sanction or

⁵ Brassey *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 3.

the final sanction which has been imposed. The overturning of a disciplinary sanction normally occurs where the external chairperson recommends or imposes a disciplinary sanction which is short of dismissal, for example, in the form of a reprimand or a final written warning. In such a case, employers tend to follow a process to substitute the disciplinary sanction with a harsher sanction, which normally amounts to a dismissal. Such a process may or may not be catered for in the disciplinary code and procedure, collective agreement, or the contract of employment, depending on the circumstances.

An employer's conduct of substituting a disciplinary sanction often raises questions regarding the employer's powers to do so in circumstances where the employer has delegated its authority to discipline to an external chairperson, who is essentially clothed as the employer. Where an employer delegates its authority to an external chairperson to not only decide on guilt but to also further decide on the final disciplinary sanction to be imposed, it is generally understood that the external chairperson imposes the sanction as if it were being directly imposed by the employer. In such a case, the external chairperson is generally understood to be authorised as the final arbiter and he or she presides over the disciplinary enquiry with the *persona* of the employer and his or her decision is therefore final and binding on the employer.

The ramifications are distinguishable in instances where the employer mandates and/or delegates an external chairperson to decide on the employee's guilt or otherwise, and if there is a finding of guilt, to recommend an appropriate disciplinary sanction, which is to be imposed by the employer. The recommendation is not final and binding on the employer, which by implication means that the recommendation could be accepted or rejected by the employer. The rejection of an external chairperson's recommendation often occurs in circumstances where the employer is of the view that the external chairperson has recommended a lenient disciplinary sanction in light of the severity of an employee's misconduct or where the disciplinary sanctions imposed in the past for the same or similar transgressions are heavier than the disciplinary sanction recommended by the external chairperson.

In circumstances where an employer elects to intervene and substitute the disciplinary sanction, the employer is likely to impose a harsher disciplinary sanction, which is a sanction of dismissal. Such conduct by the employer raises questions about the substantive and/or procedural fairness of the employee's dismissal; specifically, whether it is fair for an employer to interfere when an externally appointed chairperson has already decided upon a disciplinary sanction and if so, what procedure should be followed.

2 THE EMPLOYER'S RESPONSIBILITY TO MAINTAIN DISCIPLINE AND ORDER IN THE WORKPLACE AND AN EMPLOYEE'S RIGHT AGAINST UNFAIR DISMISSAL

2.1 Challenging the unfairness of dismissals

As a general rule, employees who wish to challenge the fairness of their dismissal should pursue available internal remedies before instituting a claim under the Labour Relations Act (LRA).⁶ In the absence of internal remedies, an employee may request the CCMA or relevant bargaining council with jurisdiction to conciliate the dispute within thirty (30) days of the date of the dismissal or the employer's final decision to dismiss or uphold the dismissal.⁷

The fairness of a dismissal for purposes of section 188(1) of the LRA must be construed through the lens of the Code of Good Practice. The Code of Good Practice consists of a set of guidelines rather than rules – which are, in its own words, “intentionally general” – that must be taken into consideration when assessing whether a dismissal is fair.⁸ The effect is to create a presumption that the Code of Good Practice should be followed rather than there being a duty to do so.⁹ Any action by an employer which is manifestly in conflict with the provisions of the Code of Good Practice might, in the absence of good cause, be regarded as a failure by the employer to take into account the provisions of the Code of Good Practice.¹⁰

It follows that the Code of Good Practice cannot be afforded an interpretation that is in conflict with the LRA and in the event of such conflict, the LRA must prevail.¹¹ The Code of Good Practice must not, however, be construed in a manner that supersedes disciplinary codes and procedures that are contained in collective agreements or individual contracts of employment.¹² Accordingly, the Code of Good Practice applies where there are no agreed procedures in place.

⁶ Grogan *Workplace Law* 171. If the employee is covered by a collective agreement which requires private arbitration, the collective agreement is binding in terms of s 24 of the LRA. The arbitration award will be subject to review in terms of s 33 of the Arbitration Act 42 of 1965 read with s 157(3) of the LRA. It is also important to note that in terms of s 147(6A) of the LRA, the CCMA is empowered to assume jurisdiction in certain cases where it has been agreed that a dispute must be resolved through private arbitration.

⁷ S 191 of 66 of 1995.

⁸ Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 441.

⁹ *Highveld District Council v CCMA* [2002] 12 BLLR 1158 (LAC) 16.

¹⁰ Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6ed (2015) 441.

¹¹ *Engen Petroleum Limited v CCMA* [2007] 8 BLLR 707 (LAC) 82.

¹² In *Denel (Pty) Ltd v Vorster* [2005] 4 BLLR 313 (SCA), the court held that an employer's constitutional right to fair labour practices did not justify departure from a disciplinary procedure incorporated in a contract of employment and could constitute breach of contract. See also *Mangope v SA Football Association* [2011] 4 BLLR 391 (LC), where the court found the termination of the employment unlawful since the employer had failed to follow the procedures stipulated in the employment contract.

2 2 Substantive fairness in dismissals for misconduct

If an employer concludes that an employee's breach of a workplace rule or standard justifies dismissal, the question to be determined by the arbitrator or court is "whether [the] dismissal was an appropriate sanction for the contravention of the rule or standard".¹³ The question of the approach to be followed for purposes of an enquiry into the substantive fairness of a dismissal is not novel and is well-established. The determination of whether a dismissal is an appropriate sanction involves a consideration of the gravity of the infringement, the employee's circumstances, the nature of the job, the circumstances of the infringement, the consistent application of discipline, and possibly other applicable factors.¹⁴

2 2 1 *The corrective discipline approach*

The Code of Good Practice endorses a "corrective" or "progressive" approach to discipline. This approach involves behaviour modification in the workplace through a system of graduated disciplinary measures, such as counselling and warnings.¹⁵ The Code of Good Practice promotes an approach of employers providing informal advice and correction in relation to minor violations of workplace discipline. However, if the conduct is repeated the employee may be given warnings culminating, preferably, in a final written warning.¹⁶ However, the "corrective" or "progressive" discipline approach cannot be applied in respect of all violations of workplace discipline. It is for this reason that the Code of Good Practice endorses this approach in respect of minor or moderate violations where the behaviour of the particular employee can be corrected.

The "corrective" or "progressive" discipline approach is likely not appropriate in circumstances where an employee has committed serious misconduct and where correction is likely not going to occur due to the employee showing no remorse or if the trust in the employment relationship has irretrievably broken down.¹⁷ This implies that an employer may either dismiss as a last resort, in circumstances where an employee is a repeat offender or at the first instance if the contravention of a workplace rule or standard is sufficiently serious.

¹³ Item 7(b)(iv) of Schedule 8 of 66 of 1995.

¹⁴ See *Anglo American Farms v Komjwayo* (1992) 13 ILJ 573 (LAC) 574–575; *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC); *SACCAWU v Irvin and Johnson Ltd* [1999] 8 BLLR 741 (LAC) 751; *NUM v Amcoal Colliery* [2000] 8 BLLR 869 (LAC); *Cape Town City Council v Masitho* (2000) 21 ILJ 1957 (LAC).

¹⁵ Item 3(2) of Schedule 8 of 66 of 1995.

¹⁶ Item 3(3) of Schedule 8 of 66 of 1995.

¹⁷ In *Department of Labour v GPSSBC* (2010) 31 ILJ 1313 (LC) 33, the court confirmed that it would serve no purpose for an employer impose a sanction aimed at correction and rehabilitation where an employee believes that they have done nothing wrong. The court held that for rehabilitation to be effective, the employee must acknowledge the wrongfulness of his or her conduct and be prepared and willing to rehabilitate.

2 2 2 *The test for assessment of intolerability of the continued employment relationship*

The fundamental test is whether the employee's conduct has destroyed the trust relationship or rendered the continued employment relationship intolerable.¹⁸ Although the primary assessment of intolerability lies with the employer and not the employee,¹⁹ the test of intolerability remains objective.²⁰

In practice, "serious" or "gross" misconduct refers to misconduct of such gravity that it almost inevitably makes a continued employment relationship intolerable and may justify dismissal even for a first infringement.²¹ It is more likely that employers substitute the disciplinary sanction in respect of misconduct of this nature in circumstances where the employer is of the view that an employee has been given a lenient sanction by an externally appointed chairperson.

2 2 3 *The employer's discretion on the appropriate sanction*

The question of deciding on the fairness of a disciplinary sanction is a question that involves a value judgment in addition to findings of fact and law.²² The involvement of a "value judgment" in the assessment of fairness suggests that to the extent an employer has been unreasonable in determining the sanction, an arbitrator or court may interfere with an employer's decision to dismiss.

In several decisions, the Labour Court and Labour Appeal Court (LAC) initially adopted a deferential approach when it came to interfering with an employer's decision to dismiss. In *County Fair Foods v CCMA*,²³ the LAC held:

"If commissioners could substitute their judgment and discretion for the judgment and discretion fairly exercised by the employers, then the function of management would have been abdicated – employees would take every case to the CCMA. This result would not be fair to employers. In my view, interference with the sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. This would be the case, for example, where the sanction is so excessive as to shock one's sense of fairness. In such a case, the commissioner has a duty to interfere."

¹⁸ Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* 2ed (2004) 199–201; *De Beers Consolidated Mines v CCMA supra* 23–25; *Continental Oil Mills (Pty) Ltd v Singh* (2013) 34 ILJ 2573 (LC).

¹⁹ *Freshmark (Pty) Ltd v SA Commercial Catering & Allied Workers Union* (2009) 30 ILJ 341 (LC) 8.

²⁰ *Engen Petroleum Limited v CCMA supra* 148. See also Rycroft "The Intolerable Relationship" 2012 33 ILJ 2271 2287.

²¹ Du Toit *et al Labour Relations Law: A Comprehensive Guide* 441.

²² *Rustenburg Platinum Mines Ltd v CCMA* [2006] 11 BLLR 1021 (SCA) 32, citing *Carephone (Pty) Ltd v Marcus NO* [1998] 11 BLLR 1093 (LAC) 36 with approval.

²³ [1999] 11 BLLR 1117 (LAC) 40–41.

It is important to note that the LAC's finding in *County Fair Foods* is in the context of a CCMA commissioner's decision to interfere with an employer's decision to dismiss an employee and not specifically within the context of an employer's election to interfere with a disciplinary sanction imposed by an externally appointed chairperson. Despite this distinction, this article reveals that the consideration of fairness remains intrinsic in the determination of the reasonableness of an employer's decision to ultimately dismiss.

2 2 4 *The reasonable employer test*

In *Nampak Corrugated Wadeville v Khoza*,²⁴ the LAC held that the decision on the appropriate sanction within the discretion of the employer:

"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."

In reaching this conclusion, the LAC in *Nampak Corrugated* relied on the well-known "reasonable employer" test, derived from English law, as the correct test to apply when determining whether a dismissal is fair. In this regard, Lord Denning MR in *British Leyland UK Limited v Swift*,²⁵ formulated the test as follows:

"Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have dismissed him, the dismissal was fair."

The subsequent LAC decisions after *Nampak Corrugated* rejected the "reasonable employer" test. In *Toyota SA Motors (Pty) Ltd v Radebe*,²⁶ the LAC referred to the ordinary rule that the court is bound by its own decisions, unless a decision has been arrived at on some manifest oversight or misunderstanding, something like a palpable mistake, a subsequently constituted court has no right to prefer its own reasoning to that of its predecessors. Accordingly, the LAC held that the "reasonable employer" test was such a palpable mistake that permitted it to overrule its decision in *Nampak Corrugated*. The LAC emphasised that a statutory arbitrator is required to determine whether a sanction is fair and not whether the sanction is one which would have been imposed by a reasonable employer.²⁷

In *Conisani Engineering (Pty) Ltd v CCMA*,²⁸ the Labour Court set aside an arbitration award on the basis that the arbitrating commissioner "[substituted] her own judgment on an appropriate sanction for that of the reasonable sanction of the [employer]." This demonstrates that an arbitrating commissioner should not interfere with a reasonable sanction imposed by an

²⁴ [1999] 2 BLLR 108 (LAC) 33.

²⁵ [1981] IRLR 91 93.

²⁶ [2000] 9 BLLR 243 (LAC) 46.

²⁷ *Toyota SA Motors (Pty) Ltd v Radebe supra* 50.

²⁸ [2004] 10 BLLR 995 (LC) 20.

employer with a sanction which he or she would have made had they been in the employer's position.

2 2 5 *The applicable test for determining substantive fairness as enunciated in Sidumo*

The test to be applied was settled by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*,²⁹ where the court held as follows:

"There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator ... Any suggestion by the Supreme Court of Appeal that the deferential approach is rooted in the prescripts of the LRA cannot be sustained."

In *Sidumo*, Navsa AJ further pronounced on the correct approach which an arbitrating commissioner should follow to determine the fairness of an employer's decision to dismiss:

"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."³⁰

Importantly, the Constitutional Court pointed out that the above factors do not constitute an exhaustive list of the considerations for determining the appropriate sanction. An arbitrating commissioner must, however, make a value judgment on his or her own sense of fairness, taking into account the relevant provisions of the Code of Good Practice and the fact that the burden to prove the fairness of the dismissal rests with the employer.³¹

Following *Sidumo*, the Labour Court in *Theewaterskloof Municipality v SALGA*³² correctly characterised the correct approach to be followed as described below:

"[T]he core inquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of the employee's challenge of it. That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer's decision was fair."

²⁹ *Toyota SA Motors (Pty) Ltd v Radebe supra* 61.

³⁰ *Sidumo v Rustenburg Platinum Mines Ltd supra* 78.

³¹ GN 602 in GG 34573 of 2011-09-02.

³² [2010] 10 BLLR 1216 (LC).

In light of the development of case law, as illustrated above, the current position regarding the approach to be adopted by arbitrating commissioners when determining whether a disciplinary sanction is appropriate is trite. The fact that arbitration proceedings constitute a *de novo* hearing does not alter the approach to be followed. Simply, an arbitrating commissioner is not empowered to determine what he or she would have done if they had been in the position of the employer. An arbitrating commissioner is required to take into account all of the relevant circumstances which led to an employee's dismissal.

2 3 Procedural fairness in dismissals for misconduct

To be fair, a dismissal for misconduct must not only be justified; the employer must also follow a fair procedure before deciding to dismiss the employee.³³ Procedural fairness is therefore the yardstick by which an employer's pre-dismissal actions are measured. The LRA confirms that substantive and procedural fairness are independent requirements for a fair dismissal.³⁴ However, the courts appreciate that it is not possible in all cases to always draw a rigid line between the requirements of procedural and substantive fairness.

In some cases, a failure to adhere to the principles of natural justice may be sufficiently gross to render the dismissal substantively unfair. However, as a rule of thumb, it is accepted that substantive fairness relates to the reason for the dismissal and the appropriateness of the sanction, and procedural fairness relates to the manner in which the employer arrived at the decision to impose the sanction.³⁵

2 3 1 Procedural fairness guidelines emanating from the Code of Good Practice

Although the LRA does not provide any direction on the content of procedural fairness, guidelines are provided in Item 4 of Schedule 8 of the Code of Good Practice.³⁶ The Code of Good Practice is not meant to replace collective agreements and employers are expected to adhere to disciplinary procedures to which they have agreed.³⁷

The Code of Good Practice provides the requirement that the employer should "normally conduct an investigation to determine whether there are grounds for dismissal. Once an investigation indicates possible misconduct, an enquiry should be held."³⁸ The Code of Good Practice does not necessarily envisage a formal procedure akin to criminal procedure.³⁹ Although many employers often prefer to adopt formal disciplinary procedures, several small

³³ Grogan *Dismissal* (2010) 214.

³⁴ S 188(1) of 66 of 1995.

³⁵ Grogan *Dismissal* 214.

³⁶ Govindjee and Van der Walt *Labour Law in Context* 2ed (2017) 144.

³⁷ Cohen "Procedurally Fair Dismissals – Losing the Plot?" 2005 *South African Mercantile Law Journal* 32 48.

³⁸ Thompson and Benjamin *South African Labour Law* Vol 1 (2015) AA1–427.

³⁹ *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO* (2010) 31 ILJ 340 (LAC).

employers continue to utilise relatively informal disciplinary procedures, such as requiring an employee to provide written or oral representations in respect of alleged misconduct. An informal procedure is relatively expeditious and avoids legal complexities.

An informal procedure also does not fall short of procedural fairness requirements. In *Passenger Rail Agency of South Africa v Moreki*,⁴⁰ the Labour Court held that nowhere in Item 4 of the Code of Good Practice is there a reference to an informal procedure being applicable only in serious cases or in cases of employees who are not in the upper echelon of employees. This means that even cases involving minor workplace violations committed by junior employees may be subjected to an informal procedure, subject to the dictates of the disciplinary code and procedure, collective agreement, or the contract of employment.

Where the Code of Good Practice refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.⁴¹

This approach was followed by the LAC in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brundson*,⁴² where the court expressed the view that the LRA intends to do away with rigid procedural requirements and the principle that an employee need merely be given an opportunity to state a case applies even more strongly where senior managerial employees are involved.

2 3 2 *An employer's non-compliance with the disciplinary code and procedure*

The courts have generally held that an employer should comply with its own disciplinary process and that a failure to do so in itself renders the process unfair.⁴³ This approach was, however, overturned by the LAC in *Highveld District Council v CCMA*,⁴⁴ where the court held the following:

"[W]here the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will ordinarily go a long way towards proving that the procedure is fair as contemplated in section 188(1)(b). The mere fact that a procedure is an agreed one does not, however, make it fair. By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair."

The *Highveld* decision emphasises that where the actual procedure followed was fair, regardless of the fact that an agreed disciplinary procedure may have not been followed by the employer, does not mean that the actual procedure which was followed was unfair. By implication, this means that if

⁴⁰ Unreported judgment (J190/15, JR2361/16) [2017] ZALCJHB 114 (28 March 2017) 31.

⁴¹ *Avril Elizabeth Home for the Mentally Handicapped v CCMA* [2006] 9 BLLR 833 (LC).

⁴² (2000) 21 ILJ 501 (LAC) 61–62.

⁴³ Thompson and Benjamin *South African Labour Law* AA1–429.

⁴⁴ (2003) 23 ILJ 517 (LAC) 15, cited with approval in *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union* [2018] 3 BLLR 246 (LAC) 15.

an employer departs from an agreed disciplinary procedure, the onus rests on the employer to demonstrate that its conduct of doing so was reasonable in the circumstances and that its conduct was not unfair and/or prejudicial to the employee concerned. This decision essentially leaves open two possibilities: (1) it may be that if an employer follows a disciplinary code, even an agreed one, the dismissal may nevertheless be unfair when measured against the requirements of the LRA; and contrariwise, (2) it may be that if an employer departs from an agreed procedure, it may nevertheless still comply with the requirements of fairness in terms of the LRA.⁴⁵ Accordingly, in terms of the *Highveld* decision, an employer's failure to follow a disciplinary code is not *per se* unfair. This is especially in circumstances where the disciplinary code constitutes a guideline and has not been incorporated into an employee's terms and conditions of employment.

In *Denel (Pty) Ltd v Vorster*,⁴⁶ the Supreme Court of Appeal (SCA) confirmed the *Highveld* approach and held that procedures stipulated in a disciplinary code can be departed from in appropriate circumstances. The SCA, however, held that if the disciplinary code has been incorporated in the employee's contract of employment, failure to follow such a disciplinary code may constitute a breach of contract.⁴⁷

3 AN EMPLOYER'S RIGHT TO REVISIT A DISCIPLINARY SANCTION

3.1 The context

Employers often elect to appoint an external chairperson to conduct a disciplinary enquiry. An employer's reason to adopt such an approach may be influenced by a variety of factors, such as the fact that the allegations of misconduct have been levelled against a senior employee, the allegations give rise to factual and/or legal complexities, or an employer might not have a competent employee to chair the disciplinary enquiry, amongst other reasons. In some cases, when employers make such an external appointment, they tend to expect that the final outcome of the disciplinary enquiry will likely result in a dismissal, depending on the severity of the alleged misconduct.

However, despite the employer's expectations, many things could thwart the anticipated outcome of the disciplinary process. For example, an employer might appoint an independent chairperson who, casting a cold and objective eye over the allegations of misconduct and the evidence presented by the employer, reaches a finding of guilt, but nevertheless concludes that dismissal is not appropriate.⁴⁸ In some instances, the appointed chairperson may simply impose an unreasonably lenient sanction in respect of gross misconduct which would ordinarily attract summary dismissal.

⁴⁵ Grogan *Dismissal* 227.

⁴⁶ [2005] 4 BLLR 313 (SCA).

⁴⁷ Thompson and Benjamin *South African Labour Law* AA1–429.

⁴⁸ Mischke "On Second Thoughts ... When Can an Employer Revisit a Disciplinary Hearing?" 2009 19(2) *Contemporary Labour Law* 11 20.

It is therefore very common for employers to be disappointed with the disciplinary sanctions recommended or imposed by externally appointed chairpersons. As a result, employers often take steps to review or substitute disciplinary sanctions which appear to be lenient or do not meet their expectations. In such instances, employees will often raise the defence of "double jeopardy" when senior management unilaterally reviews or reconsiders the decision of an externally appointed chairperson, in the absence of any provision permitting such procedure in terms of the disciplinary code and procedure, collective agreement or the contract of employment, and with the view of imposing a more severe sanction than the one which was recommended and/or imposed by the chairperson.

It is, however, quite rare to find disciplinary codes and procedures which make provision for an employer to review or appeal a chairperson's decision. Such a right is ordinarily afforded to an employee in the event of an adverse finding against them. The absence of a provision empowering the employer to review or appeal a disciplinary sanction in the disciplinary code and procedure tends to give rise to the question regarding where the employer obtains the authority to interfere with the chairperson's finding on the appropriate sanction, let alone to create a process which does not form part of the contractual relationship between the parties.

However, it is legally permissible for an employer to regulate its own disciplinary code and procedure and further reserve the right of appeal in its discipline code and procedure. Similarly, an employer may incorporate a right of review in respect of a chairperson's findings on sanction. However, this is not common in practice. The controversial issue arises when the employer has not reserved its right to appeal or review in terms of an existing disciplinary code and procedure but nevertheless proceeds to review or substitute a disciplinary sanction imposed by an external chairperson.

The broad question which then arises is: can an employer revisit the outcome of its own disciplinary enquiry? More specifically, consideration must be drawn to whether it is legally permissible for an employer to effectively reopen the disciplinary process, to review that process, or simply overturn the disciplinary sanction imposed. Another issue to be considered is whether it is legally permissible for the employer to scrap one disciplinary process and initiate another process on the same disciplinary charges against the same employee.⁴⁹

The latter situation possibly necessitates the application of the "double jeopardy" principle, which essentially means that a person should not be tried twice for the same offence.⁵⁰ Strictly speaking and in the employment context, the "double jeopardy" rule applies in situations where the employee is subjected to more than one disciplinary enquiry on disciplinary charges arising from the same set of facts. As a result, it is generally considered unfair for an employer to subject an employee to a second disciplinary enquiry in respect of the same disciplinary charges for the purpose of achieving a more desirable outcome before a different chairperson.

⁴⁹ Mischke 2009 *Contemporary Labour Law* 11 20.

⁵⁰ Grogan *Dismissal* 251.

3 2 The “double jeopardy” principle and the approach of the Labour Appeal Court

The basic point of departure is that subjecting an employee to more than one disciplinary enquiry on the same disciplinary charges would be a contravention of the “double jeopardy” rule.⁵¹ This principle is applied strictly by the criminal courts where it is expressed that criminal proceedings may not be retried if the accused has already been found guilty and convicted of the same offence (*autrefois convict*) or where he or she has been charged with and acquitted of the same offence (*autrefois acquit*).⁵² Similarly, in civil law, the *res judicata* principle is well-established, which means that a claim that has been determined by a competent court cannot be reheard, subject to an appeal.⁵³ The public policy considerations underlying these defences include reaching finality in disputes, achieving certainty in respect of the parties’ respective legal positions, and avoiding undue burdens on the justice system.⁵⁴

In determining issues of “double jeopardy,” our labour courts initially followed these criminal law principles.⁵⁵ If an employee successfully showed the elements of *autrefois convict* or *autrefois acquit*, a further disciplinary enquiry or the overturning of a disciplinary sanction would not be permitted.⁵⁶

Van Niekerk *et al* explain that the “double jeopardy” defence, in an employment context, is to the effect that once an employer has imposed a disciplinary sanction, the matter may not be re-opened to allow the employer to revise the sanction, and in particular, to impose a more severe sanction.⁵⁷

Since “double jeopardy” relates to instances where new disciplinary proceedings are instituted, it does not apply to internal appeal hearings since these constitute extensions of the disciplinary proceedings which have already been instituted and do not constitute new proceedings in the strict sense.⁵⁸ The same applies to internal reviews of disciplinary proceedings, provided they are permitted by disciplinary codes and procedures or company practices.⁵⁹ This will be the case, for example, where the chairperson of a disciplinary enquiry is only mandated to make a recommendation on the appropriate disciplinary sanction, which management may either accept or reject.

⁵¹ Mischke 2009 *Contemporary Labour Law* 11 20.

⁵² Ponelis “Double Jeopardy – When Can an Employee Be Recharged for the Same Offence?” 2011 21(3) *Contemporary Labour Law* 21 26.

⁵³ Mischke 2009 *Contemporary Labour Law* 11 20. See also *Mitfords’ Executor v Edben’s Executors* 1917 AD 682.

⁵⁴ Ponelis 2011 *Contemporary Labour Law* 21 26.

⁵⁵ *Ibid.*

⁵⁶ *Mondi Paper Co v PPWAWU* (1994) 15 ILJ 778 (LAC).

⁵⁷ Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law @Work* (2008) 253.

⁵⁸ Ponelis 2011 *Contemporary Labour Law* 21 26.

⁵⁹ *Samson v Commission for Conciliation, Mediation and Arbitration* (2010) 31 ILJ 170 (LC). See also *Rustenburgh Base Metal Refiners (Pty) Ltd v Solidarity* (2009) 30 ILJ 378 (LC).

3 2 1 *The yardstick is fairness – the Van der Walt judgment*

The controversial issue regarding an employer's ability to substitute a disciplinary sanction has been explored by the courts for a number of years. The first decision traditionally cited is *BMW SA (Pty) Ltd v Van der Walt*.⁶⁰ In this case, the employee was charged with undervaluing scrap equipment, which he had subsequently acquired from BMW at a reduced cost. BMW's finance department had mistakenly given the scrap equipment a "nil evaluation". After such, the employee discovered that the scrap equipment was valued at approximately ZAR15 000.00, and therefore arranged to have it removed from the company premises for repairs. The employee arranged for the scrap equipment to be purchased by a "non-existent" company, which he owned.

The employee was found guilty on a charge of a "misrepresentation" in respect of his conduct in relation to when he had removed the scrap equipment. The LAC noted that the employee's conduct to conceal the nil evaluation was disgraceful and held that where there is calculated silence in the face of a duty to speak, one has to do with that species of fraudulent misrepresentation known as fraudulent concealment or fraudulent non-disclosure.⁶¹

In this matter, there had been two disciplinary enquiries. At the first enquiry, the employee had been charged with three counts of fraud. It was concluded that the employee had not made himself guilty of any transgression, save for a "misrepresentation by him when removing the equipment for repairs".⁶² No disciplinary sanction was imposed on the employee. Based on this outcome, the LAC inferred that the employer did not consider the employee to have committed any disciplinary offence.

Shortly after the conclusion of the first disciplinary enquiry, new information pertaining to the employee's conduct came to the employer's attention. This information related to a quotation which the employee had received marked for his attention. This information brought home to the employer the enormity of the employee's deception.⁶³ The fact that the employee had attempted to sell the equipment to another company resulted in the employer viewing the situation from a different perspective.⁶⁴ This demonstrated fraudulent intent far beyond making a mere misrepresentation.⁶⁵

In respect of the employer's conduct of holding a second disciplinary enquiry, the LAC held as follows:

"Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so. I agree with the dicta in *Amalgamated Engineering Union of SA & Others v Carlton Paper of SA (Pty) Ltd* (1988) 9 ILJ

⁶⁰ (2000) 21 ILJ 113 (LAC).

⁶¹ *BMW SA (Pty) Ltd v Van der Walt supra* 17.

⁶² *BMW SA (Pty) Ltd v Van der Walt supra* 9.

⁶³ *BMW SA (Pty) Ltd v Van der Walt supra* 11.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

588 (IC) at 596 A – D that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res iudicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick. See also *Botha v Gengold* [1996] BLLR 441 (IC); *Maliwa v Free State Consolidated Gold Mines (Operations) Ltd* (1989) 10 ILJ 934 (IC). I should make two cautionary remarks. It may be that the second disciplinary enquiry is *ultra vires* the employer's disciplinary code (*Strydom v Usko Limited* [1997] 3 BLLR 343 (CCMA) at 350 F–G. That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.⁶⁶

The LAC's finding, as illustrated above, is of fundamental importance. First, the LAC excluded the application of the principles of *autrefois acquit* or *res iudicata*. The LAC instead adopted the notion of fairness as opposed to upholding the application of these aforementioned legal principles. It is apparent from the above excerpt that the LAC envisaged that an employer could refuse to implement a chairperson's finding and to convene a second disciplinary enquiry if the dictates of fairness make it necessary to do so.⁶⁷

However, despite fairness being the yardstick, the LAC imposed factors that could potentially serve as a limitation to an employer holding a second disciplinary enquiry, namely being the following:

- 1 the employer's disciplinary prohibiting the holding of a second disciplinary enquiry; and
- 2 where it would be considered to be unfair to hold a second disciplinary enquiry, save in rather exceptional circumstances.

The former limitation is of considerable importance in circumstances where the provisions of a disciplinary code and procedure may be silent on the employer's ability to revisit a disciplinary sanction that has been imposed.

The majority of the LAC held that BMW had not acted unfairly by holding a second disciplinary enquiry.⁶⁸ BMW had acted *bona fide* throughout and it was the employee who had concealed what he had done. The majority noted that it may be that BMW should have seen through the employee's scheme sooner than it did, but that did not make it fair that the employee should effectively get away "scot-free".⁶⁹

The LAC held that although the charges in both disciplinary enquiries involved misrepresentation, the full import of the deception was not realised at the first disciplinary enquiry.⁷⁰ It would therefore be unfair to compel an employer to retain an employee in whom it has justifiably lost all confidence.⁷¹ Importantly, the LAC further held that since the loss of confidence justifiably

⁶⁶ *BMW SA (Pty) Ltd v Van der Walt supra* 12.

⁶⁷ Le Roux "Can Employers Review the Outcomes of Disciplinary Procedures?" 2016 25(7) *Contemporary Labour Law* 70 81.

⁶⁸ *BMW SA (Pty) Ltd v Van der Walt supra* 13.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

occurred only after a first disciplinary enquiry had been held, it did not consider that it was unfair to hold another enquiry.⁷²

3 2 2 *Distinguishing “fairness” from “exceptional circumstances” – Branford decision of the LAC*

Following the *Van der Walt* decision, the LAC had to decide the “double jeopardy” issue again in *Branford v Metrorail Services (Durban)*.⁷³ In this case, Mr Branford was dismissed for making eight fraudulent petty cash claims, in some cases for forging his manager’s signature on the petty cash claims. His line manager, upon discovering the offence, called Mr Branford to his office and gave him a “dressing down” and placed a verbal warning into Mr Branford’s employee file.⁷⁴ One of the factors that influenced the leniency towards Mr Branford was that he had implemented significant cost-cutting measures for the company.

After the verbal warning, an internal audit was conducted into the issue and it was recommended that Mr Branford should be formally charged with fraud, forgery, and dishonesty. Although the auditor’s report took a more serious view of the facts, it was common cause that the report was not based on any facts which could be described as “new”.⁷⁵

A while after the verbal warning had been issued and on the strength of the auditor’s report, Mr Branford was formally charged, and a disciplinary enquiry was convened. Despite protests that Mr Branford had already been disciplined for the same misconduct, the disciplinary chairperson held that he was not being disciplined twice because the disciplinary code provided for more serious penalties for misconduct of a serious nature.⁷⁶ Mr Branford was subsequently dismissed and referred an alleged unfair dismissal dispute to the relevant bargaining council. The arbitrator found the following:

“It is my conclusion therefore that the applicant’s argument that he was disciplined twice for the alleged infringements must be sustained ... the only appropriate relief herein is that of reinstatement.”⁷⁷

On review, the Labour Court held that the first enquiry was a mere discussion between Mr Branford and his line manager and that the arbitrator failed to take into account that Mr Branford was not disciplined for fraud but when the verbal warning was given, it was for a mere irregularity.⁷⁸ The Labour Court further held that the arbitrator committed a gross irregularity by not taking into account the fact that the first sanction by the line manager was without any charges being proffered against Mr Branford and that it resulted from a discussion concerning the irregularity.⁷⁹ Importantly, the Labour Court found that when the “proper” disciplinary

⁷² *Ibid.*

⁷³ (2003) 24 ILJ 2269 (LAC).

⁷⁴ *Branford v Metrorail Services (Durban) supra* 15.

⁷⁵ *Branford v Metrorail Services (Durban) supra* 4.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Branford v Metrorail Services (Durban) supra* 5.

⁷⁹ *Ibid.*

enquiry was held, Mr Branford was subjected to three disciplinary charges and that, in its view, constituted a proper disciplinary enquiry which was held by Metrorail.⁸⁰ Effectively, the Labour Court found that the “double jeopardy” rule was not applicable because the “second” enquiry was in actual fact the first enquiry.

On appeal, the LAC in *Branford* considered the *Van der Walt* decision. The LAC per Wallis JA in the minority judgment held the following:

“The norm in assessing the fairness of a disciplinary offence is a single disciplinary enquiry conducted in compliance with the employer’s disciplinary code. Where there has been compliance with the company’s disciplinary code and the first enquiry has adequately canvassed the facts involved, it will be unfair to hold a second enquiry.”⁸¹

As a result of this finding, Wallis JA in the minority judgment further held:

“In the light of the facts in this case and the current state of the law, it cannot be said that the arbitrator committed a gross irregularity in finding that the dismissal was unfair. Furthermore, I would wish to note that the relative informality with which the first disciplinary enquiry was held does not, in itself, make it *pro non scripto*. There is therefore no basis upon which a court could interfere with the arbitrator’s decision. The court a quo was wrong in deciding to interfere with the arbitrator’s award.”⁸²

In the same *Branford* judgment, Jafta AJA (as he then was) with Nicholson JA concurring respectfully disagreed with the findings of Wallis JA in their majority decision. Jafta AJA provided a detailed analysis of the approach which was formulated by the LAC in the *Van der Walt* decision. In this regard, he held:

“Although during the hearing of this appeal Mr Bingham, for [Mr Branford], contended that the test laid down in *Van der Walt’s* case (*supra*) was that a second enquiry was permissible only in exceptional circumstances, that is not borne out by the dictum in para [12] quote above.⁸³ In that paragraph it is quite clear that Conradie JA considered fairness alone to be the decisive factor in determining whether or not the second enquiry is justified. The learned Judge of appeal mentioned the issue of exceptional circumstances merely as one of the two caveats and not as the actual or real test to be applied. Therefore, in my view, it is incorrect to contend that the test espoused in *Van der Walt* is that a second enquiry would only be permissible in exceptional circumstances. The true legal position as pronounced in *Van der Walt* is that a second enquiry would be justified if it would be fair to institute it.”⁸⁴

The LAC in *Branford* followed the *Van der Walt* approach, which means that the position it adopted was that the ultimate test is fairness. The question which then arises is whether fairness is to be interpreted from an employer’s or employee’s perspective. In *Branford*, the LAC held that the concept of fairness applies to both the employer and employee.⁸⁵ It involves the balancing of competing and sometimes conflicting interests of the employer,

⁸⁰ *Ibid.*

⁸¹ *Branford v Metrorail Services (Durban) supra* 7.

⁸² *Ibid.*

⁸³ See fn 72 above.

⁸⁴ *Branford v Metrorail Services (Durban) supra* 13.

⁸⁵ *Ibid.*

on the one hand, and the employee on the other.⁸⁶ The weight to be attached to those respective interests depends largely on the overall circumstances of each case.⁸⁷

In deciding what constitutes fairness, the LAC cited with approval the remarks of Smalberg JA in *National Union of Metalworkers of SA v Vetsak Cooperative Ltd*.⁸⁸

“Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (*Num v Free State Cons* at 446l). And in doing so it must have due regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or attempt to lay down, any universally applicable test for deciding what is fair.”

Jafta AJA applied the fairness test to determine whether Metrorail was entitled to revisit the sanction imposed on Mr Branford. Jafta AJA emphasised the significance of the fact that Mr Branford's line manager had no information indicating that Mr Branford committed fraud when he issued the written warning.⁸⁹ Jafta AJA further emphasised that the apparent problem in the matter was that Mr Branford's line manager did not know how to properly discipline an employee.⁹⁰ Therefore, he held that it would be unfair for Metrorail to be saddled with a quick, ill-formed, and incorrect decision of its employee who misconceived the seriousness of the matter and hurriedly took an inappropriate decision leading to an equally inappropriate penalty.⁹¹

The reasoning demonstrated by Jafta AJA is sensible. Few situations can be imagined that can be more unfair to an employer than to compel it to retain the services of a fraudster and forger merely because his line manager ignored the employer's disciplinary code and procedure for reasons of his own.⁹² Consequently, the majority in *Branford* found that the employer is entitled to hold a second disciplinary enquiry if it is fair to do so.

3 2 3 *The caveat of “exceptional circumstances” apparent from the Van der Walt and Branford decisions*

The majority judgment in *Branford* relied on the fairness test as enunciated in the *Van der Walt* judgment. The application of the fairness test to determine whether an employer may hold a second disciplinary enquiry gives rise to the question: what, then, is the correct legal position regarding the application of the “double jeopardy” rule in South African labour law?

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ 1996 (4) SA 577 (A).

⁸⁹ *Branford v Metrorail Services (Durban)* *supra* 15.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Grogan *Dismissal* 253.

It was argued on behalf of Mr Branford that an employer may convene a second disciplinary enquiry concerning the same misconduct which is allegedly committed by an employee only in “exceptional circumstances”.⁹³ The court rejected this proposition. According to the majority judgment in *Branford*, the legal position is that a second disciplinary enquiry may be held by an employer in circumstances where it is fair to do so. The reference to “exceptional circumstances” in the *Van der Walt* judgment was merely one of the two “caveats” and not the general test, being fairness.⁹⁴

The *Van der Walt* and *Branford* decisions, however, do not provide much assistance concerning the test to be applied in respect of what could constitute “exceptional circumstances”. In the *Van der Walt* decision, Conradie JA merely added the caveat that “it would probably not be considered fair to hold more than one disciplinary enquiry save in rather exceptional circumstances”.⁹⁵ The “exceptionality” of the circumstances is, therefore, a measure of fairness, not a test in itself.⁹⁶ Accordingly, the court’s reference to “exceptional circumstances” should not be construed as the actual test to be applied. If exceptional circumstances is the test, it would subject employers to a heavy burden and make it virtually impossible to convene a second disciplinary enquiry.⁹⁷

Grogan argues that the “fairness” criterion seems to open the way to arbitrators to assess the merits of the respective findings of the disciplinary and appeal enquiries and to base the justification for a second disciplinary enquiry on the fact that the disciplinary enquiry was wrong, and the appeal enquiry was right.⁹⁸ This is well-illustrated in the matter between *YF and Multichoice Management Services (Pty) Ltd t/a MWeb*,⁹⁹ where the employee was charged with sexual harassment after a successful applicant for a learnership complained about his conduct. The disciplinary enquiry chairperson found that the employee was not guilty of the misconduct. The employer was dissatisfied with the outcome and consulted senior counsel regarding the convening of a second disciplinary enquiry.

Having consulted with senior counsel, a second disciplinary enquiry was convened in terms of which the employee was found guilty of “*quid pro quo*” harassment. He was dismissed thereafter. In subsequent private arbitration proceedings, the arbitrator held:

“Given the facts and circumstances of this case, I am of the view that respondent was fully justified to hold a second enquiry. As I have already recorded, [the] applicant made himself guilty of serious misconduct and [the] respondent had to take measures to prevent similar occurrences. [The] [r]espondent was not satisfied with the finding by the first chairperson. In my view, [the] respondent’s disapproval of the finding was, with respect, justified. The evidence clearly showed that [the] applicant was guilty of sexual harassment. It would have been unfair for [the] respondent to be saddled with a decision that was clearly incorrect. Fairness extends not only to an employee

⁹³ *Branford v Metrorail Services (Durban) supra* 13.

⁹⁴ Le Roux 2016 *Contemporary Labour Law* 70 81.

⁹⁵ *BMW SA (Pty) Ltd v Van der Walt supra* 12.

⁹⁶ Grogan *Dismissal* 254.

⁹⁷ Ponelis 2011 *Contemporary Labour Law* 21 26.

⁹⁸ Grogan *Dismissal* 255.

⁹⁹ (2008) 29 *ILJ* 2850 (ARB).

but also to an employer. As I have already alluded to, [the] respondent was not bound by the finding and recommendation of the first chairperson.”¹⁰⁰

Although the decision in *Multichoice Management Services* does not constitute judicial precedent in circumstances where it is an arbitration award, it does, however, serve as guidance as to what could possibly constitute “exceptional circumstances” since the courts have not provided much clarity on this caveat to the fairness test.

Grogan argues that there is probably no test more precise than fairness with which a particular breach of the “double jeopardy” rule can be assessed.¹⁰¹ He further submits that apart from “exceptional circumstances”, a number of considerations may be suggested, which include (1) whether the disciplinary enquiry was conducted in good faith by the chairperson; (2) whether the chairperson had the power to make a final decision or only give a recommendation;¹⁰² (3) whether the person who countermanded the original decision was in fact conducting a second disciplinary enquiry;¹⁰³ (4) whether the first disciplinary enquiry was conducted in terms of the employer’s disciplinary code; (5) whether the employer was acting in good faith when it decided to hold a second disciplinary enquiry; (6) whether provision was made in the disciplinary code for a second disciplinary enquiry;¹⁰⁴ (7) whether the second disciplinary enquiry conformed with the principles of natural justice;¹⁰⁵ (8) whether and in what circumstances new and relevant information came into light after the first enquiry;¹⁰⁶ (9) the time between the first and second disciplinary enquiry; (10) the gravity of the employee’s offence;¹⁰⁷ (11) the extent to which the sanction imposed by the first chairperson was out of kilter with the sanction prescribed by the disciplinary code and those actually imposed in practice for the particular offence;¹⁰⁸ and (12) whether, in cases where the employee was found not guilty by the first chairperson, the finding was not supported by the evidence.¹⁰⁹

Grogan contends that the *Van der Walt* and *Branford* decisions make it clear that the “double jeopardy” principle does not apply unless the earlier sanction was imposed by a properly constituted disciplinary enquiry.¹¹⁰ This is not the case where, as in cases like *Branford*, the first enquiry was not really a hearing at all.¹¹¹ The principle may also not apply in cases where the initial tribunal is empowered only to recommend a penalty to a higher authority.¹¹²

¹⁰⁰ *YF and Multichoice Management Services (Pty) Ltd t/a MWeb supra* 69.

¹⁰¹ *Grogan Dismissal* 255.

¹⁰² *Wium v Zondi* [2002] 11 BLLR 1117 (LC).

¹⁰³ In *PSA obo Venter v Laka NO* (2005) 26 ILJ 2390 (LAC), the court held that the review by a departmental head in terms of s 17(1) of the Public Service Act 38 of 1994 did not constitute a second hearing.

¹⁰⁴ *Telkom SA v CCMA* [2002] 4 BLLR 394 (LC).

¹⁰⁵ *Strydom v USKO Limited* [1997] 3 BLLR 343 (CCMA).

¹⁰⁶ *BMW SA (Pty) Ltd v Van der Walt supra*.

¹⁰⁷ *Solidarity/MWU obo Van Staden v Highveld Steel & Vanadium* (2005) 26 ILJ 2045 (LC).

¹⁰⁸ *Grogan Dismissal* 255.

¹⁰⁹ *Ibid.*

¹¹⁰ *Grogan Dismissal* 255.

¹¹¹ *Ibid.*

¹¹² *Wium v Zondi* [2002] 11 BLLR 1117 (LC).

4 REVIEW OF A SANCTION BY HIGHER LEVELS OF MANAGEMENT IN CONTRAVENTION OF DISCIPLINARY CODES AND COLLECTIVE AGREEMENTS

4.1 The effect of disciplinary codes and collective agreements in the workplace

In most cases, the starting point of the enquiry concerning the procedural fairness of a dismissal is the employer's disciplinary code.¹¹³ Where there is no disciplinary code, arbitrators and adjudicators are enjoined by the LRA to have regard to the Code of Good Practice.¹¹⁴ In circumstances where the employer accepted certain procedural standards to be followed, it will generally be held to its self-imposed standards, even if those standards are stricter than those required by the courts and the Code of Good Practice.¹¹⁵

However, in the *Highveld* decision, the LAC held that the mere fact that a procedure is an agreed one does not, however, make it fair.¹¹⁶ By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair.¹¹⁷

The effect of non-compliance with disciplinary codes and procedures has been an existing debate for several years. In this regard, there is an approach that disciplinary codes and procedures should not be interpreted strictly, but in accordance with equity and fairness.¹¹⁸ As a result of this approach, courts and arbitrators tend to not sanction minor departures from disciplinary codes and procedures on the pure basis that they constitute guidelines and are therefore not binding in nature.

The other approach is that courts and arbitrators are not bound by disciplinary codes and procedures in circumstances where the disciplinary codes and procedures themselves fail to comply with the requirements of fairness.¹¹⁹ However, if such a disciplinary code and procedure contains provisions which, on face value, appear unfair, the courts and arbitrators are ready to uphold them if those provisions are the product of genuine collective bargaining between the employer and its employees or their trade union.¹²⁰

4.1.1 *The legal status of collective agreements and their relationship with disciplinary codes and procedures*

The purpose of the LRA is the advancement of economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling

¹¹³ *Grogan Dismissal* 251.

¹¹⁴ *Ibid.*

¹¹⁵ *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU* (1998) 19 ILJ 1481 (LC).

¹¹⁶ *Highveld District Council v CCMA* (2003) 23 ILJ 517 (LAC).

¹¹⁷ *Ibid.*

¹¹⁸ *Grogan Dismissal* 228.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

the primary objectives of the Act.¹²¹ One of the primary objectives of the LRA is to provide a framework within which employers and employees can collectively bargain to determine wages, terms and conditions of employment, and other matters of mutual interest.¹²² Another key objective is to promote collective bargaining.¹²³ Collective bargaining can be described as the process of seeking to reach an agreement through negotiation between employers and labour on terms and conditions of employment and other matters of mutual interest.

Thompson and Benjamin argue that the scheme of the LRA overshadows other interactions, such as individual employer-employee negotiations and the determination of issues through arbitration and adjudication.¹²⁴ Thompson and Benjamin further contend that it is fair to then describe the tangible outcome of the process, the collective agreement, as the optimum regulatory instrument of the LRA.¹²⁵

In *KemLin Fashions CC v Brunton*,¹²⁶ the LAC interpreted section 1 of the LRA, which contains the objectives of collective bargaining, as follows:

“The Act seeks to promote the principle of self-regulation on the part of employers and employees and their respective organisations. This is based on the notion that, whether it is in a workplace or in a sector, employers and their organisations, on the one hand, and, employees and their trade unions, on the other, know what is best for them, and, if they agree on certain matters, their agreement should, as far as possible, prevail.”

Collective agreements, as the end product of collective bargaining, play a far greater role in regulating terms and conditions of employment than individual contracts of employment.¹²⁷ Collective agreements may regulate rights and obligations between employers and trade unions as well as the terms and conditions of employment of individual employees.¹²⁸ These employees will, in the first place, be members of the trade union(s) that entered into the collective agreement.¹²⁹ However, collective agreements can also be extended to employees who are not members of the trade union(s) which entered into the collective agreement.¹³⁰ Collective agreements are therefore statutory instruments and their legal consequences are specified and regulated by the LRA.¹³¹

Turning to disciplinary codes and procedures, the Code of Good Practice provides that “all employers should adopt disciplinary procedures that establish the standard of conduct required of their employees” and “an employer’s rules must create certainty and consistency in the application of

¹²¹ S 1 of 66 of 1995.

¹²² S 1(b) of 66 of 1995.

¹²³ S 1(d) of 66 of 1995.

¹²⁴ Thompson and Benjamin *South African Labour Law* AA1–157.

¹²⁵ *Ibid.*

¹²⁶ Unreported judgment (DA1015/99) [2000] ZALAC 25 (16 November 2000).

¹²⁷ Du Toit *et al Labour Relations Law: A Comprehensive Guide* 441.

¹²⁸ *Ibid.*

¹²⁹ Le Roux “The Role and Enforcement of Collective Agreements” 2006 15(6) *Contemporary Labour Law* 51–58.

¹³⁰ S 23(1)(d) of 66 of 1995.

¹³¹ Thompson and Benjamin *South African Labour Law* AA1–161.

discipline".¹³² Although codes of good practice are not directly enforceable, section 188(2) of the LRA requires adjudicators and arbitrators to take relevant codes of good practice enacted in terms of the LRA into consideration in establishing whether a dismissal is substantively and procedurally fair.¹³³

The wording of the Code of Good Practice makes it clear that the drafters adopted an approach that prefers disciplinary codes and procedures which are adopted in terms of collective agreements. It is further well-established that the LRA emphasises the primacy of collective agreements. This is illustrated by the provision that the Code of Good Practice "is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective bargaining."¹³⁴

Calitz argues that disciplinary codes and procedures embodied in collective agreements are conducive to balancing the power between employers and employees, self-regulation, and democratisation of the workplace as well as consistency and certainty and that employers who unilaterally substitute the sanction of a disciplinary chairperson should not compromise these ideals.¹³⁵

4 1 2 *The courts' approaches regarding adherence to disciplinary codes and procedures*

The matter between *County Fair Foods (Pty) Ltd v CCMA*¹³⁶ is one of the earliest decisions in terms of which the LAC had to decide whether it was fair for an employer to substitute a disciplinary sanction and impose a heavier sanction in the absence of an express provision in the disciplinary code and procedure which provided the employer with such power.

In *County Fair Foods II*, the LAC revisited the issue regarding the substitution of disciplinary sanctions after the *Van der Walt* and *Branford* decisions and adopted a different approach compared to its previous decisions. The substantive issue which gave rise to the dispute in *County Fair Foods II* concerned the dismissal of a certain Mr Joseph Alexander emanating from an assault on a fellow employee. A disciplinary enquiry was conducted by the company's manager, who found Mr Alexander guilty of assault. However, due to the mitigating factors presented, a sanction of a final written warning valid for twelve months and a five-day unpaid suspension was imposed.

Two days later, Mr Alexander was advised that, following consultation with senior management, the company was of the view that the sanction was "contradictory to the principle and precedent of the company."¹³⁷ An appeal enquiry was held, and the sanction was altered to one of dismissal. The

¹³² Item 3(1) of Schedule 8 of 66 of 1995.

¹³³ Calitz "May an Employer Dismiss an Employee if the Disciplinary Chairperson Imposed a Lesser Sanction? *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 38 ILJ 97 (CC)" 2019 *Stellenbosch Law Review* 166 185.

¹³⁴ Item 1(2) of Schedule 8 of 66 of 1995.

¹³⁵ Calitz 2019 *Stellenbosch Law Review* 166 185.

¹³⁶ [2003] 2 BLLR 134 (LAC).

¹³⁷ *County Fair Foods (Pty) Ltd supra* 4.

minutes of the appeal reflected that the sole ground of the appeal was procedural unfairness – the argument being that the first sanction must stand.¹³⁸ The CCMA commissioner found the dismissal to have been procedurally unfair and ordered that the employee should be compensated. An application for the review of the arbitration award was unsuccessful before the Labour Court.

In determining the merits of the case, the LAC held the following:

“The evidence placed before [the] second respondent was that Kemp was appointed by [the] appellant to chair the disciplinary enquiry. No evidence was presented by [the] appellant to contradict the conclusion reached by second respondent that ‘Kemp was clearly mandated by the company to make the final determination regarding the outcome of Alexander’s disciplinary enquiry’. [The] [s]econd respondent found further that ‘the company’s disciplinary code and practice does not make provision for intervention or for the overruling of this sanction by a more senior manager than the one appointed to chair the disciplinary enquiry.

[T]he [s]econd respondent correctly found on the basis of Midgley’s own evidence that his decision represented the first time that this kind of intervention had taken place within appellant’s organisation. In the present dispute, there was no provision in appellant’s disciplinary code which could justify the kind of intervention which Midgley initiated in order to ensure the dismissal of Alexander. Alexander’s conduct was considered by a properly constituted disciplinary enquiry. The fact that the appellant sought to discipline Kemp for failing to comply with company policy and procedures and dismiss Alexander does not alter this conclusion. This dispute concerned the unfairness of interfering with the decision of the disciplinary tribunal which had properly been appointed by [the] appellant and, to which interference, no express provision was contained in the disciplinary code which could justify the action taken by Midgley.”¹³⁹

The crux of the CCMA commissioner’s decision was that senior management was not entitled to overturn a decision not to dismiss the employee because the chairperson of the disciplinary enquiry had been mandated by the employer to make a final determination regarding the outcome of the disciplinary enquiry and that the employer’s disciplinary code and procedure did not make provision for the overturning of the disciplinary sanction by a more senior manager.¹⁴⁰ On appeal, the LAC endorsed the view that the employer was not entitled to overturn the disciplinary sanction in circumstances where the disciplinary code and procedure further did not make provision for such process. The LAC accordingly held that the CCMA commissioner’s decision was not unjustifiable in light of the evidence presented during the arbitration proceedings.

It is worth noting that arbitrators and the courts may be disinclined to endorse the convening of a second disciplinary enquiry unless it is specifically provided for in the employer’s disciplinary code and procedure. This approach, however, loses sight of the fact that whether it is permissible to convene a second disciplinary enquiry is a matter of fairness.¹⁴¹ It should therefore, in principle, be possible to convene a second disciplinary enquiry

¹³⁸ *County Fair Foods (Pty) Ltd supra* 5.

¹³⁹ *County Fair Foods (Pty) Ltd supra* 19–21.

¹⁴⁰ Le Roux 2016 *Contemporary Labour Law* 70 81.

¹⁴¹ Poneis 2011 *Contemporary Labour Law* 21 26.

even if the employer's disciplinary code and procedure does not specifically cater for this eventuality.¹⁴²

It is also important to point out that court decisions regarding an employer's conduct of disregarding disciplinary codes and procedures are inconsistent. In some instances, the courts have permitted deviation in circumstances where fairness prevailed in respect of the process which was followed, while in other cases, the courts have held employers to strict compliance with the disciplinary code and procedure.

In *Leonard Dingler (Pty) Ltd v Ngwenya*,¹⁴³ the LAC as per Kroon JA (as he then was) held as follows:

“Mr MALULEKE referred to authority to the effect that an employer is bound by its disciplinary code. The correct approach is, however, that disciplinary codes are guidelines which can be applied in a flexible manner. See Le Roux & van Niekerk, *The Law of Unfair Dismissal in South Africa*, at 100 and 155 and the authorities there cited. See, e.g., *Nehawu v Director-General of Agriculture & Another* (1993) 14 ILJ 1488 (IC) at 1500. It was there stated, correctly, that the purpose of the Labour Relations Act of 1956 was the promotion of good labour relations by way of striking down and remedying unfair labour practices. To that end a strictly legalistic approach should yield to an equitable, fair and reasonable exercise of rights; and insistence on uncompromising compliance with a code, to substantial fairness, reasonableness and equity.

In my judgment, and having regard to all the circumstances, the time when and the manner in which the appeal hearing was held, while not strictly in accordance with the appellant's disciplinary code, were substantially fair, reasonable and equitable.”

This approach was followed in *Highveld*, where the LAC held that the mere fact that a procedure is an agreed one does not, however, make it fair.¹⁴⁴ By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed is unfair.¹⁴⁵ This approach means that as long as the rules of fairness and natural justice regarding the rights of the employee have been complied with, the content of the relevant disciplinary code and procedure of the employer must not be regarded as binding to the extent that non-compliance therewith necessarily renders the disciplinary proceedings invalid.¹⁴⁶

In *Solidarity obo Parkinson v Damelin (Pty) Ltd*,¹⁴⁷ a senior employee did not receive a final written warning as required by the disciplinary code and procedure but was instead dismissed for misconduct. Although the disciplinary code and procedure formed part of the employee's contract of employment, the employer believed that it could be *laissez-faire* in respect of its adherence to and compliance with such disciplinary code.¹⁴⁸ In this regard, the Labour Court held the following:

¹⁴² *Ibid.*

¹⁴³ (1999) 20 ILJ 1171 (LAC) 44–45.

¹⁴⁴ *Highveld District Council v CCMA* (2003) 23 ILJ 517 (LAC).

¹⁴⁵ *Ibid.*

¹⁴⁶ Jordaan-Parkin “Deviation by Employer From Its Own Disciplinary Code When Conducting Disciplinary Enquiries” 2005 26(3) *Obiter* 734.

¹⁴⁷ Unreported judgment (JR2792/12) [2014] ZALCJHB 480 (4 December 2014).

¹⁴⁸ Unreported judgment (JR2792/12) [2014] ZALCJHB 480 (4 December 2014) 16.

"Mr Nel who appeared on behalf of the First Respondent at the hearing before me was at pains to refer to judgments where the need to follow disciplinary processes to the letter in respect of senior employees was less rigorous than in respect of other employees. I do not understand that to mean that you can simply bypass a Disciplinary Code and Procedure that you yourself have drafted when it suits you. This makes nonsense of a Disciplinary Code and Procedure which employees are required to follow and gives *carte blanche* to the employer to act at its will."¹⁴⁹

In the *Damelin* decision, the Labour Court placed primacy on the incorporation of the disciplinary code and procedure into the employee's terms and conditions of employment. It is for this reason that the Labour Court found that the employer cannot simply decide to disregard the application of the disciplinary code and procedure.

In contrast to *Leonard* and *Highveld* decisions, the employee in *Vorster* had relied on contractual remedies. In the latter case, the employer had unilaterally disregarded its disciplinary code by adopting a different process to that which was agreed for purposes of terminating the employee's employment. Although *Vorster* is not an LAC decision, the SCA (a court of equivalent status to the LAC at the time) held the following:

"It might be that the construction advanced by the appellant would create a disciplinary regime that was equally acceptable (whether that is so is by no means certain) but that is not the test: through its disciplinary code, as incorporated in the conditions of employment, the appellant undertook to its employees that it would follow a specific route before it terminated their employment and it was not open to the appellant unilaterally to substitute something else."¹⁵⁰

The distinguishing factor in *Vorster* is that the employee's claim was founded on a breach of contract in circumstances where the terms of the disciplinary code and procedure were incorporated into the employee's terms and conditions of employment – thus assuming a contractual legal effect. This is demonstrated in the SCA's finding as described below:

"The procedure provided for in the disciplinary code was clearly a fair one – it would hardly be open to the appellant to suggest that it was not – and the respondent was entitled to insist that the appellant abide by its contractual undertaking to apply it. It is no answer to say that the alternative procedure adopted by the appellant was just as good."¹⁵¹

Accordingly, the issue before the SCA did not relate to the unfairness of the process which was followed by the employer. On the contrary, it was concerned with a contractual claim found upon common law principles relating to breach of contract, hence the SCA adopted a different approach to the *Leonard Dinger* and *Highveld* decisions.

¹⁴⁹ Unreported judgment (JR2792/12) [2014] ZALCJHB 480 (4 December 2014) 21.

¹⁵⁰ *Denel (Pty) Ltd v Vorster supra* 15.

¹⁵¹ *Denel (Pty) Ltd v Vorster supra* 16.

4 1 3 *The employer's deviation from a binding collective agreement regulating the disciplinary code and procedure*

In *SAMWU obo Abrahams v City of Cape Town*,¹⁵² the South African Municipal Workers' Union (SAMWU) instituted an application for an interdict relating to pending disciplinary proceedings against a large number of its members. SAMWU sought an order declaring the disciplinary proceedings embarked upon by the employer in respect of its members to have been in breach of the collective agreement and further interdicting and restraining the employer from continuing with the said disciplinary proceedings.

The Labour Court, in reaching its decision, relied on the SCA's *dictum* in *Vorster*, which is described below:

"The procedure provided for in the disciplinary code was clearly a fair one – it would hardly be open to the Appellant to suggest that it was not – and the Respondent was entitled to insist that the Appellant abide by its contractual undertaking to apply it. It is no answer to say that the alternative procedure adopted by the Appellant was just as good." (emphasis added)¹⁵³

The Labour Court further distinguished the LAC's decision in *Leonard Dingler* and the SCA's decision in *Vorster*. In this regard, the Labour Court held the following:

"The decision in *Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1171 (LAC) does not constitute contrary authority as contended by Respondent. In that matter, the Court had to decide whether a relatively minor deviation from the terms of the disciplinary code would render the disciplinary proceedings in question, invalid. The Court held that disciplinary codes are guidelines which can be applied in a flexible manner. It concluded that having regard to all the circumstances the proceedings in issue, while not conducted strictly in accordance with the disciplinary code, were substantially fair, reasonable and equitable. The judgment patently does not deal with the right of an employee to require strict compliance with the terms of a peremptory disciplinary code. This distinction is crisply set out as follows in *Riekert v Commission for Conciliation, Mediation and Arbitration & Others* (2006) 27 ILJ 1706 (LC) at para [14] :

"I am of the view that the Applicant herein is entitled to insist that the Third Respondent abide by its contractual undertaking, namely to comply with the disciplinary code and procedure. I believe the Third Respondent failed to do so. However, that is not the issue herein. Rather, the question is whether the Commissioner was justified in his conclusion that the Third Respondent's conduct was procedurally fair notwithstanding the fact that he did not comply with all the terms of its own disciplinary code and procedure. (The Third Respondent conceded both at the arbitration and before me that it had not complied in every respect with its own disciplinary code.)"¹⁵⁴

In line with the above authorities, the Labour Court held that SAMWU was entitled to insist that the employer complies with the national collective

¹⁵² (2008) 29 ILJ 1978 (LC).

¹⁵³ *SAMWU obo Abrahams v City of Cape Town supra* 21.

¹⁵⁴ *SAMWU obo Abrahams v City of Cape Town supra* 22.

agreement and the stipulated procedure for disciplinary enquiries.¹⁵⁵ Accordingly, the Labour Court declared that the disciplinary proceedings against SAMWU's members were in breach of the collective agreement and it, therefore, interdicted and restrained the employer from proceeding with the said disciplinary proceedings.¹⁵⁶

In *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council*,¹⁵⁷ the employee was charged as a result of his conduct in terms of which he had been alleged to have displayed gross disrespect by uttering rude and abusive language to the municipal manager and further making aggressive advances towards the same manager.¹⁵⁸

An external chairperson was appointed to conduct the disciplinary enquiry. The municipality and SAMWU were bound by a collective agreement, part of which prescribed the procedures to be observed for the purpose of conducting disciplinary enquiries.¹⁵⁹

The external chairperson decided that the employee should be dismissed, and that the dismissal should be suspended for twelve months on the condition that the employee does not repeat the same misconduct. The external chairperson conveyed his "recommendation" to this effect to the municipality. The municipality's management was surprised by the external chairperson's "sanction" and asked him to explain how he had come to his decision. In his response, the chairperson stated the following:

"Before dealing with the questions raised by the Municipality, I wish to state that my sanction is merely a recommendation to the municipality.

The Municipality has got the right to deviate or not to deviate from the recommended sanction.

In other words it's up to the municipality to accept the recommended sanction or not. It may substitute the recommended sanction with a sanction that it deems fit."¹⁶⁰

Therefore, the municipality advised the employee regarding his summary dismissal, without affording him an opportunity to be heard before it took the decision to dismiss him. The employee subsequently referred an alleged unfair dismissal dispute to the South African Local Government Bargaining Council (SALGBC) challenging the substantive and procedural unfairness of his dismissal.

The SALGBC commissioner held that it was of the utmost importance that the external chairperson had an unrestricted choice of sanction because the collective agreement provided that he could choose from a number of specified sanctions.¹⁶¹ SAMWU contended that the dismissal was unfair

¹⁵⁵ *SAMWU obo Abrahams v City of Cape Town supra* 23.

¹⁵⁶ *SAMWU obo Abrahams v City of Cape Town supra* 26.

¹⁵⁷ (2011) 32 ILJ 2738 (LC).

¹⁵⁸ *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 5.

¹⁵⁹ *Ibid.*

¹⁶⁰ *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 7.

¹⁶¹ *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government*

because the collective agreement had not been followed in the sense that the chairperson's determination should have been final and binding in terms of the disciplinary procedure.¹⁶² The SALGBC commissioner dispensed this argument, citing the well-established principle in *Highveld* that a failure to follow an agreed procedure does not necessarily render a dismissal unfair.¹⁶³ Accordingly, the SALGBC commissioner endorsed the sanction of dismissal imposed by the municipality, taking into account the seriousness of the charges on which the employee was found guilty, amongst other things.

On review, the Labour Court held the following:

"What happened in this case is that the chairperson of the enquiry did make a finding on Mahlangu's guilt on the charges but failed to complete his duties under the code by finalising the sanction. Instead, he contented himself with only making a recommendation to the employer. There is nothing in the [collective] agreement to suggest that the powers given to the chairperson included the power to delegate or re-assign his responsibility to decide a sanction to another party.

The employer also did not invite any representations from the applicants before it decided to take up the chairperson's invitation to determine the sanction itself. As this was clearly a departure from the [collective] agreement, it might reasonably be expected that it would not have assumed this power without obtaining the applicant's consent for such a material deviation from the [collective] agreement. But it did not. In deciding to perform the function which was entrusted to the chairperson, the employer acted in direct breach of the disciplinary procedure and exercised a power it was not entitled to exercise in terms of that procedure. The fact that an employer is responsible for and entitled to take disciplinary action does not mean that it can simply reclaim powers to determine guilt and sanction which it has previously relinquished in terms of a binding [collective] agreement that remains applicable to it. The facts of this case are also distinguishable from the case of *Samson v Commission for Conciliation, Mediation & Arbitration & Others* (2010) 31 ILJ 170 (LC), in which there was no collective agreement and there was a well established practice of reviewing disciplinary sanctions internally."¹⁶⁴

The Labour Court reasoned that the municipality could not unilaterally assume the power to determine the appropriate disciplinary sanction after it had delegated such authority to an external chairperson. The Labour Court further emphasised that the delegation of this power was exercised in terms of a binding collective agreement and the municipality could therefore not unilaterally deviate from the binding terms of the collective agreement. As a result, the municipality's conduct resulted in the employee's dismissal being determined by a person who did not have the requisite authority to do so. Such conduct flagrantly breached the provisions of the collective agreement. Accordingly, the Labour Court held that dismissal would not have occurred had the municipality not acted in the manner which it did. This affected the substantive fairness of the employee's dismissal.

Regarding procedural fairness, the Labour Court held that the fact that SAMWU and the employee were unaware of the exchange between the

Bargaining Council supra 10.

¹⁶² *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 12.

¹⁶³ *Ibid.*

¹⁶⁴ *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 29.

municipality and the chairperson until after the fact, and had no opportunity to make representations to the actual decision-maker – albeit one who had usurped the chairperson's function – on the validity of the chairperson's views on recommending a sanction, nor to make representations whether any different sanction could, or should be imposed, was procedurally unfair.¹⁶⁵ The Labour Court consequently ordered the reinstatement of the employee.

Interestingly, Lagrange J indicated that the municipality was not without an alternative to the extent that it was unhappy with the sanction which was imposed by the external chairperson. In this regard, he held the following:

"If the employer was unhappy with the sanction the chairperson would have imposed, it would not have been without recourse: it could have applied to review the chairperson's decision."¹⁶⁶

This suggestion by Lagrange J is founded on the principle that an organ of state can review its own decision "on such grounds as are permissible in law".¹⁶⁷ The municipality (in this case) is an organ of state in terms of section 239 of the Constitution of the Republic of South Africa, 1996 (Constitution). Lagrange J referred to this alternative remedy with reliance on the LAC's decision in *MEC for Finance, KwaZulu-Natal v Dorkin NO*.¹⁶⁸ The permissibility of an organ of state reviewing its own decisions is discussed in detail in Part 2 of this article.

4 2 Increasing sanctions on appeal

In certain cases, an employee may be subjected to a disciplinary enquiry and the chairperson finds the employee guilty of the alleged misconduct but imposes a disciplinary sanction short of dismissal. The employee may be of the view that they are not guilty of misconduct and decide to lodge an internal appeal. Although in such cases, the employee institutes the appeal and not the employer, the question which arises is the following: is the appeal chairperson, to the extent that he or she also finds the employee guilty, entitled to increase the disciplinary sanction which was imposed in the internal disciplinary enquiry?

In *Rennies Distribution Services (Pty) Ltd v Bierman NO*,¹⁶⁹ the Labour Court frowned upon the practice of an appeal chairperson increasing the disciplinary sanction. In this case, the employee had been issued a final written warning for unauthorised absenteeism. The employee was dissatisfied with the outcome and lodged an internal appeal process. In the appeal hearing, the appeal chairperson changed the disciplinary sanction of a final written warning and substituted it with a sanction of dismissal.

¹⁶⁵ *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 34.

¹⁶⁶ *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 33.

¹⁶⁷ S 158(1)(h) of 66 of 1995.

¹⁶⁸ [2008] 6 BLLR 540 (LAC).

¹⁶⁹ (2008) 29 ILJ 3021 (LC).

The Labour Court recognised that in criminal cases, a court of appeal has the right to interfere with a sentence that has already been imposed.¹⁷⁰ It noted that the court of appeal derives such power from the express provisions of section 322(6) of the Criminal Procedure Act 51 of 1977, which sets out the powers of the court (sitting as a court of appeal) in detail.¹⁷¹ The Labour Court held that it would be unfair to allow a chairperson in an appeal hearing (as part of a disciplinary process) to simply increase a disciplinary sanction except in circumstances where the disciplinary code expressly allows for such a power.¹⁷²

Importantly, Basson J indicated that he was mindful of the fact that a disciplinary enquiry should not be equated with a criminal trial per the decision in *Avril Elizabeth Home for the Mentally Handicapped v CCMA*.¹⁷³ He added that the rationale underlying the reasons why a criminal court on appeal should caution against increasing a sanction is equally valid in respect of disciplinary enquiries.¹⁷⁴

Therefore, the position from *Rennies* is that an appeal chairperson is permitted to increase a disciplinary sanction on appeal only if such is expressly permitted in terms of the disciplinary code and procedure. Grogan submits that where an appeal tribunal is permitted to increase the disciplinary sanction, the employee should, at the very least, be warned if the chairperson is contemplating increasing the disciplinary sanction so that the employee can either withdraw the appeal or prepare submissions on why the sanction should not be increased.¹⁷⁵

In *Marina Opperman v CCMA*,¹⁷⁶ Steenkamp J endorsed the *Rennies* decision by emphasising that except where express provision is made for the imposition of a harsher disciplinary sanction on appeal, a chairperson on appeal does not have the necessary power to consider imposing a harsher sanction. Steenkamp J further held that even if there is express provision for such a power, the chairperson on appeal must still adhere to the fundamental principles of natural justice which require that the *audi alteram partem* principle must be afforded to the employee who may be prejudiced by the imposition of a more severe sanction.¹⁷⁷

The *Rennies* and *Opperman* decisions make it definitively clear that an employer may only impose a harsher disciplinary sanction on appeal only if express provision is made for such in terms of the employer's disciplinary code, subject to adherence to the principles of natural justice.

¹⁷⁰ *Rennies Distribution Services (Pty) Ltd v Bierman NO supra* 20.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ [2006] 9 BLLR 833 (LC).

¹⁷⁴ *Rennies Distribution Services (Pty) Ltd v Bierman NO supra* 23.

¹⁷⁵ Grogan *Dismissal* 264.

¹⁷⁶ (2017) 38 ILJ 242 (LC) 18.

¹⁷⁷ *Ibid.*

4 3 Conclusion

Based on the consideration of the above authorities, it is evident that the courts adopt different approaches in respect of compliance with the disciplinary codes and procedures. The courts have in the past permitted employers to deviate from strict adherence to the disciplinary code and procedure in circumstances where the employer nonetheless followed a fair process. The difficulty arises when the disciplinary code and procedure has been incorporated into an employee's contract of employment. In this regard, the courts have indeed been consistent by holding the employer strictly bound to the provisions of the disciplinary code and procedure since those provisions constitute contractual terms in such circumstances.

The courts have also upheld the primacy of collective agreements since they constitute a contractual undertaking between the employer and the trade union(s) (acting on behalf of their members). This is because it is contrary to public policy to permit an employer to unilaterally resile from a contractually binding agreement without the consent of the other contracting party. It is for this reason that the courts hold employers bound to disciplinary codes and procedures which are incorporated into collective agreements.

It is further evident that the courts do not permit employers to impose harsher disciplinary sanctions in circumstances where an employee has lodged an internal appeal unless the disciplinary code and procedure makes express provision for the imposition of a harsher sanction and that the employee is warned of the possibility of harsher sanction being imposed and that the employee is provided with an opportunity to make representations. The reason for providing an employee with an opportunity to be heard is rooted in the legal principle of *audi alteram partem*.