Unpacking the constitutional promise of a fair hearing and the twin concepts of substantive justice and procedural justice in labour disputes in Zimbabwe.

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Abstract
The relationship between the employer and the employee is inherently unequal. It is the relationship between those who have and those who do not have. Capital and labour when put to good use result in efficient production of goods and services. In real life, capital and labour are constantly in binary opposition. Capital occupies a higher status to labour and the tendency to dictate employment conditions is overwhelming. Capital dominates labour in every respect. Previously the law was permissive to dismissal of an employee at the instance of capital without fault. Labour had no responds to these determinations. The employers right to hire and fire was inherent. The terms substantive justice and procedural justice are legal terms which are designed to facilitate equity, justice, and fairness at the work place. International human rights laws brought in new sensitivities to this field of law. Accordingly, Independence saw the introduction of the local legislation that weighed in to balance the relationship between labour and capital. Employment rights are inherent to all human beings. Recognition, promotion and protection of these rights is for the common good. The research methodology applied is the qualitative methodology which is largely desk top research. The article sets out to articulate the meaning of the term's substantive justice and procedural justice in the work place. Labour law is the theory of justice and has always had justice as its ultimate aim. In conclusion it is submitted that justice leads to an equitable working environment and the achievement of the sustainable development goals for the nation.
Key Words: *Domination; Misconduct; Procedural justice; Subordination*;

1. Introduction

The courts of law in Zimbabwe frown upon cases in which charges are trumped up in order to find reason to charge and discharge an employee from work. False and malicious accusations are not expected, and if they are brought up, then the procedural justice system will ensure that this is picked out. Procedural justice aims to afford the employee who is being charged, of misconduct an opportunity to know the case they have to answer in advance, prepare for one's defence, and call necessary witnesses, and instruct a lawyer if possible. The tribunal or forum is to be properly constituted. The hearing must be before an impartial body. The principles of natural justice are to be observed. The starting point is that an employee accused of misconduct is presumed innocent until proven guilty according to the Constitution of Zimbabwe, (2013).

1.1 Philosophical and Theoretical Underpinnings of Labour Laws

Brian Langille (2017) writes about labour laws theory of justice. He espouses that labour law has always had, and will always have a theory of justice. He cites Bob Hepple who stated

> *The temptation for labour law scholars is to focus their energies on developing an ideal theory of labour rights or social justice. But any theory is sterile unless we first try to understand why real employers, workers, politicians, and judges act as they do in practice. Labour law is not an exercise in applied ethics. It is the outcome of struggles between different social actors and ideologies of power relationships. Labour laws are used by people to pursue their own goals and sometimes they need rights such as a minimum wage or to freedom of association, simply in order to survive*.

It has been noted by many labour law experts that the relationship between the employer and the individual employee is that of a bearer of power and one who has no power. The relationship is therefore inherently unequal. The object of labour law is and will always be the balancing of power between those who have and those who do not have Brian Langille (2017). Labour law therefore comes in to assist the employee who has no bargaining power as against the all-powerful employer. In the same vein labour law comes to the aid of the employer who is injured by the misdeeds of the worker.

1.1.1 Termination of Employment

Article 4 of the Termination of Employment Convention (1985) which entered into force on 23 November 1985 states as follows:

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

Zimbabwe as a member of the United Nations is bound by this Convention in addition to others by virtue of having acceded to it. This means an employee cannot just be dismissed from employment for no cause. A cause may be in the capacity of the employee to implement the work or in the conduct of the employee. Otherwise, the employee's employment is secure.

The Labour Act [Chapter 28:01] in section 12 B introduced the concept of unfair dismissal and thereby abolished the common-law termination of employment.

(1) Every employee has the right not to be unfairly dismissed
(2) An employee is unfairly dismissed;
    (a) If subject to subsection (3) the employer fails to show that he dismissed the employee in terms of an employment code or;
    (b) In the absence of an employment code the employer shall comply with the model code made in terms of section 101 (9)
(3) An employee is deemed to have been unfairly dismissed;
    (a) If the employer terminated the employment contract with or without notice because the employer deliberately made continued employment intolerable for the employee;
    (b) If on termination of an employment contract of a fixed duration the employee;
        (i) Had a legitimate expectation of being engaged
        (ii) Another person has been engaged instead of the employee,

This provision of the Labour Act [Chapter 28:01] brought an end to the common law right of the employer to hire and fire employees at will. The employer may still hire, again subject to the law that is to say without discrimination. When it comes to termination of the employment contract, if it is a contract of no fixed term then s/he must comply with the law. Termination can only be for a cause, or reason. In addition, the termination of employment if it is on grounds of alleged misconduct, the misconduct has to be serious or of such gravity that it is shown that it goes to the very root of the employment contract.

Over and above that there should be a hearing to prove the alleged misconduct. Section 101(9) of the Labour Act introduced the concept of employment codes of conduct. The employment codes of conduct which are entered into by

the employers and the employees contain the duties and obligations of the employers and the employees. They also contain actions of conduct or omissions which are regarded as misconduct. The misconduct may be ordinary misconduct which does not attract severe penalties or minor misconduct that attracts verbal warnings, others attract written warnings, yet others attract the penalty of dismissal. The misconduct that attracts the penalty of dismissal is the very serious or grave misconduct. Where an organization has such a code of conduct all the disciplinary proceedings are to be conducted in terms of the code of conduct (The Labour Act [Chapter 28:01] section 101)

In instances where a company does not have a code of conduct of its own then all disciplinary proceedings are to be according to the model code (S.I. 15 of 2006). The model code is Statutory Instrument number 15 of 2006 that was created to guide those without their own codes of conduct on the procedures that are to be followed. The model code, (2006) outlines the constitution of hearing committees, defines their roles and outlines acts of misconduct and deals with penalties that can be meted out.

By the same token constructive dismissal is outlawed by the Labour Act [Chapter 28:01] section 12B. Constructive dismissal is where the employer unfairly makes working conditions for the employee difficult such that the employee after feeling the heat would then give up on the job. The employer would have made continued employment intolerable. The section emphasizes that an employee has a right not to be unfairly dismissed. Such a right did not exist prior to the Act.

An employee is considered unfairly dismissed if the employer makes the employment situation unbearable to the employee, such that the employee ends up resigning because the conditions are unbearable, the Labour Act [Chapter 28:01] section 12. The law takes it that the employer deliberately introduced the unsavory conditions to force the employee to resign because s/he can no longer stand it. This is also known as constructive dismissal. That is making life at work difficult or impossible and the employee feels not only helpless, but unwanted. The test for constructive dismissal is objective. There must be a link between the conduct of the employer and the resignation of the employee and the intolerable situation. In addition, the intolerable situation must be caused by the employer or one's representative.

Madhuku (2015) cites` the case of Mudakureva v The Grain Marketing Board 1998 (1) ZLR 145 (S) where trumped up charges were raised against the employee. After a sham hearing he was told that the charges had been proved. He was advised to resign or face dismissal. He opted to resign. On appeal to the Supreme Court, it was stated that what transpired was constructive dismissal. This was because the charges were fabricated and the trial was meant to unfairly justify the dismissal of the employee

The fixed term contracts are those contracts for a fixed period. These can be for a week, two weeks, six months or one, or five years. Madhuku L (2015) explains that, the principle of reasonable expectation is that an employee would expect naturally, that the contract would be renewed if there is still work to be done. If, however the fixed term of the employee is terminated, but another person is then taken to do that same work, the employee could claim unlawful dismissal. The question to ask is: Did the employee reasonably expect the contract to be renewed? (Madhuku, 2015)

Madhuku (2015) espoused on the case of Council for Civil Service Union v Minister of Civil Service (1984) 3 ALL ER 935 at 944 which dealt with the aspect of reasonable expectation. It highlighted that legitimate expectation may arise either from express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Regular practice of renewal creates legitimate expectation.

In UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira 2010 (1) ZLR 127 127 (S) the Supreme Court held that the contract of employment excluded any reasonable expectation of renewal and that parties are bound by the express terms of their contract.

Madhuku (2015) posits that if another person is taken to do the same work or substantially the same work then there is reasonable expectation of the renewal of an employment contract. The South African Courts have taken the attitude that the writing of exclusive terms does not exclude reasonable expectation.

The Constitution of Zimbabwe (2013) does among other things promise and encourage the upholding of human rights. In the preamble it talks of a resolve, a commitment, to build a united just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work.

Section 4 of the Constitution of Zimbabwe (2013) encourages the State to take all positive measures to create employment and to remove restrictions and inhibitions to the creation of employment for all. The right to fair and safe labour practices and standards and to be paid a fair and reasonable wage is buttressed in section 65 of the Constitution. The Right to Administrative Justice is provided for in the Constitution of Zimbabwe (2013). It reads:

(1) Every person has a right to administrative conduct that is lawful, prompt efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

In all dealings every person has expectations to be treated open-handedly. That is to say fair treatment at all times. Should any conduct be otherwise, then an explanation for the deviation would be required. A person charged with the **administration or administrative conduct is bound to observe these requirements.**

1.1.2 Substantive Justice

Substantive justice requires that there be sufficient and reasonable grounds for a person or authority to act in a particular manner. That is to say there must be a reason why certain action is being taken. Substantive justice requires that an offence recognized as an offence at law must have been committed before an employee is charged of misconduct.

The term Substantive according to the Oxford Dictionary means having a firm basis in reality and so important, meaningful or considerable. The Oxford English Dictionary defines justice as the quality of being fair and reasonable.

Substantive justice is concerned with the content of the law. The legal principles created by Parliament and the courts need to be regarded as "just (www.open.edu/openleran).

Justice is defined by the Oxford Dictionary of Law as a moral ideal that the law seeks to uphold in the protection of rights and the punishment of wrongs. It goes on to say that justice is not one and the same thing with the law and that some law can be unjust (www.lawteacher.net/free-law-essay).

The right to a fair hearing goes hand in hand with the right to administrative justice (Constitution of Zimbabwe, 2013). According to the Constitution of Zimbabwe, (2013), every person accused of crime has the right to a fair and public trial within a reasonable time, before an independent and impartial court. In most cases labour misconduct cases are dealt with as criminal cases although the burden of proof is that of proof in a balance of probabilities.

1.1.3 Resolution of Disputes between Employers and Employees

Under the common law the employer could terminate the employment of an employee summarily for misconduct. Some grounds for summary dismissal were insubordination, negligence, incompetence, dishonesty, breach of duty of good faith and absence from work.

Madhuku cites the case of National Foods v Masukusa 1994 (10) ZLR 66, (**S**) where, Korsah J.A said;

> *while there is no fixed rule as to what will justify summary dismissal, it is generally accepted that willful disobedience to the lawful and reasonable order of the employer, misconduct inconsistent with the due faithful discharge of his duty to the employer or prejudicial to the business of the employer may justify dismissal.*

Apart from our labour laws and the Constitution termination of employment has to comply with international standards and conventions because we are members of the universal family. The termination of employment Convention states:

> *The termination of employment of a worker shall not be terminated unless there is a valid reason for such termination connected with capacity or conduct of the worker or based on operational requirements of the undertaking, establishment or service {Termination of Employment Convention 1982 (158)}.*

There has to be a valid reason for the termination of an employment contract. Which reason has to be justifiable in a democratic society. By the same token for an employee to be adversely affected by the acts of the employer there must be reasonable grounds for so doing. In essence for the employer to mount disciplinary proceedings against an employee there must have been misconduct or omission to do something which is categorized as wrong at law or practice. The, National Employment Code of Conduct Regulations No 15 (2006) stipulates that an employee's employment can be terminated on any of the listed grounds:

(a) Any conduct or omission inconsistent with the fulfillment of the express or implied conditions of one's employment contract.
(b) Willful disobedience to a lawful order or employment code of conduct,
(c) Willful and unlawful destruction of the employer's property, or
(d) Theft, or fraud, or,
(e) Absence from work for a period of five or more working days without leave or reasonable cause in a year, or,
(f) Gross incompetence or inefficiency in the performance of his or her work, or
(g) Habitual and substantial neglect of his or her duties; or
(h) Lack of a skill which the employee expressly held himself out to possess.

These are the only permissible grounds for terminating the employment of an employee under the Model Code, 2006. These are to be proved at a hearing called for that purpose. Of special note is the fact that paragraph 4 (a) has been referred to as the omnibus provision because it covers many acts of misconduct and omission (Madhuku, 2015). The Employment Code No. 15 of 2006 in section 5 states that termination of employment of an employee is to be in terms of the employment Code of conduct which is registered in terms of section 101 (1) of the Act.

In the event that the organisation has no code of conduct of its own then termination should be in terms of the Model Code.

So, any other form of termination other than by consent is unlawful. Some companies do have codes of conduct which list misconduct as either ordinary misconduct or serious misconduct. So, companies or organizations which have codes of conduct are to apply the code of conduct in disciplinary hearings. These are in terms of section 101 of the Labour Act whilst companies or organizations which do not have codes of conduct are enjoined to apply the model code. It is inappropriate for an organization with its own code of conduct to make use of the model code and vice versa (The Labour Act [Chapter 29:01] section 101)

The advantage of a code of conduct for an industry is that the employers and employees agree in advance on what is permissible and what is not permissible at the work place. Possible penalties are also stipulated, depending on the gravity of the misconduct or omission. An act of misconduct is a positive act or conduct, whereas an omission could be a failure to do what was expected or agreed upon or it may be negligence.

A misconduct which is not serious does not undermine the relationship between an employer and an employee (Madhuku, 2015).

Serious misconduct is labeled as serious because it can have the effect of destroying or undermining the relationship of trust and confidence between an employer and an employee. Without this trust an employment relationship cannot continue (www.employment.govt.nz).

The Constitution, 2013 section 65. recognises the rights of employees as inalienable rights. That is to say rights which cannot be lightly taken away. The Constitution of Zimbabwe, (2013) in section 65 states:

(1) Every person has the right to fair labour practices and standards and to be paid reasonable wages.
(2) ……..
(3) ……..
(4) Every employee is entitled to just, equitable and satisfactory conditions of work.

Fair labour practices invoke people's sense of justice and fairness. Whatever happens at the work place the employee is not to be prejudiced of his right to work without reasonable cause. The labour practices and standards themselves are to be fair. This is reinforced in section 2 A of the Labour Act [Chapter 28:01] which gives the purpose of the Act as one to advance social justice and democracy at the work place. Employees are not expected to be treated heavy-handedly or to perform impossible tasks.

Any work that an employee is expected to do will be judged justly and equitably and the conditions of work are to be satisfactory. It amounts to unjust treatment, if an employee is tasked to do work that is impossible to perform. In addition, the necessary tools of the trade are to be availed. Madhuku (2015) lists misconduct as serious and ordinary as follows:

Misconduct	**Serious Misconduct**
Using inappropriate language	Bullying

Internet misuse	Harassment
Minor instances of failing to follow the employers reasonable and lawful instructions	Theft/Fraud
	Behaviour that endangers the health and safety of other employees
	Disobeying an employer's reasonable and lawful instructions.
Inappropriate clothing,	Use of illegal drugs or abuse of alcohol at work
Lateness,	Dishonesty
Absence from work for less than five days without excuse.	Absence from work for five days or more in a year

Serious misconduct usually involves an employee acting deliberately although there are instances when an employee act carelessly or recklessly. The above list is not exhaustive.

1.1.4 Any conduct or omission inconsistent with the express or implied conditions of one's employment contract

The Labour Act (S.I. 15 of 2006 section 4 (a) can be invoked wherever the conduct of the employee is regarded as having breached the implied and express terms of the contract. This covers a whole array of acts of misconduct and acts of omission. It goes back to the duties express or implied of the employee.

The Obligation to Corporate

The employee has an obligation to corporate in advancing the employers commercial interests. The employee must at all times work so as to advance the employers interests and not against those interests. This encompasses performing ones work faithfully and diligently and not otherwise. Our common law recognizes that the employer and the employee have reciprocal duties towards each other (Madhuku, 2015). One of such duties is for the employee to be obedient to the employer. Madhuku (2015) also adds that the employee by virtue of being an employee holds a subordinate position. He also added, Willful disobedience to the express instructions of the employer go to the very root of the employment contract. The Supreme Court in, DHL International v Kevin Tinofireyi S.C. 80/14, Civil Appeal No. SC165/11, clearly illustrates this concept. The facts were that the respondent was by the appellant as a data coordinator. He was charged with the offence of disobedience and indiscipline. The respondent had been asked to report for duty but

decided not to do so. The respondent employee therefore absented himself from duty in defiance of an order to the contrary. The respondent was asked to work overtime. He deliberately defied the instructions of the employer not to leave work. The Supreme Court reasoned that:

> *such conduct was clearly inconsistent with the fulfillment of the express or implied conditions of employment. On the basis of common law and numerous authorities in this jurisdiction and beyond such conduct justified dismissal,*

The Supreme Court confirmed the dismissal of the respondent for misconduct

The case of Zimbabwe Banking Corporation v Saidi Mbalaka S.C. 55/15 also involved the charge of (any act, conduct or omission inconsistent with the fulfillment of the express or implied conditions of his contract among other charges. The respondent herein was a branch manager of the bank. As a branch the lending limit was ten million dollars ($10 000 000, 00). Respondent authorized the encashment of seventy-three million dollars (Z$73 000 000.00) against an account which was overdrawn in the sum of over ten million dollars (Z.$10 000 000.00). The second charge was that his branch was the one with the highest number of overdrawn accounts and the greatest exposure to risk in relation to client indebtedness as well as the highest number of unclassified savings accounts. After a hearing the respondent was dismissed. The dismissal was overturned on appeal to the arbitrator but confirmed by the Labour Court. On further appeal to the Supreme Court the penalty of dismissal was reinstated.

The case of Delta Corporation versus Gwashu S.,C, 56/2000 is interesting. It gives another angle to the all-encompassing charge of conduct or omission inconsistent with the fulfillment of ones implied and express conditions of employment. The facts were that Gwashu was employed in the food section of Delta Corporation. His duties were to serve *sadza* to those working in the section. An altercation arose between him and three customers. Gwashu allegedly insulted the three customers by saying that their tummies were too big and that he would put rat poison or pills in their food. He was charged with using abusive language thus contravening the code of conduct. After a hearing he was convicted and dismissed. On appeal to the Supreme Court the conviction was confirmed but the penalty of dismissal was changed.

The essence of this judgement is that it is an offence to insult customers at the work place that is the reason why the conviction was confirmed. The penalty of dismissal was by far excessive and was changed by the Supreme Court

Implied terms of employment are those terms which are not specifically expressed in a contract (www.Farrer.co.uk). Custom and practice may have it that certain terms and conditions are always included such that it would be reasonable, notorious or certain. Notorious here means well known" (www.Farrer.co.uk).

The concept of the officious bystander is that the proposed term is so obvious that it goes without saying such that if an officious bystander suggested to the party's inclusion of a certain term in their contract the two parties would have said "Of course!" simultaneously.

The rights and obligations of the employer and the employee are reciprocal. That is to say the employer's obligations are the rights of the employee and the obligations of the employee are the rights of the employer (www.labourguide.co.za). The South African Labour Guide says the relationship between the employer and the employee are built out of trust. Employees have a general right not to be dismissed from employment unfairly and to be treated with dignity and respect. Employers have a right to provide employees with a safe working environment. The employees have a reciprocal duty to ensure that the working environment is safe for the employer and other employees.

In the South African case of Media 24 Ltd and Another v Grobler [2005] BALLR 649 (SCA) the complainant was an employee (a 33-year-old secretary) who sued for damages against the employer and the one who sexually harassed her. The harasser was a junior manager. The allegations were that the employer had failed to act to stop the sexual harassment. This was in spite of the fact that the sexual harassment was common knowledge. Although the employer argued that the sexual harassment had nothing to do with the employment, the court found that the employer has a common law duty to take reasonable care for the safety and security of the employee. This duty extended to taking reasonable steps to protect employees not only from physical harm caused by what may be called physical hazards. The duty included the duty to protect employees from psychological harm caused by sexual harassment by another employee. The court went on to say employers must therefore know that ignoring such a duty can be costly, considering that they would be liable for heavy damages and heavy legal costs. Sexual harassment of other employees can be charged under an act of conduct or omission which is inconsistent with the fulfillment of the express or implied conditions of his or her conduct.

Willful Disobedience to a Lawful Order

Willful disobedience to a lawful order is another possible charge under the model Code of 2006. Willful disobedience to a lawful order of the employer goes to the very root of the employment relationship and is considered a very serious offence. Under the Master and Servant Ordinance (1901) disobedience to the lawful orders of the employer was a crime. That is to say a servant could be imprisoned for refusing to comply with the lawful instructions of the employer. The only defence is possibly that the instructions were not lawful. An unlawful instruction cannot be complied with. The Master and Servant Act (1910) was only repealed in 1980 by the Employment Act (1980).

Duty of Subordination

One of the most important duties of the employee is the duty of subordination. The employee by virtue of being an employee is subordinate to the employer. As a subordinate the employee is required to obey all lawful orders of the employer. When the employee refuses or neglects to obey the instructions the employment contract is seriously vitiated. Degrading and insulting orders cannot be obeyed. Coupled with the duty of obedience is the duty to respect the employer. In the case of Matereke v Bowring & Associates 1987 (1) ZLR 206 (SC), the court elaborated on willful disobedience to lawful orders. The facts were that Matereke was appointed an acting broker. He wanted to move into the office of the executive broker who had left employment. He was expressly advised against doing so but nonetheless moved into the office. Matereke was instructed to leave the office but he did not comply. At 5.30 pm, he was suspended for disobeying a lawful order. He was eventually dismissed. The Supreme Court held that the dismissal was lawful because he refused to obey a lawful order.

This offence involves a willful and deliberate refusal to obey- knowledge and deliberateness must be present.

Willful Destruction of Employers Property

Willful destruction of the employer's property is another dismissible offence. An employee who goes about destroying the property of the employer can be dismissed. It is tantamount to biting the hand that feeds. Employees are to safeguard the property of the employer because the employee benefits from the property as much as the employer. By destroying the property, the employee behaves in a way that is contrary to the implied end express terms of the employment contract.

Theft or Fraud

According to Madhuku, (2015) the employment contrast is one which is born out of absolute trust. Honesty in all dealings with the employer is therefore a prerequisite. Any conduct exhibiting dishonesty is a breach of the employment contract.

Theft from the employer is a dismissible offence. According to the Criminal Law (Codification and Reform Act) [Chapter 9:23] section 113 Theft is the unlawful taking of property belonging to another with the intention of permanently depriving that other of it. It means an employee may be prosecuted for the theft in the courts of law. Whatever the result of the criminal prosecution the employer may still drag the offender before a disciplinary hearing. According to Madhuku, (2015) an acquittal at the criminal court does not of its own clear the employee because s/he may still be convicted at a disciplinary hearing. This is so because the standard of proof at a criminal hearing is referred to as proof beyond a reasonable doubt, whereas in labour matters the standard of proof is on a balance of probabilities which is a lower standard of proof; this is the standard of proof required in civil matters.

Fraud

Fraud is the crime of gaining money or property by a trick or by lying (Collins dictionary). Madhuku, (2015) alludes to the fact that fraud is intentional deception to cause a person to give up property or some lawful right, something said or done to deceive; or trick. An employee who commits acts of fraud is liable to be charged and dismissed.

Absence from Work for Five days or More Working days without leave or Reasonable Excuse in one Year

The employee is expected to perform the mandate for which s/he is employed. The performance is continuous (Madhuku 2015). The work is to be carried out on all the relevant days except when the employee is on official leave. An employee who absents oneself from work without a lawful excuse breaches the very contract of employment. Such a breach goes to the very root of the employment contract.

Sick Leave

The law provides for sick leave in the event that the employee is unable to work due to sickness (Madhuku, 2015). There is also provision for compassionate leave if a close relative or spouse passes on (Labour Act [Chapter28:01] section 14B (c).

Special Leave

Special leave may be obtained where an employee is required to attend court as a witness Labour Act [Chapter 28:01] section 14B (b) An employee who is required to attend a conference as a delegate of a trade union may be granted special leave Labour Act [Chapter 28:01] section 14B (c). According to the Labour Act [Chapter28:0] section 14B (c) the law has however limited this type of leave to twelve days in any one year. In addition, there is another limit concerning the the passing on of a close relative. The relatives are; one's parents, one's spouse and one's children. There is no room for absenting oneself from work on the basis that an uncle, aunt or cousin or neighbour has passed on. An employee who is detained for purposes of investigations is entitled to special leave under the Act.

The entitlement of a worker to leave when it is due is the employer's obligation to grant an employee leave, (Labour Act [Chapter28:01] section 14A.

Maternity Leave

Maternity leave is now constitutionally provided for. The Labour Act in section 18 also provides for it. Women who fall pregnant apply for maternity leave for the purpose of delivering that is ninety-eight days (98). The problem is that it is only granted to someone who has been employed for a year (Labour Act). For this reason, it can be challenged for being discriminatory on the ground of gender or sex (Constitution, 2013). There is also a limitation of three such applications for leave for an individual at the same place of employment (Labour Act. In addition, such leave can only be taken after two years from the previous one. In other words, prior to the expiry of the two years from the date of such leave an employee may not take maternity leave.

Gross Incompetence or Inefficiency in the Performance of His or Her Duty

Madhuku, (2015) posits that employees are expected to possess the requisite qualifications for the jobs they hold. By the same token expertise and skill are to be demonstrated in the way they perform their work. Gross incompetence is therefore a ground to terminate the employment of a worker**.** Minor mistakes may be tolerated at a work place. Serious mistakes are not pardonable because they go to the very root of the employment contract. This applies even to unskilled workers who because of experience should exhibit the necessary skill otherwise they lose their jobs.

Habitual and Substantial Neglect of his or her Duties

According to the Labour Act, the most important duty of the employee is to perform the mandate. Performance has to be according to the assigned quality and quantity within the prescribed time (Labour Act). An employee who neglects to perform his or her duty fails to comply with the expectations of the employer. An employee who habitually neglects his duty may be charged with misconduct (Labour Act). An employee is to perform her duties diligently at all times. Failure to do so may result in charges of misconduct and eventually dismissal.

Lack of Skill

Lack of skill which the employee expressly or impliedly held himself or herself to possess is an act of misconduct**.** Most of the time employees are employed, for the employer to exploit their skills. An employee gives out that he is an expert in this field and is skilled in the field. The output of the worker must therefore showcase the skill (Labour Act). An employee who produces shoddy work causes loss to the organization. Customers will frown on the products. The skill expressed or implied by the employee must be given vent to in the excellent products (Labour Act). A continuous failure to meet the required standard of skill will result in the dismissal of the employee.

Work related Offences

Offences committed by an employee against other employees or against the employer whilst at the work place do not pose a problem because this is clearly work related (Labour Act). Offences committed outside the normal place of employment sometimes do cause challenges. In some cases, the offences can be traced back to the work place. For other types of offences, it would be difficult to link them to the employment, thus not warranting preferment of misconduct charges by the employer (Labour Act).

Procedural Justice

Unless there is agreement to terminate the employment contract the employer cannot terminate the contract of an employee at one's pleasure. That is so even if the employee is alleged to have committed a serious offence. The employee is still entitled to a fair trial. The misconduct or allegations still have to be proved.

Before a charge is made against an employee the employer must institute investigations as a way of fact finding before the hearing itself. Investigations can be done by one person or by a committee. Investigation is done before the employee is suspended. Written evidence can be obtained whilst events are still fresh in the minds of the witnesses.

The Principles of Natural Justice

The principles of natural justice have to be observed before a decision can be made on whether an employee is guilty of an offence. There are two very important principles of natural justice.

The first one is *the audi alteram parten* rule. This is a Latin term which means that before a person can be convicted of an offence or found liable in civil, criminal or labour matters s/he must be given an opportunity to defend oneself. The defence must be given an opportunity to tell its story and may be, explain away any probable mischief or perceived misconduct.

The second principle of natural justice *is nemo judex*. This is another Latin term which means one should not be a judge in one's own cause. The witness or complainant cannot be the prosecutor and the judge in the same matter. Someone else who has no interest in the matter should be the judge.

Labour misconduct charges are in the form of criminal charges. At the end of the hearing the disciplinary committee is to come up with a decision of either guilty or not guilty, Special note has to be taken that the standard of proof is not proof beyond a reasonable doubt as in criminal matters but on proof on a balance of probabilities as in civil cases.

Companies or organisations which have their own registered codes of conduct are to encapsulate the principles of natural justice therein.

The Model Code, (2006) is permissive of the employer appointing a person to hear a disciplinary matter. In other instances, a disciplinary committee is appointed to hear a dispute comprising of three or more members one of whom would be the chairperson. Some codes of conduct do specify that members are to be drawn from management, and the workers representatives. Members from management are those workers who hold managerial positions. The workers committee if there is one may choose one of its own members to be part of the hearing committee. Care is to be taken that those who have a personal interest in the matter do not take part.

Personal interest can be from relationships with the one on trial or enemies of the one on trial. It can be personal relationships, such as close family members or friends or members who are averse to the one on trial or witnesses to the event leading to the hearing. If say the spouse of one of the witnesses is a member of the disciplinary committee fairness would be compromised and justice negated. As is often said by lawyers, justice must not only be done but must manifestly be seen to be done. The relative of the accused may come up with a fair decision but the very fact that one is related taints the whole concept of fairness. Personal interest can arise from personal relationships which can be pecuniary interest as well.

Madhuku, (2015) posits that unlike previously now there is no room for summary dismissal irrespective of the seriousness of the offence. Moreover, the disciplinary procedure can only be invoked where an employee is suspected of committing an offence (Madhuku, 2015). The most that an employer may do prior to instituting disciplinary

proceedings is to suspend the employee summarily with or without pay. Madhuku (2015) postulates that; before the hearing the employee is entitled to a bundle of rights under the Model Code. There is to be adequate time to prepare ones defence to the charges. Madhuku, (2015) also adds that the minimum period of notice of the hearing must be no less than three working days. This is confirmed by the Model Code Weekends and public holidays do not count. The employee is entitled to be legally represented by a legal practitioner, or by a member of the trade union or a member of the workers committee (Madhuku, 2015). Madhuku, (2015) posits that the employee is also accorded the right to call witnesses in support of his case and to cross-examine witnesses who testify against her. This enables the employee to test the veracity of all testimony against her without unnecessary restraint. The reasons for judgement are to be supplied to the employee. This is to properly justify the decision (Madhuku, 2015).

The Misconduct Charge Must be in Writing

The charge must be in writing stipulating in very clear terms on what the offence is and how, where, date and time where possible it was committed. There is no room for hide and seek. As in criminal charges an employee under trial may request and be supplied with the witness's statements and copies of the exhibits. This is to enable one to prepare for one's own defence.

The opportunity to be heard is regarded as very fundamental. It is however better practice to give a longer notice period. A person to be charged with misconduct needs time to prepare for his defence. The preparation for one's defence includes time to seek legal advice and legal representation. It is unfair for the disciplinary committee to start off by saying the employee is wasting their time. The presumption of innocence as enshrined in the Constitution of Zimbabwe, (2013) needs to be observed. The hearing committee starts off from the premise that the employee concerned is innocent. It is up to the organization to prove the guilt and not for the employee to be condemned before such evidence is adduced.

70 Rights of accused persons (Constitution of Zimbabwe, 2013 section 70) states that any person accused of an offence has the following rights:

To be presumed innocent until proven guilty;
To be informed promptly of the charge, in sufficient detail to enable them to answer it;
To be given adequate time and facilities to prepare a defense;

The reason is that although most of the time employees are only charged when an offence is alleged to have been committed, it is also known that many a time some charges are malicious and meant to dismiss an employee for no reason. That is to say to find a justification of depriving an employee of his livelihood where one does not exist.

Employee Facing Misconduct Charges to Be Personally Present

The law is that the employee is to appear personally before the disciplinary committee. If she does not appear after proper service one would be considered to be in willful default. The trial may commence in one's absence. The right to be heard is an important right. The employee gives evidence at one's trial and may call witnesses to support their case. When the prosecution calls witness the employee can challenge them through cross-examination.

At the hearing the employee is to testify and follow proceedings in a language that s/he understands. If the employee does not understand the language sufficiently, then s/he must be afforded an interpreter who is charged with the responsibility of interpreting/translating the proceedings to him or her.

Should the employee be found guilty and be convicted of the charges the employee has the right to be supplied with the reasons for the decision.

Mitigation

In the event the employee is convicted of the misconduct charge, one is entitled to address the tribunal in mitigation before the penalty is imposed (Labour Act S.I 15/2006). The worker, endeavors to persuade the hearing committee to be lenient in passing sentence or penalty. After conviction the employee has a right to address the disciplinary committee in mitigation so as to be granted a less severe penalty. The address in mitigation can include such aspects as the age of the employee, the length of service, marital status, and whether or not the employee has dependence that rely on him for their livelihoods.

Penalties

Various penalties may be imposed on the employee, depending on the circumstances. Some offences attract the penalty of dismissal.

The Delicate Balancing Act

The passing of penalties or sentences in labour matters require a balancing act. It is a delicate balancing act which takes into account the offence, the offender and how the offence was committed. Account has to be taken of the prejudice actual or perceived. The expectations of the employer are to be met, yet the employee would expect leniency. At the end of the day the disciplinary committee must do justice to both. The employer and the employee.

The Model Code urges that a first offender needs to be educated first as a starting point. Therefore, dismissal should be as a last resort. Workers need education on what is good and recommended before they are discharged. The penalty of dismissal affects the employee and the whole of his/her family. That is not to say dismissal should not be a penalty for first offenders or even repeat offenders.

In the case of Standard Chartered Bank Limited v Michael Chapuka SC 125/04 the Supreme Court reasoned that,

> *"the seriousness of the misconduct is to be measured by whether it is inconsistent with the fulfillment of the express or implied conditions of the contract. If it is, then it is serious enough prima facie to warrant dismissal. Then it is up to the employee to show that his misconduct though technically inconsistent with the fulfillment of the conditions of his contract was so trivial, so inadvertent, so aberrant or otherwise so excusable that the remedy of summary dismissal was not warranted".*

This means if the seriousness of the offence is so grave that it can be regarded as if one has repudiated the contract through the misconduct, then it follows that dismissal should follow. It would be up to the employee then to persuade the disciplinary committee that his conduct can be excused.

3 Conclusion

In conclusion, to satisfy the substantive justice aspect it means there must be justifiable grounds for charging an employee with misconduct. Prior to instituting charges against an employee there should be evidence that an offence was committed. Once there is evidence that an offence was committed by an employee there is to be a nexus between the commission of the offence and the employee. In the event that there is no nexus between the commission of an offence and an employee the matter ends there.

Secondly the disciplinary hearing has to be according to the rules of natural justice. An employee is presumed innocent until proven guilty. The procedure followed in initiating and hearing the case must be procedural. No half measures are allowed. An employee who is accused of misconduct is entitled to be given an opportunity to know the case against them in advance and an opportunity to prepare ones defence. In addition, at every stage of the hearing the employee should be fully informed of one's rights.

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