



Chapter 7

Some Perspectives on the Impact of Disciplinary Procedures on Academic Freedom in State Universities in Zimbabwe

*Tapiwa G Kasuso*¹ 

*Faculty of Law
Midlands State University* 

*Gift Manyatera*² 

*Faculty of Law
Midlands State University* 

Abstract

The administration of workplace discipline for employees of higher education institutions (HEIs) has always provided a key indicator of HEIs' respect for and promotion of fundamental rights. Corollary to this, the mechanisms for disciplining employees at state universities necessarily impact directly or indirectly on academic freedom. Consequently, fairness of the disciplinary process appears to be the key to guaranteeing academic freedom in state universities in Zimbabwe. In recognition of the challenges associated with employer-employee relations, Zimbabwe enacted the Amendment of State Universities Statutes Act 4 of 2022. The Amendment Act seeks to align with the Constitution all the 14 Acts of parliament establishing state universities in Zimbabwe. Further, the Amendment Act provides

-
- 1 LLBS, LLM, LL.D. Lecturer, Midland State University, Zimbabwe.
 - 2 LLBS, LLM, MSc. CLEF, LL.D. Executive Dean, Faculty of Law, Midlands State University, Zimbabwe.



a homogeneous mechanism for the appointment of university councils and the regulation of conditions of employment of university employees. Importantly, the Amendment Act provides for the discipline of members of state universities by providing a new composition of Staff Disciplinary Committees (SDCs) for HEIs. These legislative changes directly impact the right of HEIs' employees not to be unfairly dismissed. This chapter critically examines the composition of SDCs in HEIs in Zimbabwe and its impact on the labour rights of employees of state universities and in particular the right against unfair dismissal. The chapter commences with an overview of the Zimbabwean labour law framework and its applicability to HEIs. This is followed by a discussion of the right not to be unfairly dismissed in the Zimbabwean context. The concept of procedural fairness of a dismissal and the effect of improperly constituted SDCs is also examined. Thereafter, an overview of the composition of SDCs in HEIs is given. Critical is the relationship between the composition of SDCs provided for in statutes establishing HEIs and the SDCs provided for in codes of conduct of such HEIs. The aim is to ascertain the extent to which the legal framework on the composition of SDCs fully gives effect the right not to be unfairly dismissed and academic freedom. The adequacy or otherwise of the current framework is considered. The chapter concludes with insightful proposals for law reform and general recommendations aimed at enhancing the enjoyment and realisation of academic freedom and labour rights of employees of HEIs in Zimbabwe.

1. Introduction

Zimbabwe promulgated an amendment to the state universities statutes in 2022. The effect of this amendment, among other objectives, was to align the composition of disciplinary committees in all state universities. Zimbabwe has 14 state universities which are constituted as body corporates in terms of enabling acts of parliament.³ The main object of these

3 These include the following: Bindura University of Science and Technology (BUSE), Chinhoyi University of Technology (CUT); Gwanda State University (GSU), Harare Institute of Technology (HIT), Lupane State University (LSU), Manicaland State University

higher education institutions (HEIs) is the advancement of knowledge through teaching and learning, research, community engagement, innovation, and industrialisation.⁴ HEIs play a critical role in the development of a constitutional state. HEIs contribute as knowledge fountains through the production of knowledge, which forms the core business and primary function of universities.⁵ Furthermore, HEIs contribute to the nation's human capital development at large as employers and managers of human resources and students in their fold.⁶

The administration of workplace discipline for employees of HEIs has always provided a key indicator of HEIs' respect for and promotion of fundamental rights. Corollary to this, the mechanisms for disciplining employees at state universities necessarily impact – directly or indirectly – academic freedom. Thus, the scope of academic freedom encompasses the ability of an employee to express their ideas without fear of reprisals from the employer. Consequently, fairness of the disciplinary process appears to be the key to guaranteeing academic freedom in state universities in Zimbabwe.

In recognition of the challenges associated with employer-employee relations, Zimbabwe enacted the Amendment of State Universities Statutes (hereafter the Amendment Act).⁷ The Amendment Act sought to align with the constitution of all the 14 acts of parliament establishing state universities in Zimbabwe.⁸

of Applied Sciences (MSUAS), Marondera University of Agricultural Sciences and Technology (MUASt), Great Zimbabwe University (GZU), Midlands State University (MSU), National University of Science and Technology (NUST), Pan African Minerals University of Science and Technology (PAMUST), University of Zimbabwe (UZ) and Zimbabwe Open University (ZOU).

- 4 For example, see s 4(1)(a) of the Great Zimbabwe University Act [chp 25:24], which establishes the GZU, s 4(1) of the National University of Science and Technology Act [chp 25:13], and s 4 (1) of the Midlands State University Act [chp 25:21].
- 5 Mupangavanhu and Mupangavanhu "Alignment of student discipline design and administration to constitutional and national law imperatives in South Africa" 2011 *PER/PELJ* 125 125-146.
- 6 Mupangavanhu and Mupangavanhu (n 3) 125.
- 7 the Amendment of State Universities Statutes Act 4 of 2022 (hereafter "the Amendment Act").
- 8 Constitution of Zimbabwe Amendment 20 of 2013 (hereafter "the Constitution").

Further, the Amendment Act provides a uniform mechanism for the appointment of university councils and the regulation of conditions of employment of university employees.⁹ Importantly, the Amendment Act provides for the discipline of members of state universities by providing a new composition of Staff Disciplinary Committees (SDCs) for HEIs.¹⁰ These legislative changes directly impact the right of HEI employees not to be unfairly dismissed.

This chapter critically examines the composition of SDCs in HEIs in Zimbabwe and its impact on the labour rights of employees of state universities and, particularly, the right against unfair dismissal. The contribution commences with an overview of the Zimbabwean labour law framework and its applicability to HEIs. This is followed by a discussion of the right not to be unfairly dismissed in the Zimbabwean context. The concept of procedural fairness of a dismissal and the effect of improperly constituted SDCs is also examined. Thereafter, an overview of the composition of SDCs in HEIs is given. Critical is the relationship between the composition of SDCs provided for in statutes establishing HEIs and the SDCs provided for in codes of conduct of such HEIs. The aim is to ascertain the extent to which the legal framework on the composition of SDCs fully gives effect the right not to be unfairly dismissed. The adequacy or otherwise of the current framework is considered. The chapter concludes with proposals for law reform and general recommendations aimed at improving the administration of staff discipline in HEIs in Zimbabwe.

2. Applicability of labour legislation to HEIs

The principal labour legislation in Zimbabwe is the Labour Act.¹¹ This Act applies to “all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution”.¹² Employees whose conditions of employment are provided for in the Constitution are members of the civil service.¹³

9 See preamble of the Amendment Act.

10 *Ibid.*

11 chp 28:01. Act 16 of 1985 (hereafter “the Labour Act”).

12 s 3 (1) of the Labour Act.

13 These are governed by the Public Service Act [chp 16:04] and the Health Services Act [chp 15:16].

Also excluded from the application of the Labour Act are members of the disciplined forces and any other employees designated by the president in a statutory instrument.¹⁴ In essence, section 3(1) of the Labour Act sets the tone for the establishment of a two-tiered labour law system in Zimbabwe:¹⁵ on one hand, the Labour Act applies to the private sector and, on the other hand, labour legislation that also applies to state employees. The Labour Act also applies to parastatals, local authorities, and – importantly – state universities. The conditions of employment of these institutions are not provided for in the Constitution. Therefore, despite state universities being state-aided institutions, their employees are not members of the Civil Service, thus, the Labour Act applies to all state universities in Zimbabwe.¹⁶ This has implications for the conditions of employment and the discipline of employees of state-funded HEIs. The current dual labour law system was once abolished in 2002,¹⁷ only to be reintroduced in 2005.¹⁸

Section 2A(3) of the Labour Act also affirms the supremacy of the Act by providing that “the Act shall prevail over any other enactment inconsistent with it”. The import of this is simple: in the event of any conflict between a provision in the Labour Act and any other statutory provision, the Labour Act takes precedence. It has been argued that section 2A(3) does not, by implication, repeal provisions of other statutes inconsistent with the Labour Act, since its provisions remain valid and applicable in all circumstances not subject to the application of the Labour Act.¹⁹ For example, if a provision in the Midlands State University Act – which establishes the Midlands State University – is inconsistent with the Labour Act, it follows that the Labour Act

14 See s 3(2) and (3) of the Labour Act. Members of the disciplined force are defined in s 2 of the Labour Act to include a military, air or naval force; a police force; a prison service, and members of the intelligence services.

15 Madhuku *Labour Law in Zimbabwe* (2015) 5.

16 *Midlands State University Council v MSU Lecturers Association SC 42/05; Rutunga & Others v Chiredzi Town Council & Another 2003 (1) ZLR 197 (S)*.

17 the Labour (Amendment) Act 17 of 2002.

18 the Labour (Amendment) Act 7 of 2005.

19 Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* (2006) 47.

trumps the inconsistent section in the Midlands State University Act. Therefore, section 2A(3) of the Labour Act puts to rest the controversy on whether or not the Labour Act is superior to any other enactment inconsistent with it.²⁰

3. Zimbabwean legal framework on unfair dismissal

The Zimbabwean legal framework on dismissal law is largely influenced by international labour standards made under the auspices of the International Labour Organisation (ILO).²¹ Zimbabwe joined the ILO on 6 June 1980 and since then it has ratified several ILO Conventions, including the core or fundamental conventions. Zimbabwe incurs particular obligations insofar as domestic laws and policies must be adopted to conform to those ILO Conventions that have been ratified.²² The Labour Act states in its preamble that one of its purposes is to give effect to the obligations incurred by Zimbabwe as a member state of the ILO.²³ Although ratification of international standards is key to their relevance in Zimbabwe, it does not follow that an unratified convention is irrelevant. It remains an important source of labour law in more ways than one. Firstly, it can be used as a basis to resolve labour disputes where domestic law is found wanting.²⁴ Secondly, it can be used as a guide in interpreting domestic law, thus giving content to domestic law.²⁵ Thirdly, it can be the basis for developing the common law and the establishment of a labour

20 See *Mombeshora v Institute of Administration and Commerce* SC 72/17; *City of Gweru v Masinire* SC 56/18; and *Chingombe & Another v City of Harare* SC 177/20.

21 International Labour Organization n.d. <https://www.ilo.org> (02-09-2024).

22 In Zimbabwe, international labour standards are not automatically part of Zimbabwean labour law. To be part of Zimbabwean law, there must be a voluntary assumption of the obligation by the executive through ratification as provided for in s 327(2)(b) of the Constitution. See *Magodora & Others v Care International Zimbabwe* SC 24/14; *Simbi (Steelmakers) (Pvt) Ltd v Shamu & Others* SC 71/15.

23 This implies that the interpretation of the Labour Act must comply with Zimbabwe's international obligations.

24 the Constitution.

25 See ss 46(1), 326 (2) and 327 (6) of the Constitution.

law jurisprudence grounded in international best practices.²⁶ Lastly, international labour standards reinforce domestic labour law jurisprudence.²⁷

In 1982, the ILO adopted the Termination of Employment at the Initiative of the Employer Convention.²⁸ Convention C158 is complemented by the ILO Termination of Employment at the Initiative of the Employer Recommendation.²⁹ Convention C158 makes provisions for substantive fairness and procedural fairness of a dismissal.³⁰ Article 4 of the Convention sets the tone for substantive fairness of dismissal by providing that:

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 operational requirements of the undertaking, establishment or service.

Therefore, for a dismissal to be substantively fair, it must be based on a valid reason, that is, those related to misconduct, incapacity, or the employers' operational requirements.³¹ The second principle that can be extracted from Convention C158 is that of procedural fairness of a dismissal. Article 7 provides that a worker must be afforded an opportunity to defend themselves against the allegations made by the employer. This is the embodiment of

26 s 165(7) of the Constitution implores members of the judiciary to keep themselves abreast of developments in international law and s 176 of the Constitution gives superior courts inherent powers to develop the common law.

27 Madhuku (n 13) 508.

28 Convention 158 of 1982.

29 the ILO Termination of Employment at the Initiative of the Employer Recommendation 166 of 1982.

30 A detailed discussion of this Convention is beyond the scope of this contribution, however for its comprehensive discussion see Smit and Van Eck "International perspectives on South Africa's unfair dismissal law" 2010 *XLIII CILSA* 46 46-67; ILO *Protection Against Unfair Dismissal* (1995).

31 Art 5 of Convention C158 provides reasons that do not constitute valid grounds for termination and these include: union membership, appointment as a workers' representative, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, and national extraction or social origin.

the right to be heard. Although Article 7 does not provide details of the right, it is generally accepted that the right encompasses all processes relating to disciplining an employee. This would include notification periods, personal appearance, disclosure of documents and evidence, the right to call witnesses, cross-examination, the composition of the disciplinary committee, issues of bias, entitlement to legal representation, and right to reasons.³² The last principle in Convention C158 is that every worker must be entitled to an opportunity to appeal to an impartial tribunal or court against a decision to dismiss him or her.³³

It is significant to note that Zimbabwe has not ratified Convention C158. Notwithstanding this non-ratification, Convention C158 has had profound effects on the Zimbabwean dismissal law framework in that its framework gives effect to the above three core principles of Convention C158. Section 65(1) of the Zimbabwean Constitution entrenches the right to fair and safe labour practices and standards. It is accepted that the broad right to fair labour practices also incorporates the right against unfair dismissal, that is the right to a substantively and procedurally fair dismissal.³⁴ The right is given effect in section 12B(1) of the Labour Act, which provides that every employee has the right not to be unfairly dismissed. Madhuku submits that section 12B(1) makes provision for generic unfair dismissals and automatically unfair dismissals.³⁵ The Labour Act does not define the concept of generic unfair dismissal. As such, guidelines must be drawn from international labour standards, namely Convention C158 and Recommendation R166. Unfair dismissal under Convention C158 has two dimensions. First, the employer must have a fair reason to terminate employment, which is substantive fairness.

32 Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* (2006) 162.

33 art 8 of Convention C158.

34 For a discussion of the constitutional right to fair labour practices in Zimbabwe, see Kasuso "Revisiting the Zimbabwean unfair labour practice concept" 2021 PER/PELJ 1-27; Tsabora and Kasuso "Reflections on the constitutionalising of individual labour law and labour rights in Zimbabwe" 2017 *ILJ* 43 43-62.

35 The concept of unfair dismissal was introduced in Zimbabwean labour law by the Labour (Amendment) Act 17 of 2002.

Second, in terminating employment, the employer must follow fair pre-dismissal procedures, that is, procedural fairness.³⁶ In the Zimbabwean context, a dismissal must be substantively fair in that there must be a valid reason for the dismissal. The second aspect of substantive fairness arises after the establishment of a valid reason. It is critical to determine whether it was reasonable to dismiss for that reason.³⁷ As for procedural fairness, it covers principles of natural justice, namely the *audi alteram partem* rule,³⁸ and the *nemo iudex in sua causa* rule.³⁹

The second group of dismissals specified in section 12B of the Labour Act is that of automatic unfair dismissals. Sections 12B(2) and (3) of the Labour Act specify four circumstances in which a dismissal is not automatically unfair. The first circumstance is if there is a registered code of conduct and the dismissal for misconduct is not done in terms of that code of conduct.⁴⁰ The second circumstance is if, in the absence of a registered code of conduct, the dismissal for misconduct is not in terms of the model code made in terms of section 101(9) of the Labour Act.⁴¹ Whether the dismissal is in terms of a registered code of conduct (or, in its absence, of the model code), such dismissal must still pass the fairness test, that is, it must be substantively and procedurally fair. This is because the Labour Act does not state that compliance with the code of conduct is automatically fair.⁴² It states that non-compliance with the code is automatically unfair, thus leaving the issue of compliance with the code subject to the fairness test in section 12B(1) of the Labour Act. The third circumstance in which a dismissal is not automatically unfair

36 Madhuku (n 13) 103.

37 Madhuku (n 13) 104.

38 An employee must be given an opportunity to be heard before the dismissal.

39 No one should be a judge in his or her case. The rule demands that a person, authority, or committee that makes the decision to dismiss must be impartial and unbiased.

40 s 12B(2)(a) of the Labour Act. See *Medical Investments Ltd t/a Avenues Clinic v Chingwena* SC 2/12; *Tirivangana v University of Zimbabwe* SC 21/13.

41 s 12B(2)(b) of the Labour Act. See *Hurungwe RDC v Moyo & Others* SC 37/21; *Chikomba Rural District Council v Pasipanodya* 2012 (1) ZLR 577 (S).

42 Madhuku (n 13) 110.

is in section 12B(3)(a) of the Labour Act which provides for constructive dismissal arising from an employee terminating the contract of employment because of the employer's conduct.⁴³

The final circumstance relates to dismissal arising from the non-renewal of a fixed-term contract where the employee had a legitimate expectation of being re-engaged, and another person was engaged instead of the employee.⁴⁴ Of interest to this discourse is the dismissal of employees of HEIs for misconduct in terms of a registered code of conduct or, in its absence, the model code. This is particularly relevant to the procedural fairness of the dismissal in so far as the composition of Staff Disciplinary Committees (SDCs) is concerned.

4. Dismissal of employees of state-funded HEIs in Zimbabwe

The dismissal of employees for misconduct in Zimbabwe must be done in terms of a registered code of conduct and, in its absence, the model code made in terms of section 101(9) of the Labour Act.⁴⁵ The model code is provided for in the Labour (National Employment Code of Conduct) Regulations.⁴⁶ It makes provision for acts of misconduct, disciplinary procedure, the composition of disciplinary authorities and committees, rights of employees, as well as penalties and procedures for appeals. It is similar to any other registered code which covers dismissals arising from misconduct. Most state universities in Zimbabwe have registered codes of conduct. For example, the Zimbabwe Open University has a code of conduct which was registered in August 2015.

43 See *Astra Holdings v Kohwa* SC 97/04; *Thomas Miekles Stores v Mwaita & Another* 2007 (2) ZLR 185 (S); and *Mudakureva v GMB* 1998 (1) ZLR 145 (H).

44 s 12B(3) (b)(i)-(ii) of the Labour Act. See *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S); *Magodora & Others v Care International Zimbabwe* SC 24/14, *Kenyan Airways v Musarurwa* SC 67/14.

45 s 12B(2)(a)-(b) of the Labour Act.

46 Statutory Instrument 15 of 2006.

The Midlands State University has a registered code of conduct registered in 2014.⁴⁷

In terms of section 101(3) of the Labour Act, a registered employment code of conduct provides for the following issues: disciplinary rules to be observed by employees; acts or omissions which constitute misconduct; procedures for disciplinary processes; penalties for breach of the employment code; provision of the person, committee, or authority responsible for implementing and enforcing rules, procedures and penalties; the procedure for notifying an employee on commencement of disciplinary processes; the right of an employee to be heard before any decision is made; and the production of the record of proceedings and appeals. Significantly, any disciplinary proceedings conducted in terms of an unregistered code of conduct are null and void.⁴⁸

In light of the foregoing, state universities without codes of conduct or with unregistered codes of conduct must rely on the model code, Statutory Instrument 15 of 2006, in disciplining staff.⁴⁹ Section 12B(2) of the Labour Act read with sections 5(a) and (b) of Statutory Instrument 15 of 2006 is clear that the model code can only be invoked where there is no registered code of conduct. Where there is a registered code of conduct, the parties cannot agree to use the model code. Such an agreement is contrary to the law and a nullity.⁵⁰ However, Zimbabwean authorities are in agreement that the expression “in the absence of an employment code” must be interpreted purposively to also cover situations where a registered code is in existence but is rendered inapplicable by circumstances or when it is impracticable to use it, or it is dwarfed by circumstances.⁵¹ Put differently, the mere existence of

47 The registration of codes of conduct with the Registrar in the Ministry of Labour is done in terms of s 101 of the Labour Act.

48 *Zimbabwe Newspapers (1980) Ltd v Ndlovu* 2000 (1) ZLR 127 (S).

49 For example, Chinhoyi University of Technology and Bindura University of Science and Technology do not have registered codes of conduct. They rely on the Model Code, Statutory Instrument 15 of 2006.

50 *Chikomba Rural District Council v Pasipanodya* 2012 (1) ZLR 577 (S); *Hurungwe Rural District Council v Moyo & Others* SC 37/21.

51 Mucheche “Can an employer discipline an employee in terms of the Labour (National Employment Code of Conduct) SI 15 of 2006

a registered code of conduct is not sufficient to oust resort to the model code. As succinctly summarised by Madhuku:

There must be in existence a registered code of conduct applicable to the case in question. Where there is a registered code which is inapplicable to the circumstances of the case, there is ‘the absence of an employment code’ for purposes of section 12B(2) of the Labour Act.⁵²

For example, in *Samuriwo v Zimbabwe United Passenger Co. Ltd*,⁵³ the registered code of conduct applied to all employees, regardless of rank. The managing director was charged with acts of misconduct in terms of Statutory Instrument 371 of 1985, the predecessor to Statutory Instrument 15 of 2006. The court held that the registered code of conduct did not apply to the managing director, but rather Statutory Instrument 371 of 1985, given the circumstances of the case.⁵⁴ In *Zimpost (Pvt) Ltd v Communications and Allied Workers Union*,⁵⁵ it was held that, if a registered code of conduct does not provide for some of the serious acts of misconduct covered by the model code, an employer is entitled to resort to the model code in respect of those acts of misconduct not covered by its registered code of conduct.⁵⁶ It therefore follows that, if a registered code of conduct of a state university has no provision for serious misconduct specified in the model code, there is an “absence of an employment code” for the purposes of section 12B(2) of the Labour Act, and the university can invoke the model code.

It has since been established that, apart from being governed by the Labour Act, employees of state universities in Zimbabwe are also governed by acts of parliament establishing

where a registered code of conduct exists?” in Muccheche *A Practical guide to labour law in Zimbabwe* (2013) 16–25.

52 Madhuku (n 13) 117.

53 *Samuriwo v Zimbabwe United Passenger Co. Ltd* 2000 (1) ZLR 647 (S).

54 See also *Cargo Carriers (Pvt) Ltd v Zambezi & Others* 1996 (1) ZLR 613 (S).

55 *Zimpost (Pvt) Ltd v Communications and Allied Workers Union* 2009 (1) ZLR 334 (S).

56 *Net One Cellular (Pvt) Ltd v Communications and Allied Services Workers Union of Zimbabwe* SC 89/05.

the universities. These Acts provide specific disciplinary rules and procedures. For example, section 25 of the Midlands State University Act as amended provides for the composition of and functions of a SDC, the right of an employee charged with misconduct to be heard, and penalties.⁵⁷ In *Marume v Chinhoyi University of Technology*,⁵⁸ it was held that the Chinhoyi University of Technology Act (and particularly section 26 of the Act) are not a registered code of conduct. Therefore, in the absence of a registered code of conduct, the peremptory provisions of section 12B(2)(a) and (b) of the Labour Act mandated the university to resort to the model law, Statutory Instrument 15 of 2006.⁵⁹ Furthermore, the conduct of disciplinary proceedings in terms of a registered code of conduct of a state university or the model code must also be substantively and procedurally fair. At this juncture, we move on to a discussion of procedural fairness broadly.

5. Procedural fairness and composition of SDCs

Traditionally, codes of conduct provide for the composition of SDCs. The code of conduct usually indicates the number of persons who would constitute the SDC and the designation of such persons stipulated.⁶⁰ For substantive and procedural fairness, a disciplinary hearing ought to be properly constituted in that it must be comprised of individuals prescribed by a code of conduct. In *Madoda v Tanganda Tea Company Ltd*,⁶¹ it was held that any deviation from the composition of a SDC provided for in a code of conduct constitutes a procedural irregularity. Any proceedings conducted by the improperly constituted SDC are rendered null and void.⁶² Whilst the general rule is that the effect of an improperly constituted SDC is to render the proceedings null

57 s 26(1)–(6) of the Midlands State University Act as amended by the Amendment Act. The Acts establishing the other thirteen state universities in Zimbabwe have similar provisions.

58 *Marume v Chinhoyi University of Technology* SC 120/22.

59 *Tamanikwa & Others v Zimbabwe Manpower Development Fund* SC 33/12; *Tirivangana v University of Zimbabwe* SC 21/13.

60 *Chataira v ZESA* HH 9/00.

61 *Madoda v Tanganda Tea Company Ltd* 1998 (1) ZLR 374 (S).

62 *Sable Chemical Industries Ltd v Easterbrook* 2010 (1) ZLR 342 (S); *Medical Investments Ltd t/a Avenues Clinic v Chingwena* SC 2/12.

and void, it was held in *MMCZ v Mazvimavi*⁶³ that it must be shown that the employee concerned was prejudiced by the procedural irregularity.⁶⁴ The basis of this position has been that an employee must not escape the consequences of their misdeeds simply because of a failure to conduct proceedings properly.⁶⁵

It is submitted that this position is flawed. The composition of an SDC impacts the employee's right to be heard, the right to present a defence, and the right to be fairly judged. Therefore, the position consistent with the constitutional right to fair labour practices – and, in particular, the right not to be unfairly dismissed – is that a failure to comply with the code of conduct is sufficient to render the proceedings voidable, regardless of whether or not prejudice has been proved.⁶⁶ The registration of a code of conduct shields an employer from any charge of an automatically unfair dismissal if there is compliance with the code of conduct.⁶⁷ As such, it must have been the intention that only strict compliance with the code warrants exemption from protective legislation.⁶⁸ This is the position that was adopted by the court in *Madoda v Tanganda Tea Co. Ltd.*⁶⁹ Two workers' committee representatives required by the code to constitute a SDC were not on the committee. The court did not hesitate to set aside the disciplinary proceedings. The hearing was null and void for failure to comply with the provisions of the code on the composition of the disciplinary committee.⁷⁰ In this regard, we can do no better than repeat the MacFoy phraseology as quoted in *Mugwebi v Seed Co Ltd*:⁷¹

63 *MMCZ v Mazvimavi* 1995 (2) ZLR 353 (S).

64 See also *Nyahuma v Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 435 (9S); *Chipangura v Environmental Management Agency* SC 35/12; and *Cold Storage Company v Ndlovu & Others* SC 67/07.

65 *Ramana v NSSA* SC 38/03; *Pangeti v GMB* 2002 (1) ZLR 454 (S); *Air Zimbabwe (Pvt) Ltd v Mensa* SC 89/04.

66 *Madhuku* (n 13) 173.

67 *Madhuku* (n 13) 174.

68 *Madhuku* (n 13) 175.

69 *Madoda v Tanganda Tea Co. Ltd* 1999 (1) ZLR 374 (S).

70 See also similar findings in *Pangeti v Grain Marketing Board* 2002 (1) ZLR 454 (H); *Sable Chemical Industries Ltd v Easterbrook* 2010 (1) ZLR 342 (S).

71 *Mugwebi v Seed Co Ltd* 2000 (1) ZLR 93 (SC).

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

6. Composition of SDCs in state-funded HEIs

SDCs are constituted by the employer in terms of a registered code of conduct or, in its absence, the model code, Statutory Instrument 15 of 2006. Acts of parliament establishing HEIs provide for the composition of SDCs and the designation of the individuals to be appointed to the SDCs. The functions of the SDCs are to investigate any breach of a statute, regulation, or ordinance or other misconduct on the part of any member of staff of the university and recommend to the vice-chancellor the penalty to be imposed for the misconduct.⁷² Before the promulgation of the Amendment Act, the composition of SDCs for universities included the following members: a retired judge, who was the chairperson; a senior member of the academic or administrative staff; a member of the academic, technical, or administrative staff of similar status to the person charged; a registered legal practitioner of at least ten years' standing who did not hold any post at the university; and one member appointed by the council from among its members who was not a member of the university.

Such composition was bloated, and it did not balance the representation of workers' representatives and employer representatives. Furthermore, the SDC was chaired by a retired judge and not an academic. A judge does not have knowledge and experience of academia and administration of academic institutions. The participation of a retired judge and a legal practitioner also led to the over-proceduralism and technicalisation of disciplinary hearings for university employees.

72 See s 25(4) of the State University Act.

They were perceived to be obtrusive because their interests were in billable hours. This inhibited the expeditious resolution of disciplinary matters and it also made the process expensive not only to the employee but also to the university. The composition had the potential of violating employees' rights to a substantively and procedurally fair dismissal. In light of these weaknesses, the Amendment Act has introduced a new composition of SDCs for HEIs that consists of the following: a pro vice-chancellor, who shall be the chairperson; a senior member of the academic or administrative staff; a member of the university council; and a member of the academic or administrative staff of similar status to the person charged.⁷³ Two members of the SDC form a quorum.⁷⁴ The streamlined composition is manned by individuals well-versed in academic institutions. Nevertheless, serious misgivings arise in relation to the quorum of the SDC. Two members – that is, the pro vice-chancellor and the council member – apparently may be termed employer representatives. In terms of procedural fairness, this necessarily creates an unacceptable situation whereby an employee is disciplined in an unfair manner. Justice must not only be done, but it must be seen to be done especially in the context of safeguarding jealously academic freedom in HEIs in Zimbabwe. A right balance must be struck in the quorum so that the disciplinary processes are beyond reproach.

Some codes of conduct of HEIs reflect the composition of SDCs as provided for in the enabling State University Act.⁷⁵ However, other HEIs have registered codes of conduct which are at odds with what is provided for in the enabling Act. For instance, clause 10.3 of the Zimbabwe Open University Act provides for a SDC which comprises: a dean from a faculty other than the employee's faculty, who shall be the chairperson of the committee; a representative from the Human Resources Unit; and two representatives from the academic staff association as nominated by the staff association. Other State universities such as Chinhoyi University of Technology (CUT), Great Zimbabwe

73 s 25(1) of the State Universities Act 4 of 2022.

74 s 25(2) of the State Universities Act.

75 For example, cl 6.14, of the Midlands State University Act provides for the composition of the SDC which is consistent with that in s 25(1) of the Midlands State University Act.

University (GZU), and Bindura University of Science Education (BUSE) do not have registered codes of conduct. They rely on the model code, Statutory Instrument 15 of 2006, which gives the employer power to constitute a disciplinary authority or a disciplinary committee.

A disciplinary committee in terms of the model code is a committee set up at the workplace or establishment composed of employer and employee representatives, to preside over and decide disciplinary cases and/or worker grievances.⁷⁶ As for a disciplinary authority, the employer has the discretion to choose the size of – and specific people to sit on – such disciplinary authority. The designation of such persons is not stipulated; it can even be external members of the university. It is all left to the employer's discretion.⁷⁷ The question which therefore arises is: What is the effect of a code of conduct which provides for a SDC which is inconsistent with the SDC provided for in the State Universities Act?

This question was answered by the Supreme Court in the case of *Marume v Chinhoyi University of Technology*.⁷⁸ The appellant was employed by the university as a secretary. Allegations of misconduct were raised against her in terms of section 4(a) of the model code, Statutory Instrument 15 of 2006. A disciplinary committee was constituted by the employer and consisted of three members. The authority found the appellant guilty as charged and she was dismissed from employment. She challenged the dismissal on review on the grounds of procedural irregularity. Specifically, she alleged that the disciplinary committee was improperly constituted as it did not follow the composition of the SDC provided for in the Chinhoyi University of Technology Act.⁷⁹ Section 26(1) of the Chinhoyi University of Technology Act (hereafter the CUT Act) provided that there shall be a SDC which shall consist of the following: “a distinguished legal person,

76 s 2 of the Statutory Instrument Act 15 of 2006.

77 For an overview of the differences between a disciplinary authority and disciplinary committee in terms of the model code, see *National Engineering Workers Union v Dube* SC 1/16; *Mandizvidza v ZFC Limited & Another* SC 73/15.

78 *Marume v Chinhoyi University of Technology* SC 120/22.

79 The Chinhoyi University of Technology Act [chp 25:23].

who shall be chairman; a senior member of the academic and administrative staff; a member of the academic, administrative, and technical staff of similar status to the person charged; and a registered legal practitioner of at least five years standing who does not hold any post at the university". She argued that, although the Labour Act (through the model code, Statutory Instrument 15 of 2006) allowed the employer to set up a disciplinary authority at its discretion, the CUT Act required a specific composition of the disciplinary panel. Section 26(1) of the CUT Act ought to be read together with the model code, and the university was bound by the CUT Act.

The court held that in terms of section 12B(2)(a)-(b) of the Labour Act, the dismissal of an employee must be done in terms of a registered code of conduct or, in its absence, the model code. The court accepted that the CUT Act – and, in particular, section 26(1) of the CUT Act – was not a registered code of conduct. Therefore, the disciplinary proceedings had to be held in terms of the model code, Statutory Instrument Act 15 of 2006. As such, the composition of the disciplinary authority would be dictated by the provisions of the model code and not the CUT Act. The court further held that the CUT Act could not take precedence over the model code made in terms of the Labour Act. The basis of this reasoning was that section 2A(3) of the Labour Act made it clear that the Act prevails over any other enactment inconsistent with it.⁸⁰ The CUT Act not being a registered code of conduct and not providing for mechanisms for conducting hearings could not override the Labour Act. The appeal was therefore dismissed.

A similar finding was made by the Labour Court in *Damison v Atukwa NO and Another*.⁸¹ It was held that the law did not provide for a two-pronged approach where provisions of the model code (Statutory Instrument 15 of 2006) and the Bindura University of Science Education (BUSE) Act⁸² could be used in the same proceedings. It was improper to charge an employee in terms of

80 *City of Gweru v Masinire* SC 56/18.

81 *Damison v Atukwa N.O and Another* LC/H/07/21. See also *Hapanyengwi v Nyambo N.O & Zimbabwe Open University* LC/H/20/22.

82 chp 25:22 of the Bindura University of Science Education (BUSE) Act.

the model code, appoint a SDC in terms of the BUSE Act and then conduct disciplinary proceedings in terms of the model code. The BUSE Act was not a code of conduct.

It is apparent that Zimbabwe's courts have accepted that the composition of a SDC provided for in a registered code of conduct or the model law takes precedence over the one provided in the State Universities Acts. This narrow interpretation renders the composition of SDCs for HEIs prescribed by the State Universities Acts nugatory. This would not have been the intention of the legislature. It is submitted that a purposive approach is required. Whilst Acts establishing state-funded HEIs are not codes of conduct, they provide for the composition of SDCs suited for such institutions, especially if one looks at the designation of individuals who constitute these SDCs. They have knowledge and experience in academia. It is suggested that codes of conduct or the model code must not be read in isolation, but read with the relevant sections of Acts establishing state universities and especially sections of SDCs.

A registered code of conduct is merely an agreement between an employer and employee representatives. Should such an agreement be allowed to override the provisions of a statute? Any agreement entered into between employers and employees – even if it is made in terms of the Labour Act – must comply with specific provisions of the law, including the enabling Acts that establish HEIs in Zimbabwe. Similarly, the model code is a subsidiary legislation; it cannot take precedence over an act of parliament. That acts of parliament override the common law and subsidiary legislation need not be overemphasised.⁸³ Therefore, any disciplinary proceedings conducted by a SDC not consistent with the composition prescribed in the applicable state university act are afflicted with procedural irregularities that render the proceedings null and void. Any interpretation to the contrary has the potential of stripping HEIs' employees of their right not to be unfairly dismissed. Invariably, there is no legally sound point in creating specialised SDCs in terms of the Acts of HEIs when the

83 *Chikomba Rural District Council v Pasipanodya* SC 26/12; *Chikera & Another v AL Sham's Global BVI Limited* SC 17/17.

employer can invoke the model code and uses its discretion to appoint a SDC.

7. Conclusion

Zimbabwe's legal framework on unfair dismissal is largely consistent with international labour standards such as Convention C158 and Recommendation R166. This chapter established that employees in the private sector, local authorities, parastatals, and state-funded HEIs are entitled to the right not to be unfairly dismissed. This requires dismissal to be substantively and procedurally fair. It was demonstrated that a dismissal would be procedurally unfair if it is not conducted in accordance with a fair pre-dismissal enquiry, with the fairness being measured against guidelines in a registered code of conduct or, in its absence, the model code, Statutory Instrument 15 of 2006. A key component of procedural fairness that was discussed is that disciplinary proceedings must be conducted by a properly constituted SDC. Allowing persons other than those specified in the code of conduct to sit and participate in the deliberations of an SDC is a procedural irregularity which renders the proceedings, at the very least, voidable at the instance of the employee concerned. It was further established that enabling Acts of state-funded HEIs provide a tailor-made composition of SDCs for these academic institutions. Whilst other HEIs follow the composition of SDCs in the enabling Acts, others have in their codes of conduct compositions which are inconsistent with the Acts.

Further, it was also established that other HEIs do not have registered codes of conduct. They rely on the model code, Statutory Instrument 15 of 2006, which gives the employer the discretion to appoint a disciplinary authority or disciplinary committee. In most cases, the disciplinary authority or committee so appointed is at variance with the composition prescribed in the enabling Acts. This mismatch between the composition of SDCs in the enabling Acts of HEIs and their codes of conduct has the potential of violating the right not to be unfairly dismissed. The situation has not been made easy by the Zimbabwean courts which have adopted a restrictive interpretation of the relationship between labour legislation and enabling state universities Acts.

The approach renders SDCs established in terms of enabling state universities Acts inconsequential. It greatly undermines the purpose of establishing specialised SDCs for HEIs. One of the purposes of prescribing a specific composition of SDCs is to enhance fairness and promote academic freedom. The current composition and quorum of SDCs have the potential of violating these principles. The current quorum of SDCs is two. If the pro-vice chancellor and a council member alone avail themselves for the hearing, it would mean that the disciplinary action would be handled by employer representatives only. There is a need to include equal membership of employer and employee representatives and increase the quorum.

A number of recommendations are necessary in order to enhance academic freedom and the enjoyment of the right against unfair dismissal in HEIs. The current composition of SDCs must be amended so that it reflects equal representation of employer and employee representatives. The participation of representatives of academic staff associations will ensure that the scales of fairness are not tilted in favour of employers, given the institutional bias inherent in disciplinary processes. This also demands increasing the quorum of members of the SDCs. Whilst this chapter only addresses the composition of SDCs as provided for in the state universities Acts, there is a need to align HEIs' codes of conduct with the enabling Acts. In this regard, a policy directive from the Minister of Higher and Tertiary Education, Innovation, Science and Technology Development⁸⁴ and the Zimbabwe Council for Higher Education⁸⁵ directing all HEIs to align their codes of conduct with their enabling Acts is necessary.

Alternatively, the Labour Act must be amended so that it formally recognises the disciplinary procedures – and particularly the composition of SDCs – for HEIs in the enabling Acts. The current framework, in which the Labour Act and codes of conduct

84 All state-funded HEIs in Zimbabwe fall under the Ministry of Higher and Tertiary Education, Innovation, Science and Technology Development. The enabling Acts of state universities provide that the Minister is responsible for administering the Acts.

85 It is the regulatory authority of HEIs in Zimbabwe established in terms of the Zimbabwe Council for Higher Education Act [chp 25:27].

made in terms of that Act trump provisions on the composition of SDCs in enabling Acts of HEIs, poses a threat to the enjoyment and realisation of academic freedom and the right to fair labour practices. In the interim, the judiciary must take the lead in interpreting labour legislation purposively and in a manner consistent with the enabling state universities Acts, especially provisions on the composition of SDCs.