



A comparative analysis of disciplinary actions against trade union representatives in South Africa and Sweden

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complete this dissertation.

DECLARATION

I, Zane Hanekom, declare that *A comparative analysis of disciplinary actions against trade union representatives in South Africa and Sweden* is my own work both in content and execution. All the resources used in this study is referenced in the comprehensive reference list found at the end of this study.

I declare that this this dissertation has never been used before for any qualification at any tertiary institution.

Zane Hanekom

Date:

Signature

ABSTRACT

This dissertation set out to determine what the correct process is to proceed with disciplinary actions against a trade union representative in the two jurisdictions, namely South Africa and Sweden and how these countries legal frameworks protects or regulates the process relating to disciplinary actions. The dissertation further identifies the similarities between Swedish and South Africa's legislation as well as the differences between the two countries and how the two jurisdictions gives effect to their shared membership to the International Labour Organisation.

The abovementioned were achieved by analysing South African jurisprudence relating to disciplinary actions against a trade union representative as well as Swedish jurisprudence. The different Recommendations and Conventions of the International Labour Organization which relates to dismissal was also explored in this study to provide clarity as how the two jurisdictions member status to the ILO shapes their legislature process.

The study revealed that even though there are differences between both jurisdictions processes regarding disciplinary actions, both countries jurisprudence are flexible pertaining to disciplinary actions against a trade union representative. Furthermore, both countries far exceed the minimum procedural threshold set-out by the ILO. It is recommended that the proposed amendments to the South Africa's labour legislations which was already processed through the National Economic Development and Labour Council and which will soon be open for public comment, removes the overly restrictive procedural requirements for taking disciplinary actions against a trade union representative which are not explicitly mandated by jurisprudence or legislation become a thing of the past, whereby Sweden can follow suit in the near future.

LIST OF ABBREVIATIONS

AD	Arbetsdomstolen
BALR	Butterworths Arbitration Law Reports
BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
CEPPAWU	Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union
FAWU	Food and Allied Workers Union
FBC	Furniture Bargaining Council
<i>FML</i>	Förtroendemannalagen
IC	Industrial Court
ILJ	Industrial Law Journal
ILO	International Labour Organization
ILOSTAT	International Labour Organization Statistics
IMSSA	Independent Mediation Service of South Africa.
<i>LAS</i>	Lagen om anställningsskydd
LRA	Labour Relations Act
LC	Labour-Court
LAC	Labour Appeal Court
<i>MBL</i>	Medbestämmandelagen

NBCCI	National Bargaining Council for the Chemical Industry
NCBAWU	National Construction, Building & Allied Workers' Union
NEDLAC	National Economic Development and Labour Council
NORMLEX	International Labour Organization's Information Systems on International Labour Standards
NUMSA	National Union of Metalworkers of South Africa
PRASA	Passenger Rail Agency of South Africa
SA	South Africa
SAMWU	South African Municipal Workers' Union
SSSBC	Safety & Security Sectoral Bargaining Council

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Chapter 1: Introduction to the research topic and design

1.1 Introduction and background

In the South African context there is a difference between disciplinary action against a trade union representative and any other employee, a difference which is reflected in a single sentence in Schedule 8 of the Labour Relations Act (hereafter referred to as the LRA’):¹

*"Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union."*²

In South Africa, approximately 29.1% of the workforce is unionised, granting trade unions a substantial presence and influence within the labour market.³ Owing to their size, membership distribution, and collective bargaining scope, trade unions are afforded various statutory and organisational rights in workplaces to facilitate effective labour relations at the operational level. One such right includes the election of trade union representatives, employees chosen from within the ranks of the unionised workforce to represent members’ interests, engage with management, and promote compliance with labour legislation and collective agreements.

In Sweden, approximately 65.2% of the workforce is unionised, making it the fourth most unionised country globally. Owing to this exceptionally high level of union density, trade unions hold a significant position of influence within Swedish labour relations. Consequently, these unions are afforded extensive rights and privileges in workplaces to facilitate effective employee representation and participation.⁴ Similar to the South African framework, one of these rights includes the election of trade union representatives from among the unionised workforce, who serve as

¹ Schedule 8 of the *Labour Relations Act*, 66 of 1995.

² Item 4(2) of the *Labour Relations Act*, 66 of 1995.

³ South Africa ILOSTAT (2020).

⁴ Sweden ILOSTAT (2022).

intermediaries between employees and employers in promoting fair labour practices and collective bargaining outcomes.

Trade union representatives play a crucial role in protecting workers' rights, promoting fair labour practices, and participating in collective bargaining on behalf of trade union members. Despite their essential role in labour relations, trade union representatives are not immune to disciplinary action when they contravene workplace rules, policies, or engage in misconduct. Although they act as representatives of the union, they remain employees of the employer and, as such, owe a fiduciary duty to their employer.⁵ It is therefore imperative that trade union representatives remain cognisant of this dual role when performing their duties, ranging from supporting fellow members in grievance and disciplinary hearings to participating in collective bargaining with the employer.

The duties of a trade union representative include protecting workers' rights, ensuring and promoting fair labour practices in the workplace as well as negotiating with the employer on behalf of the trade union.⁶ Additional day-to-day duties may entail *inter alia* recruiting new members, advising workers of their rights in terms of labour law, arranging members meetings, resolving any workplace issue and monitoring that the employer is compliant with any relevant legislation or agreements.⁷

As previously confirmed, trade union representatives remain employees and have a fiduciary duty towards their employer.⁸ It is for this reason that a trade union representative' must fulfil their duties and obligations as per their contract of employment.⁹ Trade union representatives occupy a unique position in the employment relationship, as they bear a dual responsibility towards both their members and their employer. This dual responsibility can give rise to uncertainty

⁵ Grogan, J Dismissal, Discrimination and Unfair Labour Practices (2007) 324.

⁶ Grogan *Collective Labour Law 3 ed* (2019) Chapter 5.

⁷ Section 14 of the *Labour Relations Act*, 66 of 1995.

⁸ The fiduciary duties an employee owes towards an employer includes acting in good faith, acting in a trustworthy manner and never placing himself in a position where his interests' conflicts with those of the employer.

⁹ Grogan (2007) 324.

and potential conflict, particularly in the context of discipline. It raised the question whether trade union representatives should be treated differently than other employees facing disciplinary action, or whether the principle of consistent application of workplace rules and procedures should prevail. The balance between these two considerations lies at the core of maintaining both fair labour practices and workplace discipline.

In *National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd*,¹⁰ the court made the following statement:¹¹

"When shop stewards are dismissed for alleged misconduct committed while performing their duties as shop stewards, the first issue that must be established is whether or not they were, in fact, committing misconduct as employees or whether the alleged misconduct was merely an action ancillary to the duties of a shop steward. Furthermore, where it is established that the shop steward was indeed committing misconduct in relation to his duties as a shop steward, the limits of the immunity from disciplinary action that should be extended to shop stewards must be determined."

In *National Union of Metal Workers of South Africa (NUMSA) obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others*,¹² the court was tasked with answering the question whether trade union representatives should be held to the same behavioural standard as other employees. In this matter, the Labour Appeal Court (hereinafter "the LAC") affirmed that a trade union representative is entitled to pursue, without fear, the interests of their constituency and should be protected against any form of victimisation for doing so. However, the LAC emphasised that this protection does not grant licence to resort to defiance and unnecessary confrontation with their employer. A trade union representative remains, first and foremost, an employee and the employer is entitled to expect conduct that is appropriate to that employment relationship.

¹⁰ [2010] 3 BLLR 281 (LC) at Para 36.

¹¹ *National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd* [2010] 3 BLLR 281 (LC) at Para 36.

¹² [2017] 5 BLLR 483 (LAC).

These two cases illustrate the delicate balance in labour relations, while trade union representatives require protection against victimisation when performing their duties attached to that role, they remain bound by the same workplace rules and standards of conduct applicable to all employees.

The law of dismissal in South Africa is predominantly regulated by the Labour Relations Act (hereinafter "the LRA").¹³ In cases of dismissal based on misconduct or incapacity, Schedule 8 of the LRA, the Code of Good Practice: Dismissal, serves as a key guideline for employers when initiating disciplinary action.¹⁴ Commissioners of the Commission for Conciliation, Mediation and Arbitration (hereafter referred to as the "CCMA"), a statutory dispute resolution body established in terms of the LRA, are obliged to consider and apply the Code of Good Practice during arbitration proceedings.¹⁵ This research proposal focuses primarily on the concept of procedural fairness in the context of disciplinary processes. Accordingly, particular emphasis will be placed on Item 4 of the Code of Good Practice: Dismissal, which outlines the procedural requirements expected of employers in dismissing an employee for misconduct.¹⁶

Swedish dismissal law is mostly regulated by the "Lagen om anställningsskydd" (*LAS*) translated as the Employment Protection Act as well as the "Medbestämmandelagen" (*MBL*) translated as the Co-Determination in the Workplace Act.¹⁷ These statutes collectively provide the foundation for regulating employment security and the rights of employees and trade unions in workplace decision-making. As this research focusses mainly on procedural fairness in dismissal, specific attention is directed towards Section 30 of the Employment Protection Act which sets out the procedural requirements that employers must observe when terminating an employee's employment.

¹³ Labour Relations Act, 66 of 1995.

¹⁴ Section 185(2) of the *LRA*.

¹⁵ Section 138(6) of the *LRA*.

¹⁶ Item 4 of Schedule 8.

¹⁷ Employment Protection Act, 80 of 1982 and Co-Determination in the Workplace Act, 1976.

Trade union representatives are a normal and necessary feature of the modern workplace. Inevitably, however, employers may be faced with the daunting task of instituting disciplinary action against a trade union representative for various forms of misconduct. In such situations, employers often find themselves grappling with two central questions: “how do I discipline a trade union representative?” and “what procedure must I follow as the employer?”.

Conversely, trade unions often hold a distorted or inconsistent perception of what constitutes a fair and procedurally correct procedure when disciplinary action is taken against one of their representatives. This divergence in understanding frequently gives rise to conflict between employers and trade unions.

The requirements for procedural fairness in South Africa are set out in Schedule 8 item 4 of the LRA. Notably, Item 4(2) addresses the issue of disciplinary action against trade union representatives and reads as follows:

“Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union”.¹⁸

At first reading, item 4(2) of the Code of Good Practice appears to be straightforward. However, in practice, it often gives rise to uncertainty among employers and trade unions regarding the precise meaning of the requirement to “first inform and consult”. The Code itself does not define what constitutes “consulting” in this context, leaving room for interpretative ambiguity.

According to Grogan, the term “consulting” as used in the Code merely requires the employer to inform the trade union of the allegations against the trade union representative concerned, rather than engaging in a protracted or formal consultation process.¹⁹ This interpretation finds support in the CCMA matter between *FAWU obo Mbatha & others v SASKO Milling and Baking*, where a similar

¹⁸ Item 4(2) of Schedule 8.

¹⁹ Grogan Dismissal 4th ed (2022) page 329.

understanding was applied.²⁰ Despite this, confusion remains, as evidenced by the plethora of cases referred to the CCMA and Labour Courts on this issue. This ongoing uncertainty creates unnecessary legal risks for employers and contributes to heightened tension between employers, trade union representatives, and trade unions in the workplace.

CCMA commissioners have, in certain cases, interpreted Item 4(2) of the Code of Good Practice: Dismissal as imposing a mandatory obligation on employers. In these instances, the dismissal of trade union representatives was found to be procedurally unfair solely because the employer had failed to inform the trade union representative's trade union prior to instituting disciplinary action. This interpretation was upheld in *Silicone Smelters (Pty) Ltd v NUMSA obo Makhobotloane*,²¹ as well as in *Mega Bus & Coach v SATAWU obo Matsane*.²²

In *NCBAWU v Masinga and others*,²³ the Labour Court held that the employer's failure to comply with Item 4(2) of the Code of Good Practice: Dismissal was not fatal to the fairness of the disciplinary process. The court reasoned that Schedule 8 of the LRA does not constitute binding law but rather serves as a guideline of good practice. Consequently, non-compliance with Item 4(2) did not, in itself, render the disciplinary process defective.²⁴ A similar conclusion was reached by a Bargaining Council commissioner in the matter between *CEPPWAWU obo Limba v Consol Glass*, where it was likewise held that failure to consult the trade union did not automatically amount to procedural unfairness.²⁵

The authors of *Law@work* maintain that Item 4(2) should be regarded merely as a guideline rather than a strict legal requirement.²⁶ Grogan, on the other hand, adopts a nuanced position, asserting that the significance of non-compliance with the

²⁰ (2007) 3 BALR 256 (CCMA), the commissioner stated that consultation means nothing more or less than that the union must be made aware of the allegations levelled against the shop stewards.

²¹ (2000) 4 BALR 468 (IMSSA).

²² (2001) 10 BALR 1051 (IMSSA).

²³ (2000) 2 BLLR 171 (LC).

²⁴ *NCBAWU v Masinga and others* (2000) 2 BLLR 171 (LC).

²⁵ (2009) 5 BALR 431 (NBCCI).

²⁶ A van Niekerk et al *Law@Work* 5th ed page 316 – 317.

provisions of the code depends on the specific facts of each case, particularly the gravity of the misconduct.²⁷

A further question that arises concerns the legislative intention behind Item 4(2) of the code? Was the provision intended merely to protect trade union representatives from victimisation arising from the performance of their duties as trade union representatives, or was it designed to afford them protection from disciplinary action that extends beyond the rights enjoyed by an ordinary employee? The answer to this question is essential in understanding the balance the legislature sought to achieve between employee discipline and trade union protection.

In Sweden, the requirement for procedural fairness in relation to union members is contained in Section 30 of the *Employment Protection Act*. This section provides as follows:

"If the employee is a union member, the employer shall notify the local organisation of employees to which the employee belongs at the same time as notice is given to the employee.

The employee and the local organisation of employees to which the employee belongs are entitled to consultations with the employer concerning the measure to which the information and the notice relate. This shall apply provided that such consultations are requested not more than one week after information or notice was given.

Where such consultations have been requested, the employer may not give notice of termination or summarily dismiss the employee until the consultations have been concluded. (SFS 1989:963)."

Section 30 of the Employment Protection Act, clearly provides that an employer may not give notice of termination or summarily dismiss the employee until the consultations has been concluded. This provision creates a procedural obligation on employers to engage in consultation before finalising any decision to terminate

²⁷ Grogan J *Dismissal* 4th ed (2022) page 329.

employment, thereby ensuring that trade unions are actively involved in in the dismissal process of their representatives.

In the *Arbetsdomstolen* (Swedish Labour Court) case *AD 2011 nr 74*, the Labour Court found that the dismissal a police inspector was unfair on the grounds that the employer had failed to consult with the employee's trade union prior to termination. The court held that this omission constituted a breach of section 30 of the Employment Protection Act, thereby rendering the dismissal procedurally unfair.²⁸ This judgment thus underscores the mandatory nature of consultation under Swedish dismissal law and highlights the central role of trade unions in safeguarding procedural fairness

In *Arbetsdomstolen* case *AD 2009 nr 40*, the Swedish Labour Court found the dismissal of an employee to be unfair on the basis that the employer had failed to comply with the procedural requirement of consulting the employee's trade union prior to termination.²⁹

At first glance, Section 30 of the *Employment Protection Act* appears to impose an absolute obligation on employers, suggesting that any failure to consult with the relevant trade union would be fatal to the fairness of a dismissal. However, subsequent jurisprudence demonstrates a more flexible interpretation. In *AD 2010 nr 3*, the Swedish Labour Court held that, despite the employer's failure to consult the employee's trade union before terminating the employee's services for gross misconduct, the dismissal was nonetheless fair. In reaching this conclusion, the Court took into account that the misconduct was severe, well documented, and justified termination despite the procedural error.³⁰

It therefore appears that the Swedish Labour Court interprets the consultation requirement under Section 30 of the Employment Protection Act in a manner comparable South Africa's legal forums when applying Item 4(2) of the Code of Good Practice: Dismissal. This suggests that the correct interpretation aligns with

²⁸ Arbetsdomstolen, AD 2011 nr 10.

²⁹ Arbetsdomstolen AD 2009 nr 40.

³⁰ Arbetsdomstolen AD 2010 nr 3.

Grogan's view, where he states that the relevance of non-compliance with the provisions of the code depends on the facts of each case, particularly the gravity of the misconduct.³¹

One of the primary purposes of the LRA is to give effect to South Africa's obligations as a member state of the International Labour Organisation (hereafter referred to as the "ILO").³² The same applies to Sweden, which, as an ILO member state, aligns its labour legislation with international labour standards. In a study of this nature, it is crucial to consider *supra* national instruments which relate to the specific topic.

In this regard, ILO conventions and recommendations play a crucial role in shaping international standards. ILO conventions are legally binding international treaties that may be ratified by member states, setting out fundamental principles and rights at work. In contrast, ILO recommendations are non-binding instruments that serve as practical guidelines, typically implementing conventions by providing more detailed direction on their implementation at the national level.³³

The ILO has identified eleven (11) core or fundamental conventions that are regarded as non-negotiable, which form the foundation of basic rights and principles at work globally. Members states are expected to respect, promote, and realise these fundamental principles in practice, regardless of whether they have ratified the relevant conventions.³⁴

Two ILO conventions are relevant to the research topic, namely the Convention on Freedom of Association and Protection of the Right to Organise (hereinafter "CO87"), as well as the Convention on the Right to Organise and Collective Bargaining (hereinafter "CO98"). Both these conventions were adopted by the ILO

³¹ Grogan J *Dismissal* 4th ed (2022) page 329.

³² Section 1(b) of the *LRA*.

³³ Section 231 of the *Constitution of the Republic of South of Africa*.

³⁴ ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm, on March 2023.

as fundamental conventions,³⁵ and both were ratified by the Republic of South Africa on 19 February 1996.³⁶

Article 11 of Convention C087 provides as follows:

"Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."³⁷

Article 1 of Convention C098 provides:

"1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to-

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours."³⁸

The primary purpose of these two ILO conventions is to ensure that employees are protected from any victimization by partaking in union activities.

The Constitution of the Republic of South Africa explicitly provides that South African courts must consider international law when interpreting the Bill of Rights. As previously noted, the LRA contains similar provisions regarding this constitutional commitment.³⁹ The Constitutional Court reaffirmed this position in *Sidumo & another v Rustenburg Platinum Mines Ltd* where the court stated:

"Plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator.

³⁵ Convention C087, downloaded from the ILO website at www.ilo.org, on 20 March 2023, and Convention C098, downloaded from the ILO website at www.ilo.org, on 20 March 2023.

³⁶ Ratification is a sovereign act of a member state of the ILO expressing the State's intention to be bound by the terms of an international labour convention.

³⁷ Article 11 of Convention C087.

³⁸ Article 1 of Convention C098.

³⁹ Section 233 of the *Constitution of the Republic of South Africa*, 1996, and Section 8 of the LRA.

Article 8 of the International Labour Organisation Convention on Termination of Employment 58 of 1982 (ILO Convention) requires the same."⁴⁰

For the purposes of this study, the ILO Convention on Termination of Employment (C158) is relevant. This convention was adopted on 2 June 1982.⁴¹ Article 4 of Convention C158 provides:

"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 requirement of the undertaking, establishment or service."⁴²

From the above excerpt it is evident that the ILO only recognises three broad categories of permissible grounds upon which an employee's services may be terminated.⁴³

Convention C158 provides in article 5 that the following ground of dismissal will not constitute valid reasons for termination:

- "a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave."⁴⁴

⁴⁰ (2007) 12 BLLR 1097 (CC) at para 61.

⁴¹ Convention C158, downloaded from the ILO website at www.ilo.org, on 25 March 2023. Convention C158 is not a fundamental convention.

⁴² Article 4 of Convention C158.

⁴³ Smit (2010) Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995.

⁴⁴ Article 5 of Convention C158.

Article 5 of the convention provides that acting in the capacity as a trade union representative or participating in union activities shall not constitute a fair reason for dismissal.⁴⁵ Accordingly, article 5 affords protection to employees who perform trade union functions against dismissal on such grounds.

Article 6(1) of Convention C158 further elaborates on the provisions of article 4 by providing:

“Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.”

Article 7 of Convention C158 plays a significant role in prescribing the procedural requirements to be followed when initiating disciplinary action against an employee. Consequently, it holds particular relevant for the purpose of this study. Furthermore, article 7 represents the only pre-dismissal procedural safeguard expressly required by the Convention, in contrast to the plethora of pre-dismissal procedures developed under South African law.⁴⁶

Article 7 states the following relating to dismissal:

“The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”⁴⁷

Article 7, however, makes no specific reference to trade union representatives or to the notion that they should be treated differently to any other employee. This article focuses exclusively on termination of employment and is silent on other forms of disciplinary action, such as verbal, written and final written warnings. In contrast, Item 4(2) of Schedule 8 of the LRA refers broadly to *discipline*, which encompasses both dismissal and any other forms of disciplinary measures.

⁴⁵ Article 5 is also reflected in South African legislation and is discussed later in this dissertation.

⁴⁶ Will be discussed in the dissertation later.

⁴⁷ Article 7 of Convention C158.

Finally, Article 8 of C158 states that:

- “1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.
2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.
3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.”

The Article does not, however, make any specific provision for **trade union representatives**, nor does it prescribe any special procedures applicable to such employees when appealing against their dismissal.

Article 8 of C158 addresses the appeal procedures available to employees who wish to challenge their dismissal. This Article does not, however, make any specific provision for trade union representatives, nor does it prescribe any special procedures applicable to such employees when appealing against their dismissal.

When Convention C158 is considered as a whole, three core principles emerge concerning procedural fairness in dismissal. These principles include: of

- i. There must be a fair and valid reason for dismissal.
- ii. An employee must have an opportunity to defend himself or herself against the allegations made by the employer.

The employee should have the right to appeal to an impartial body.⁴⁸

These three core principles identified above will be compared in this study with the current state of South African labour law, particularly in relation to the additional

⁴⁸ Smit, 2010 Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995.

protection afforded to trade union representatives, if any, and the implications this has for the disciplinary procedures applicable to such representatives.

Given the nature of the ILO Convention on Workers' Representatives (C135), adopted on 23 June 1971, it is also directly relevant to the topic under investigation.⁴⁹ Convention C135 complements Convention C098 in several respects and, notably, defines the term *workers' representative* in Article 3.⁵⁰

Article 3 of Convention C135 states the following:

"For the purpose of this Convention the term workers' representatives means persons who are recognised as such under national law or practice, whether they are--

- (a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or
- (b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned."⁵¹

The definition of a trade union representative in C135 is similar to the definition contained in section 213 of the LRA.⁵² The protection this convention provides to trade union representative's is contained in article 1 thereof, which provides that:

"Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements."⁵³

⁴⁹ Convention C135, downloaded from the ILO website at www.ilo.org, on 25 March 2023.

⁵⁰ Convention C135 supplements Convention C098 with protection for 'workers representative'.

⁵¹ Article 3 of Convention C135.

⁵² Section 213 of the LRA.

⁵³ Article 1 of Convention C135.

The ILO conventions discussed above underscore the principle that trade union representatives must be protected against any form of prejudicial treatment arising from the performance of their duties as representatives. These instruments further require member states to establish measures that safeguard such representatives from unfair treatment. It can therefore be deduced that the disciplining a trade union representative is not merely a challenge unique to South Africa, but rather an international concern reflected across various jurisdictions.

1.2 Problem statement

Trade union representatives play a crucial role in any organised workplace, carrying responsibilities not only towards the employer, but also towards union members and the trade union itself. Despite their dual role, trade union representatives are first and foremost employees.⁵⁴ The unique position and functions of trade union representatives inevitably complicate matters when disciplinary action has to be taken against them. The problem statement of this research can therefore broadly be summarised as follows: “How does the disciplinary action instituted by an employer against a trade union representative differ from the disciplinary action against any other employee”?

Furthermore, this study will assess whether South African legislation governing disciplinary action against trade union representatives aligns with ILO standards, and will include a comparative analysis with the position in Sweden.

Firstly, the Swedish workforce is 65.2% unionised, in contrast to South Africa’s 29.1%, making Sweden the fourth most unionised country in the world. As a result, unions hold a significant position within the Swedish labour market, with a correspondingly large number of trade union representatives or workers’ representatives active in the workplace.⁵⁵ Swedish employers who initiate disciplinary action against such trade union representatives must comply with strict legal guidelines and procedures, which has, over time, produced a substantial body

⁵⁴ SAMWU v eThekweni Municipality (2017) 38 ILJ 158 (LAC).

⁵⁵ ILOSTAT.

of *jurisprudence* on the subject. This stands in contrast to the comparatively limited case law available in South Africa. By analysing selected Swedish *jurisprudence*, this study will be able to determine how Swedish employers approach disciplinary action involving trade union representatives and how these practises compare to those adopted by South African employers.

Because both South Africa and Sweden are member states of the ILO, each is required to give effect to its obligations arising from ILO membership. It is therefore important to compare and analyse the similarities and differences between the two countries' procedures for disciplining trade union representatives. Such a comparison provides valuable insights into the respective disciplinary frameworks, highlight areas of convergence and divergence, and may assist in clarifying uncertainties faced by employers and trade unions.

Sweden has ratified all the ILO conventions relevant to this study, including Convention C158 and Convention C135, while South Africa has not ratified either of these conventions. Given the above background, the title for the dissertation is: *Disciplinary actions against a trade union representative: A comparative analysis between South Africa and Sweden.*

The research problem can be effectively explored through the following research questions:

- I. What is the position, role and function of a trade union representative in the workplace?
- II. What international labour standards provided by the ILO regulate disciplinary action against a trade union representative?
- III. What provisions in South African labour legislation govern disciplinary action against a trade union representative?
- IV. In what extent does Swedish labour legislation give effect to the relevant ILO standards?
- V. What are the similarities and differences between South African and Swedish legislation relating to discipline against trade union representatives?

By conducting a comparative analysis, this research proposal seeks to provide insights into the differences and similarities in the disciplinary processes in both countries and to inform, influence and guide future practice. Furthermore, this study intends to make a significant contribution to the academic literature on labour law and labour relations in South Africa and Sweden, and may serve as a basis for future comparative studies on the subject.

1.3 Research Aim

The general objective of this study is to provide insight into, and develop an understanding of, the processes by which disciplinary action may correctly be taken against a trade union representative in two jurisdictions, namely South Africa and Sweden, and to examine how the legal frameworks of these countries shape the rights, obligations and protection afforded to trade union representatives. The study further aims to identify the differences and similarities in how these two countries approach this issue, taking into account their respective legal frameworks as well as their shared membership to the ILO and the associated obligation to give effect to international labour standards.

1.4 Research Objectives

In order to achieve the general objective of this study as discussed above, the following research objectives have been formulated:

- To determine the position, role and function of a trade union representative in the workplace.
- To determine the relevant international labour standards provided by the ILO relating to disciplinary action by an employer against a trade union representative.
- To identify the provisions in South African labour legislation regulating disciplinary action against a trade union representative.
- To determine the extent to which Swedish labour legislation gives effect to the relevant ILO standards, and how this compares to the South African position.

- To identify the similarities and differences between South African and Swedish legislation governing discipline against a trade union representative.

1.5 Research Approach

The study aims to analyse and provide insights on how disciplinary action against a trade union representative differs in South Africa and Sweden, and how both countries interpret and implement the ILO standards within their respective labour law frameworks. Accordingly, the researcher considers a qualitative research approach to be the most appropriate methodology for this study.

A qualitative approach is well suited to addressing the aims of the research, as the research questions are open-ended and require the interpretation of domestic and international legal instruments, which cannot be meaningfully quantified. Qualitative research, at its core, seeks to explore open-ended questions whose answers are not easily put into numbers, making it an appropriate methodological choice for this study.⁵⁶

1.6 Research Design

The researcher will employ document analysis as the primary research method, as it is best suited for the aims and purposes of this study. Document analysis is a method of systematic review or evaluation of documents, whether printed or in electronic format, and has long been recognised as a valuable research method within qualitative inquiry. Document analysis involves the analysis of a variety of documents, including agendas, background papers, books, journals, articles, academic journal articles, organisational reports, public records, and other relevant written materials. These documents may be sourced from libraries, organisational documents, and reputable academic databases.⁵⁷

⁵⁶ Cleland JA. The qualitative orientation in medical education research. *Korean J Med Educ.* 2017 Jun;29(2):61-71.

⁵⁷ Morgan, H. (2022). Conducting a Qualitative Document Analysis. *The Qualitative Report*, 27(1), 64-77.

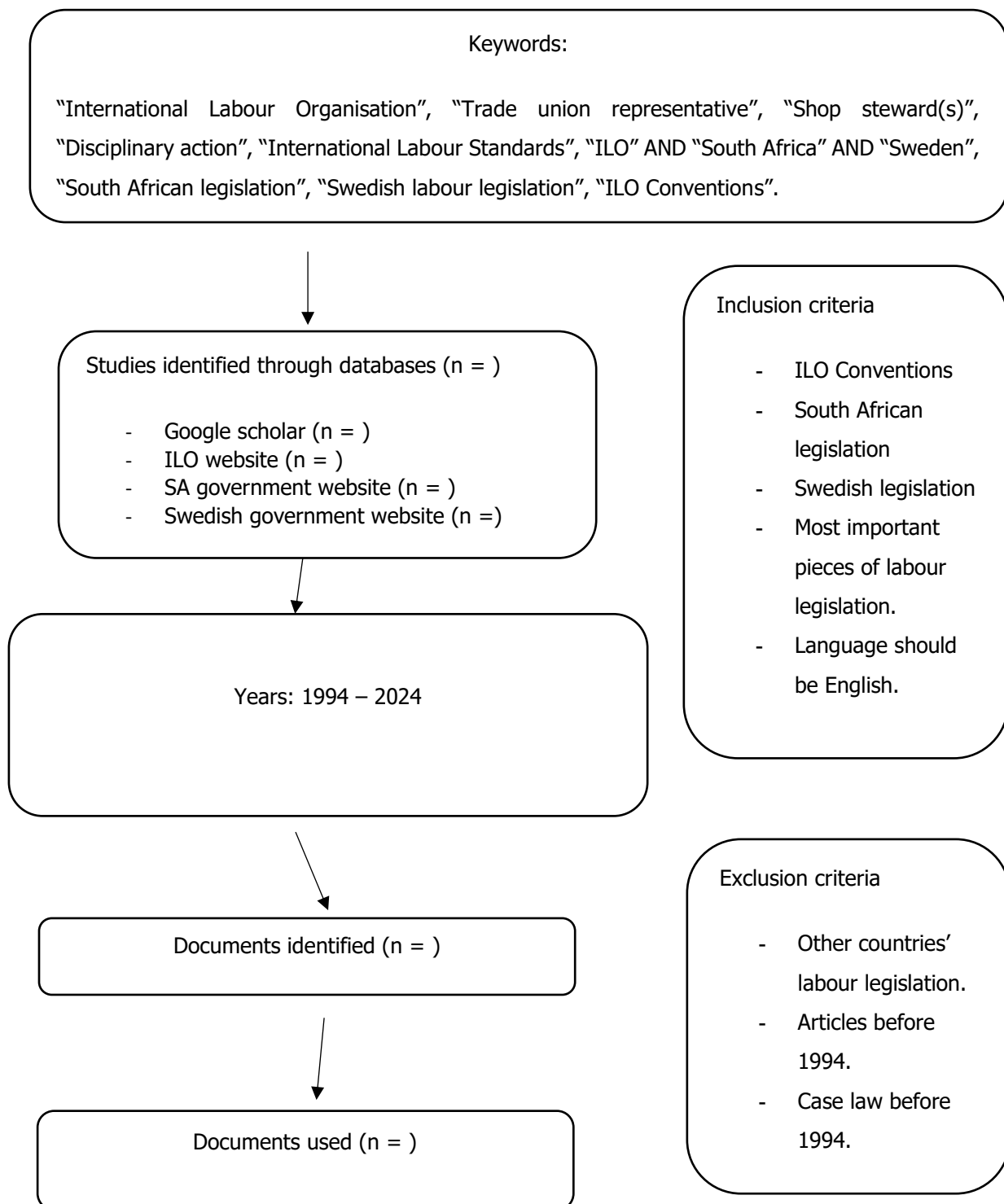
Further reasons for selecting document analysis as the research method for the study include its relative efficiency, as the documents which the researcher will use are already available in the public domain, and therefore do not require additional data collection. From an ethical and bias-mitigation perspective, document analysis is advantageous because documents remain unchanged over time, ensuring consistency, reliability, and accurate referencing.⁵⁸ Given that this study centres on interpreting legislation and international labour standards, and related scholarly sources, the use of document analysis is not only appropriate but essential to answering the research questions.

The researcher will utilize two of the three types of primary documents in this study, namely public records and physical evidence. Public records will include case law (both local and international), South African labour legislation, Swedish labour legislation, and international labour standards. Physical evidence will include articles and handbooks that contributed to answering the study's research questions.

After collecting these two categories of primary documents, the researcher will apply content analysis to code the material into themes, which will be discussed in detail under the data collection section.

⁵⁸ Bowen, G. A. (2009). Document analysis as a qualitative research method. *Qualitative Research Journal*, 9(2), 27-40

Figure 1: Literature review design



1.7 Research context

Through this analysis, the researcher aims to gain a comprehensive understanding of the role and function of trade union representatives and to interpret and compare, in detail, the international labour standards set by the ILO with the labour legislation of South Africa and Sweden. This will enable the researcher to connect theoretical knowledge with practical realities, thereby addressing the research question effectively.

The research undertaken will contribute to a comparative analysis of two countries and their adherence to the international labour standards established by the ILO, an area not widely explored in existing literature.

The study will examine the role and functions of trade union representatives in the workplace, as well as provisions of international labour standards relating to disciplinary action against such representatives. These standards will be compared and interpreted alongside South African labour legislation governing disciplinary procedures, and evaluated against the framework of Sweden.

Through this analysis, the researcher aims to gain a comprehensive understanding of the role and function of a trade union representatives and to interpret and compare, in detail, the international labour standards set by the ILO with the labour legislation of South Africa and Sweden. This will enable the researcher to connect theoretical knowledge with practical realities, thereby addressing the research question effectively.

1.8 Participants

Because this study will be a document analysis, this research will not include any participants and will only be based on documents as set out under the research design section.

1.9 Procedure

The procedure that will be followed in this study involves gathering data and documents on the role and functions of trade union representatives in the

workplace, as well as the international labour standards provided by the ILO that regulate disciplinary action against such representatives. The next step is to identify the provisions contained in South African labour legislation governing disciplinary measures against trade union representatives and to determine how Swedish labour legislation aligns with ILO standards in this regard. Finally, the similarities and differences between South African and Swedish legislation concerning disciplinary action against trade union representatives will be analysed.

All information for this research paper will be collected through document analysis. Consequently, there are no anticipated obstacles to data collection, as only reliable databases and resources will be used.

1.10 Data collection

The research design for this study is based on document, and therefore a qualitative approach will be undertaken by the researcher.

To facilitate systemic data collection, the researcher will follow a seven-step process:⁵⁹

Step 1

Compile a list of resources, specifying the source's medium (e.g., journal, policy or article), genre (labour relations and labour law fields in the respective countries), and inclusion and exclusion criteria. Resources were collected based on legislation relating to labour law in SA and Sweden, with a specific reference to discipline against employees and trade union representatives. The researcher then compiled case law from the two irrespective countries relating to discipline against a trade union representative as well as what the ILO states in its respective recommendations and conventions based on discipline against a trade union representative.

⁵⁹ Bowen, G. A. (2009). Document analysis as a qualitative research method. *Qualitative Research Journal*, 9(2), 27-40.

Step 2

Organise the information into categories. The information was categorized by legislation, case law, ILO recommendations and conventions, ILO statistics and then finally academic resources.

Step 3

Create copies of documents or store electronic documents in a dedicated folder to ensure proper preservation of all the material used in the study. The information was stored on Microsoft OneDrive in a folder named "Zane Hanekom Meesters" to ensure that it is safe and a copy of that folder was also stored on my desktop as a shortcut.

Step 4

Verify the authenticity of resources used. All resources were downloaded from the Swedish Government websites and SA government websites directly to ensure the authenticity of the resources that were used, the same can be said of the resources that was used from the ILO.

Step 5

Check for potential biases by ensuring that language and phrasing accurately reflect factual information. The resources used in this study was legislation and/or ILO recommendations and conventions which ensures that there can be no biasedness as legislation is what it purports to be.

Step 6

Critically assess each document by asking the following questions:

1. What is the history of the document and purpose of the document?
2. How and when did the document become available?
3. Is the document appropriate and accurate for the study?
4. Who created the document?

5. What sources (original, secondary data or other sources) were used in the document?
6. Are there other sources that can confirm the information?

Step 7

Evaluate the documents to identify patterns in the data.

By following these steps, the researcher will be able to ensure the reliability and accuracy of all documents collected and used in this study.⁶⁰

1.11 Data Analysis

Seers defines data analysis as a process that systematically applies logical techniques to analyse, describe, illustrate, recap, organise and evaluate documents in a specific order to extract meaningful information and makes sense of the data.⁶¹

In this study, the researcher will employ deductive analysis rather than inductive analysis. This approach is appropriate because the study is based on documents and research related to ILO Conventions and legislation in the two countries under review.

The researcher will follow Creswell's four-step process for data analysis::

Step 1: Organise and prepare the data for analysis, regrouping it into units or categories using content analysis.

Step 2: Apply content analysis to gain a deeper understanding of the information contained in the resources under investigation.

Step 3: Code the data.

⁶⁰ Rapley, T. (2018). Doing conversation, discourse, and document analysis (Vol. 7). SAGE publications.

⁶¹ Seers, K. (2012). Qualitative data analysis. *Evidence-based nursing*, 15(1), 2-2.

Step 4: Analyse and interpret the data.⁶²

These steps will enable the researcher to understand and interpret the documents in a wider sense to assist the researcher to answer the research questions.

1.12 Trustworthiness

The researcher will ensure credibility by carefully handling and collecting data that is current and relevant to the study. The research process will be logical, traceable, and clearly documented, ensuring dependability and accuracy. This transparency will allow readers and other researchers to evaluate the process and confirm that the findings and recommendations are consistent and reliable.

The study will be logical, traceable and clearly documented, which will ensure that the study is dependable and accurate. Readers and researchers will be able examine the research process so that the study can show its findings and recommendations are consistent and stable.

To ensure transferability, the researcher will provide detailed descriptions of the documents and their content, enabling others to assess the applicability of the study to future research on similar topics.

In summary the researcher will use four specific strategies to ensure trustworthiness in this study namely, credibility, transferability, dependability, and finally, when the other three strategies are met, confirmability.⁶³

1.13 Ethical considerations

This study involves only document analysis, therefore, no participants will be involved. The research is not sensitive in nature, and no confidential documents or information will be used.

⁶² Creswell, J.W. (2014). Research design: Qualitative, quantitative, and mixed methods approaches. SAGE Publications. 3rd Ed. 22-220.

⁶³ Nowell, L. S., Norris, J. M., White, D. E., & Moules, N. J. (2017). Thematic analysis: Striving to meet the trustworthiness criteria. *International journal of qualitative methods*, 16(1).

The researcher will conduct the study ethically by using only valid and reliable documents and ensuring that all sources are properly cited and referenced. The research will comply with the requirements as contained in the Protection of Personal Information Act,⁶⁴ where applicable.

After approval from the IPSHRM Scientific Committee and ethical approval from the Economic and Management Sciences Research Ethics Committee (EMS-REC) of the relevant university, the researcher commenced with the data gathering.

Chapter 2 The applicable ILO standards and South African labour legislation relating to discipline against trade union representatives.

2.1 Introduction

As outlined in the introduction, specific International Labour Organisation (hereinafter ILO) Recommendations and Conventions have been developed to protect trade union representatives and regulate disciplinary action against them. These instruments also provide guidelines for employers on the appropriate procedures to follow when initiating disciplinary measures against a trade union representative.

2.2 ILO Conventions and Recommendations.

The following ILO conventions and recommendations regulate disciplinary action against a trade union representative:

1. Freedom of Association and Protection of the Right to Organise Convention (C087).
2. Right to Organise and Collective Bargaining Convention (C098).
3. Convention on Workers' Representatives (C135).
4. Termination of Employment Convention (C158).

⁶⁴ 4 of 2013.

5. Termination of Employment Recommendation (R166).

The purpose of Convention C087 is to safeguard the rights of employees and employers to exercise their right to organise.⁶⁵ This right includes the employees' right to participate in trade union activities *inter alia* fulfilling the duties of a trade union representative. Consequently, trade union representatives are protected against dismissal for engaging in union-related, including actions aimed at furthering or defending the interests of employees.⁶⁶ This protection is reinforced by Article 10 of Convention C087, which provides:

"In this Convention the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers."⁶⁷

The primary purpose of Convention C098 is to protect employees from any adverse treatment by employers due to their participation in trade union activities or membership in trade unions. This principle is explicitly stated in Article 1, which provides that:

- "1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to-
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours."⁶⁸

Article 1(2)(b) of the Convention specifically mentions that employees are protected from dismissal for participating in trade union activities, which includes actions aimed at furthering the rights and interests of the union members in their capacity as trade union representatives.⁶⁹ Similarly, Article 2 of the Convention prohibits

⁶⁵ Article 11 of Convention C087.

⁶⁶ Article 10 of Convention C087.

⁶⁷ Article 10 of Convention C087

⁶⁸ Article 1 of Convention C098.

⁶⁹ Article 1(2)(b) of Convention C098.

employers from interfering with the functioning of trade unions, a provision that also encompasses the role of trade union representatives.⁷⁰

Convention C135, another key ILO instrument, defines the concept of a workers' representative and affords extensive protection against employer actions motivated by a wide range of anti-union prejudice, which includes dismissal.⁷¹

Understanding how the ILO defines a workers' representative is essential, and this elaborated in detail under article 3 of the convention C135, which states:

"For the purpose of this Convention the term workers' representatives means persons who are recognised as such under national law or practice, whether they are--

- (a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or
- (b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned."⁷²

It is therefore evident that a trade union representative falls within the definition of a workers' representative and is entitled to the protections afforded by the Convention. Article 1 of the Convention provides the following safeguards:

"Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements."⁷³

⁷⁰ Article 2 of Convention C098.

⁷¹ Article 1 of Convention C135.

⁷² Article 3 of Convention C135.

⁷³ Article 1 of Convention C135.

The final convention discussed in this study that regulates discipline against a trade union representative is the Termination of Employment Convention. Unlike the previous conventions, this instrument regulates termination not only in relation to trade union representatives but for all employees in the workplace. The convention explicitly states that employers may not dismiss trade union representatives or employees without a valid reason related to their capacity or conduct, or based on the operational requirements of the employer.⁷⁴

The Convention further emphasizes that trade union representatives must be protected against anti-union discrimination. It explicitly states if an employer dismisses an employee from participating in any union activities, such dismissal will not constitute a valid reason for termination.⁷⁵ Moreover, the Convention expressly provides that if an employee is seeking office as, or acting as, or has acted in the capacity of a trade union representative, and the employer dismisses them for that reason, the dismissal is considered unfair.⁷⁶

Article 7 provides that: It is important to note that article 7 of the Convention outlines the procedure that must be followed before dismissing an employee or a trade union representative. Article 7 states:

"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."⁷⁷

The only pre-dismissal requirement in terms of the Convention is that the employee or a trade union representative must be afforded an opportunity to state his/her case in defence.⁷⁸ Conversely, this requirement may be waived if it is not reasonably practicable for the employer to provide such opportunity.⁷⁹ Article 7 is significant because it is the only provision across all ILO conventions that explicitly prescribes

⁷⁴ Article 4 of Convention C158.

⁷⁵ Article 5(a) of Convention C158.

⁷⁶ Article 5(b) of Convention C158.

⁷⁷ Article 7 of Convention C158.

⁷⁸ Article 7 of Convention C158.

⁷⁹ Article 7 of Convention C158.

the procedure an employer should follow when disciplining employees, including trade union representatives.

The Termination of Employment Recommendation (R166) provides additional protections and supplementary pre-dismissal procedures to complement Convention C158. These details will be discussed in Chapters 3 and 4 of this study.⁸⁰ It is important to note that Recommendation R166 is a non-binding instrument of the ILO.

It is evident from the above-mentioned ILO Conventions that trade union representatives enjoy substantial protection against anti-union discrimination. The ILO explicitly states that any dismissal of a trade union representative while performing duties associated with their position would be deemed unfair. Conversely, an analysis of these conventions indicates that none explicitly provide pre-dismissal requirements that differ from those applicable to an 'ordinary' employee.

2.3 South Africa's dismissal law

South Africa's dismissal law is predominantly regulated by the Labour Relations Act (hereinafter "the LRA⁸¹"). As previously mentioned, both the LRA and the Constitution of the Republic of South Africa⁸² make it clear that our courts must consider international law as well as South Africa's obligations arising from its membership in the ILO.⁸³

This raises the question: what provisions in South Africa's labour legislation regulate disciplinary action against a trade union representative?

To answer this question, one should start the inquiry with reference to section 188 of the LRA. This section seeks to explain when a dismissal would be deemed to be unfair. Section 188 of the LRA provides:

⁸⁰ Recommendation R166 of 1982.

⁸¹ 66 of 1995.

⁸² 1996.

⁸³ Section 233 of Constitution of the Republic of South Africa and Section 8 of the LRA.

“(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

- (a) that the reason for dismissal is a fair reason-
 - (i) related to the employee's conduct or capacity; or
 - (ii) based on the employer's operational requirements; and
- (b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.”

It follows that the dismissal of a trade union representative or employee would therefore need to be effected in accordance with a fair procedure.⁸⁴

Automatic unfair dismissal in terms of the LRA occurs when an employer dismisses an employee in contravention of section 5 of the LRA or for any of the reasons listed in section 187 of the LRA.⁸⁵ The provision most relevant to trade union representatives is section 187(d) of the LRA, which states:

“(d) that the employee took action, or indicated an intention to take action, against the employer by-

- (i) exercising any right conferred by this Act; or
- (ii) participating in any proceedings in terms of this Act.”⁸⁶

The above provision is similar to section 5 of the LRA, which protects employees, including trade union representatives, against discrimination for exercising any right conferred by the LRA.⁸⁷ The rights of a trade union representative in relation to their functions are regulated by section 14(4) of the LRA which states:

“(4) A trade union representative has the right to perform the following functions-

- (a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings;
- (b) to monitor the employer's compliance with the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer;

⁸⁴ Section 188(1)(b) of the *Labour Relations Act* 66 of 1995.

⁸⁵ Section 187 of the *LRA* 66 of 1995.

⁸⁶ Section 187(d) of the *LRA* 66 of 1995.

⁸⁷ Section 5(1) of the *LRA* 66 of 1995.

- (c) to report any alleged contravention of the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer to-
 - (i) the employer;
 - (ii) the representative trade union; and
 - (iii) any responsible authority or agency; and
- (d) to perform any other function agreed to between the representative trade union and the employer.”⁸⁸

Therefore, a trade union representative is protected against any anti-union prejudice while doing their duties, as sections 5, 14, 187 and 188 of the LRA provides ample protection.⁸⁹

Having outlined the provisions of the LRA that specifically afford protection to trade union representatives in the execution of their functions, one must bear in mind that they are also protected under section 185 of the LRA. This section applies to all employees, including trade union representatives, and guarantees protection against unfair dismissal.⁹⁰

The question which arises at this juncture, is what process or pre-dismissal procedure does South African legislation prescribe before taking disciplinary action against a trade union representative? As stated earlier, section 188 of the LRA prescribes that for a dismissal to be fair, the dismissal must be affected in accordance with a fair procedure. The section further states that any person considering if a fair procedure was followed in a dismissal must also take into account the relevant code of good practice.⁹¹

The relevant Code of Good Practice is published under Schedule 8 of the LRA.⁹² For purposes of this study, the focus will be on Item 4 of the Code, which addresses the prerequisites for pre-dismissal procedures that employers should follow when

⁸⁸ Section 14(4) of the LRA 66 of 1995.

⁸⁹ Section 5,14,187 and 88 of the LRA 66 of 1995.

⁹⁰ Section 185(a) of the *Labour Relations Act*, 66 of 1995.

⁹¹ Section 188(b) and (2) of the LRA,66 of 1995.

⁹² Schedule 8 Code of Good Practice: Dismissal.

initiating disciplinary action against employees, including trade union representatives.⁹³

Item 4(1) of Schedule 8 provides the following:

“Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.”⁹⁴

South African courts, as well as the Commission for Conciliation, Mediation and Arbitration (hereinafter “the CCMA”), are overwhelmed with cases where employees challenge the procedural fairness of their dismissals due to various procedural shortcomings. However, the *locus classicus*⁹⁵ on procedural fairness and the minimum requirements for such fairness was established in the landmark case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others*.⁹⁶ In this matter, the court held that an employer is merely required to conduct an investigation, provide the employee or his representative an opportunity to respond to the allegations after a reasonable period, and thereafter make a decision and notify the employee accordingly.⁹⁷

The above-mentioned case, along with numerous other decisions by South African courts, has affirmed that the most fundamental principle of procedural fairness is *audi alteram partem*, which simply means to provide the other party an opportunity to state their case and to present their defence. In other words, if an employer provides an employee with an opportunity to respond to the allegations against

⁹³ Item 4 of Schedule 8.

⁹⁴ Item 4(1) of Schedule 8.

⁹⁵ Considered to be the best-known information on a particular subject, or the authoritative case or precedent

⁹⁶ (2006) 27 ILJ 1644 (LC).

⁹⁷ *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* (2006) 27 ILJ 1644 (LC).

them in any reasonable form or manner, the core requirement of procedural fairness will have been satisfied.

In the recent case of *Richardo Schouten v SSSBC and others*,⁹⁸ the court held that the failure of the employer to allow the employee to cross-examine the witnesses in an internal disciplinary hearing was procedurally unfair, as it had a direct impact on the employee's ability to state his case in defence to the charges. Conversely, in *Nitrosphoksa (Pty) Ltd v CCMA and others*,⁹⁹ the court found that merely conducting an informal interview and asking questions was adequate to satisfy the requirements of procedural fairness. Furthermore, in *PRASA v Moreki and others*,¹⁰⁰ the court ruled that when no formal hearing was held, inviting the employee to make written presentation was sufficient to comply with procedural fairness, as a disciplinary enquiry need not always be formalistic as per Item 4 of Schedule 8.¹⁰¹

On the initial reading of Item 4(2) of Schedule 8, it affords additional or special protection to trade union representatives alone. This part states:

"Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union."¹⁰²

It is evident that the Code does not specify what is meant by "consulting." Grogan contends that the term "consulting" within the context of the code merely entails notifying the union about the allegations against their trade union representative. This interpretation by Grogan is further corroborated by a CCMA case, *FAWU obo Mbatha & others v SASKO Milling and Baking*.

CCMA Commissioners have interpreted Item 4(2) of the LRA as mandatory in certain instances, holding that the dismissal of trade union representatives was procedurally

⁹⁸ (2025) C44/2022 (LC).

⁹⁹ (2011) 8 BLLR 765 (LC).

¹⁰⁰ (2017) ZALCJHB 114 (LC).

¹⁰¹ *PRASA v Moreki and others* (2017) ZALCJHB 114 (LC).

¹⁰² Item 4(2) of the Code of Good Practice: Dismissal.

unfair solely because the employer failed to inform the trade union representative's union. This interpretation was affirmed in *Silicone Smelters (Pty) Ltd v NUMSA obo Makhobotloane* and in *Mega Bus & Coach v SATAWU obo Matsane*. Conversely, in *NCBAWU v Masinga and others*, the Labour Court held that the employer's non-compliance with Item 4(2) was not fatal, on the basis that Schedule 8 merely serves as a guideline. The authors of *Law@Work* support this view, aligning with the *NCBAWU* decision.¹⁰³ In contrast, Grogan adopts a more nuanced, case-by-case approach, arguing that the legal consequence of non-compliance with the Code's provisions is contingent upon the facts of each case, with emphasis on the gravity of the misconduct.

In one of the most recent cases, *National Union of Furniture & Allied Workers South Africa obo Javulani v Dreamworx Bedding (Pty) Ltd*,¹⁰⁴ the Commissioner found the dismissal of a trade union representative to be fair, despite the fact that the trade union representative's union was not informed. Furthermore, the representative neither attended a formal hearing nor received notice of the charges against him. He was subsequently dismissed verbally after a meeting in which the alleged misconduct was discussed.

In the above-mentioned matter, the trade union representative's misconduct was of a serious nature, as he made death threats and incited violence and bullying. In reaching his decision, the Commissioner not only considered the gravity of the misconduct but also referred to Item 4(4) of Schedule 8 in his award. Item 4(4) of Schedule 8 provides:

"In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures."¹⁰⁵

It is important to note that Item 4(4) of Schedule 8 applies to both "ordinary" employees and trade union representatives. In *National Union of Furniture & Allied*

¹⁰³ A van Niekerk et al *Law@Work* 5th ed page 316 – 317.

¹⁰⁴ (2020) 12 BALR 1267 (FBC).

¹⁰⁵ Item 4(4) of the Code of Good Practice: Dismissal.

It is important to note that Item 4(4) of Schedule 8 applies to both “ordinary” employees as well as trade union representatives. In *National Union of Furniture & Allied Workers South Africa obo Javulani v Dreamworx Bedding (Pty) Ltd*,¹⁰⁶ the trade union representative was present when the employers’ foreign employees received death threats and feared for their lives. In that case it was found that the employer had good reason to dispense with pre-dismissal procedures included in Item 4 of the Code. This case underscores that the minimum requirement for procedural fairness remains compliance with the *audi alteram partem* rule, even when disciplinary action is taken against a trade union representative.

The Labour Court took a similar approach in the matter between *PRASA v CCMA and others*,¹⁰⁷ where the court stated the following under paragraph 31:

"31.7 In my view, the propriety or otherwise of the procedure followed should be assessed, not on the basis of an earlier election or the existence or absence of exceptional circumstances but rather on whether or not the chosen process resulted in a proper ventilation of the issues raised and consequently in procedural fairness.

31.8 Where the informal process is chosen by the employer, the question whether or not there has been such proper ventilation of issues can only be answered in the light of the representations made by or on behalf of the employee. It follows that where the employee has failed to make representations as to the charges or allegations in issue, as in the present case, the question of procedural fairness does not arise in that regard. The employee cannot complain that she was not afforded the audi when she did not state by way of written representations as to which aspects she deserves an oral hearing.

31.9 In fact, the applicant in this case may have resorted to this informal process precisely to determine from the requested written representations whether or not the respondent had any defence or a defence that warranted an oral hearing or she was merely fancifully defending for the purposes of delay, as in the situation of a summary judgment application."¹⁰⁸

The court subsequently held that the dismissal of the employee was procedurally fair, even no formal hearing took place. The court reasoned that requesting written representations was sufficient to meet the minimum requirement for procedural

¹⁰⁶ (2020) 12 BALR 1267 (FBC).

¹⁰⁷ [2017] ZALCJHB 114 (LC).

¹⁰⁸ *PRASA v CCMA and Others* [2017] ZALCJHB 114 (LC) para 31.

fairness, despite the employee's request for a formal oral hearing. Moreover, the judgment provides a valuable interpretation of Item 4(4) under paragraph 29:

"Item 4(4) of Schedule 8 deals with a situation where the employer wishes to dispense with the pre-dismissal procedures and such pre-dismissal procedures are those that conform to the standard set out in sub-item (1) of item 4 as outlined above. In other words, where the employer wishes to dispense with the standard set out in sub-item (1), it must comply with the requirements of sub-item (4). This would be the case, where for instance, the employer does not afford the employee an audi or pre-dismissal process because witnesses are afraid to testify, or where it is impossible to serve the disciplinary notice on the employee. In that case, the employer cannot reasonably be expected to comply with the guidelines in sub-item (1) and, upon showing exceptional circumstances, it is permitted to dispense with the procedures that must normally precede a dismissal."¹⁰⁹

South African labour legislation has a plethora of different provisions contained in the LRA, the Code of Good Practice and judicial tests developed by the courts to regulate disciplinary action against trade union representatives.

¹⁰⁹ *PRASA v CCMA and Others* [2017] ZALCJHB 114 (LC) para 29.

Chapter 3 Swedish labour legislation in terms of ILO standards

3.1 Introduction

As noted in the introduction and background, Sweden's workforce is highly unionised, making the presence of trade union representatives a common occurrence for Swedish employers. Since trade union representatives are also employees, employers occasionally face the daunting task of initiating disciplinary action against them and terminating their services from time to time. Given that Sweden has ratified all the relevant International Labour Organisation (hereinafter "the ILO") conventions pertaining to termination of employees and the protection of trade union representatives, it follows that Sweden has enacted domestic legislation to regulate the process leading up to termination. This legislation also defines what constitutes a fair reason for dismissal, ensuring compliance with these ILO conventions.

3.2 Swedish legislation

The legislation enacted by Sweden to ensure conformity with the relevant ILO Conventions include the following:

1. Employment Protection Act (1982:80) "Lagen om anställningsskydd" (*LAS*).
2. Co-Determination in the Workplace Act (1976:580) "Medbestämmandelagen" (*MBL*).
3. Discrimination Act (2008:567) "Diskrimineringslag".
4. Trade Union Representatives (Status at the Workplace) Act (1974:358).

The *Employment Protection Act*¹¹⁰ applies to all employees in the public and private sector, which naturally includes trade union representatives.¹¹¹ Section 7 of *LAS* stipulates that termination (dismissal) of an employee must be based on objective grounds, which may include the employer's operational requirements or circumstances personally attributable to the employee, in others words, the employee's conduct or capacity.¹¹² Accordingly, if the dismissal of an employee or trade union representative is not based on objective reasons, it will be deemed unfair. In such cases, the employee or trade union representative may pursue an unfair dismissal claim under section 34 and section 35, respectively.¹¹³

Section 18 of the *LAS* provides that an employee may be dismissed without notice if the employee has grossly neglected his or her obligations towards his or her employer.¹¹⁴ For any other dismissal based on conduct, the employee is entitled to the applicable notice period. Section 19 further stipulates that an employer must provide written notice of summary dismissal, which must outline the procedures and processes available should the employee wish to challenge the dismissal.¹¹⁵ The employer is also required to state the reasons for the dismissal, and if requested by the employee, these reasons must be provided in writing.¹¹⁶ The notice of dismissal must be delivered to the employee personally, and if this is not possible, it may be posted by registered letter to the employee's last known address.¹¹⁷ Where notice is sent by post, the date of the summary dismissal is deemed in effect after ten (10) days has elapsed since the letter was submitted to the post office.¹¹⁸

Section 30 of *LAS* clearly stipulates that an employer must inform an employee in advance if their services will be terminated based on the conduct or capacity of that said employee.¹¹⁹ The notice period for dismissals with notice is twee weeks, while

¹¹⁰ 1982:80.

¹¹¹ Section 1 of the *Employment Protection Act* 1982:80.

¹¹² Section 7 of the *Employment Protection Act* 1982:80.

¹¹³ Section 34 and 35 of the *Employment Protection Act* 1982:80.

¹¹⁴ Section 18 of the *Employment Protection Act* 1982:80.

¹¹⁵ Section 19 of the *Employment Protection Act* 1982:80.

¹¹⁶ Section 19 of the *Employment Protection Act* 1982:80.

¹¹⁷ Section 20 of the *Employment Protection Act* 1982:80.

¹¹⁸ Section 20 of the *Employment Protection Act* 1982:80.

¹¹⁹ Section 30 of the *Employment Protection Act* 1982:80.

for summary dismissal the notice period is one week.¹²⁰.. The remainder of section 30 is specifically tailored for trade union representatives and union members, as it sets out additional pre-dismissal procedures. It further provides that if the employee is a trade union representative, the employer must inform the trade union simultaneously with the employee when issuing the notice, thereby ensuring proper consultation with the union.¹²¹ The trade union has the right to request information regarding the termination or potential termination of employment. If the trade union initiates the request for consultation, the employer may not issue notice of termination or summarily dismiss the employee until the consultation process has been finalised.¹²²

An example of how the Swedish Labour Court has addressed non-compliance with these obligations is found in in *Arbetsdomstolen* case AD 46/11 (A 211/09).¹²³ In that matter, the employer failed to provide the union with the grounds for the employee's dismissal and refused to engage in meaningful consultation. As a result, the dismissal of the union member was declared invalid.

The *Co-Determination in the Workplace Act*¹²⁴ establishes the statutory framework regulating collective bargaining by trade unions. It outlines the rights, obligations, and procedural mechanisms essential to effective union representation and labour relations in Sweden.¹²⁵

Sections 7 to 9 of the *MBL* regulate Swedish employees' right to freedom of association. These provisions affirm that employees have the right to join any trade union of their choice and that the right of association may not be infringed in any manner.¹²⁶ An infringement would include situations where an employer initiates disciplinary action against a trade union representative for performing union duties or acting in their capacity as a trade union representative.

¹²⁰ Section 30 of the *Employment Protection Act* 1982:80.

¹²¹ Section 30 of the *Employment Protection Act* 1982:80.

¹²² Section 30 of the *Employment Protection Act* 1982:80.

¹²³ *Arbetsdomstolen*, case AD 46/11

¹²⁴ (1976:580).

¹²⁵ *Co-Determination in the Workplace Act* (1976:580).

¹²⁶ Section 7 – Section 9 of the *Co-Determination in the Workplace Act* (1976:580).

Under Swedish law, trade unions have a general right to be consulted by employers on any matter relating to their members' employment conditions, including the termination of employment.¹²⁷ Section 12 of the *MBL* specifically obliges employers to consult with a trade union when implementing a decision that concerns a member of that trade union, including a trade union representative.¹²⁸ A decision that concerns a member of a trade union encompasses termination of employment on grounds of conduct or capacity. It is, however, of particular significance to consider the final sentence of section 12 of the *MBL*, which provides that:

"Where there is special cause, however, the employer may take and implement the decision before he has fulfilled its duty to negotiate."¹²⁹

The term "special cause" is not defined in the *MBL*, however it may reasonably be assumed that "special cause" is analogous to the notion of "exceptional circumstances", a concept that will be examined in more detail later in this study.

The *Discrimination Act*¹³⁰ regulates and protects trade union representatives and employees of trade unions in Sweden from any form of anti-union discrimination. Section 1 of the Discrimination Act provides that an employer may not discriminate against an employee, which expressly includes trade union representatives.¹³¹ The Act specifically extends this protection to trade union representatives and members of trade unions in section 11. Section 11 states the following:

"Discrimination is prohibited with regard to

1. membership of or participation in an employees' organisation, employers' organisation or professional organisation, and
2. benefits that any such organisation provides to its members.

This prohibition does not prevent an organisation from providing benefits to members of one sex so as to contribute to efforts to promote equality between women and men."¹³²

¹²⁷ Section 10 of the Co-Determination in the Workplace Act (1976:580).

¹²⁸ Section 12 Co-Determination in the Workplace Act (1976:580).

¹²⁹ Last sentence in section 12 *Co-Determination in the Workplace Act* (1976:580).

¹³⁰ (2008:576).

¹³¹ Section 1 of the *Discrimination Act* (2008:567).

¹³² Section 11 of the *Discrimination Act* (2008:567).

The above-mentioned section in the *Discrimination Act*¹³³ ensures that trade union representatives are able to pursue their members' rights and fulfil their duties as trade union representatives without fear of anti-union discrimination or prejudice. It also serves as a stark warning to Swedish employers to ensure that any disciplinary action against a trade union representative must be grounded solely in the employees' conduct or capacity, rather than in their exercise of union functions.

The final piece of Swedish legislation relevant to this study is the *Trade Union Representatives (Status at the Workplace) Act*.¹³⁴ Section 1 of this Act clarifies that its provisions apply specifically to trade union representatives and the performance of their duties.¹³⁵ Section 1 provides as follows:

"This Act applies to any person who has been appointed as a trade union representative, by an employees' organisation, to represent the employees at a particular place of work with respect to matters concerning the relationship to the employer or with respect to other issues relating to union activities."¹³⁶

It is apparent from the above that the Act applies specifically to trade union representatives. The questions that then arises is: what protection does this Act afford to trade union representatives?

Section 3 of the Act provides the following protection to trade union representatives:

"An employer may not prevent a trade union representative from performing his duties. If the appointment relates to a place of work other than the representative's own place of work, the employer is obliged to allow the representative to perform his duties and to be active to the extent necessary to fulfil his duties. The activities may not, however, result in any significant impediment to the proper performance of work. The representative shall be provided with the use of premises or other space at his own place of work as necessary for the performance of the trade union activity carried out there."¹³⁷

The above-mentioned provision is largely self-explanatory, but it re-enforces the principle that trade union representatives must be able to pursue their members' rights without fear of anti-union discrimination and prejudice. Employers are

¹³³ (2008:567).

¹³⁴ (1974:358).

¹³⁵ Section 1 of the Trade Union Representatives (Status at the Workplace) Act (1974:358).

¹³⁶ First para of Section 1 of the Trade Union Representatives (Status at the Workplace) Act (1974:358).

¹³⁷ Section 3 of the Trade Union Representatives (Status at the Workplace) Act (1974:358).

therefore prohibited from taking any steps that would disparage or prevent trade union representatives from fulfilling their duties.

Section 4 provides further protection by prohibiting employers from worsening a trade union representative's working conditions as a result of their representative role. It also prevents an employer from altering a representative's terms of employment to conditions less favourable than those that applied before they assumed union office.¹³⁸ The pre-dismissal procedure applicable when an employer contemplates disciplinary action against a trade union representative is prescribed in Section 5 of the *Trade Union Representative (Status at the Workplace) Act*.¹³⁹ Section 5 essentially mirrors the requirements set out in Section 30 of the *Employment Protection Act*,¹⁴⁰ discussed earlier. Section 5 states the following:

"In the event that an issue arises concerning the alteration of a trade union representative's conditions of work or terms of employment, the employer shall inform the representative and give at least two weeks advance notice to the local employees' organisation. If this is not possible, the representative shall be informed and notice shall be given as soon as possible.

The local employees' organisation and the representative shall be entitled to deliberations with the employer concerning measures referred to in the first paragraph. Such deliberations shall be convened not later than one week after the representative has been informed and the union notified. Once the deliberations have been convened, the employer shall not be entitled to implement the anticipated measure until the opportunity for deliberations has been afforded."¹⁴¹

It is apparent from the above that Section 30 of the *LAS* and Section 5 of the *FML* is similar in nature with regard to their procedural requirements. However, Section 5 of the *FML* is broader, as it also covers changes to terms and conditions of employment, as well as disciplinary measures short of dismissal, such as demotion.¹⁴² In *AD 2007 nr 53*, the Swedish Labour Court held that the dismissal of a trade union representative was unfair because the employer had failed to comply with the consultation obligations set out in both the *LAS* and *FML*.

¹³⁸ Section 4 of the Trade Union Representatives (Status at the Workplace) Act (1974:358).

¹³⁹ (1974:358).

¹⁴⁰ (1982:80).

¹⁴¹ Section 5 of the Trade Union Representatives (Status at the Workplace) Act (1974:358).

¹⁴² Section 5 of the Trade Union Representatives (Status at the Workplace) Act (1974:358) and Section 30 of the Employment Protection Act (1982:80).

Section 5 of the *FML* also creates a 'loophole' that allows employers to implement the anticipated measures without informing the trade union if it not possible to do so.

Since the Swedish legislation has now been explained, it is important to determine how the above-mentioned provisions align with the ILO standards ratified by Sweden, as well as the potential ILO Recommendations that influence Swedish legislation.

3.3 ILO Recommendations that influences Swedish legislation

Sweden has ratified the following ILO conventions which regulate disciplinary action against trade union representatives:

1. Freedom of Association and Protection of the Right to Organise Convention (C087).
2. Right to Organise and Collective Bargaining Convention (C098).
3. Convention on Workers' Representatives (C135).
4. Termination of Employment Convention (C158).

In the part that follows, Recommendation R166 (which supports the Termination of Employment Convention) and Convention C158 will be discussed.

Sweden's domestic legislation fully aligns with the Freedom of Association and Protection of the Right to Organise Convention, as article 11 of the Convention provides the following:

"Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."¹⁴³

The right to freely exercise the right to organise includes, as previously explained, the right of employees to participate in trade union activities, including the duties of a trade union representative. Furthermore, trade union representatives are protected against dismissal for engaging in activities related to union functions, such

¹⁴³ Article 11 of Convention C087.

as furthering and defending the interests of employees.¹⁴⁴ The *LAS* stipulates that employees in Sweden may only be dismissed on objective grounds, which are limited to the employer's operational requirements or the employee's conduct of capacity.¹⁴⁵ Therefore, if an employee or trade union representative is dismissed for participating in trade union activities or due to their affiliation with a trade union, such dismissal would not constitute an objective reason under the *LAS* and the dismissal would be deemed unfair.

Section 7 to 9 of the *MBL* regulate the right to association, which, as discussed earlier, grants Swedish employees the right to join any trade union of their choice and participate in its activities, which includes serving as a trade union representative.¹⁴⁶ These rights may not be infringed upon in any means.

The *Discrimination Act* reinforces the principle that Swedish employees have the right to freely organise, as section 11 prohibits any discriminatory actions by employers aimed at deterring employees from joining trade unions or taking part in union activities. Section 11 provides that:¹⁴⁷

"Discrimination is prohibited with regard to

1. membership of or participation in an employees' organisation, employers' organisation or professional organisation, and
2. benefits that any such organisation provides to its members."¹⁴⁸

Lastly, the *FML* contains provisions to ensure that Swedish employees can freely organise. Section 3 of the *FML* explicitly states that employers may not prevent a trade union representative from performing their duties and that such trade union representatives may use the employer's premises for union-related activities, such as recruiting new members.¹⁴⁹

¹⁴⁴ Article 10 of Convention C087.

¹⁴⁵ Section 7 of the *Employment Protection Act* 1982:80.

¹⁴⁶ Section 7 - 9 of the Co-Determination in the Workplace Act (1976:580).

¹⁴⁷ Section 11 of the *Discrimination Act* (2008:567).

¹⁴⁸ Section 11 of the *Discrimination Act* (2008:567).

¹⁴⁹ Section 3 of the Trade Union Representatives (Status at the Workplace) Act (1974:358).

It is therefore apparent that Sweden aligns with the *Freedom of Association and Protection of the Right to Organise Convention*,¹⁵⁰ as the country has incorporated multiple legislative measures to safeguard employees' right to organise freely.

Sweden also fully aligns with the *Right to Organise and Collective Bargaining Convention*,¹⁵¹ as it complies with the key provisions relating to trade union representatives. Article 1 of the Convention provides the following:

- "1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to--
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours."

Trade union representatives are primarily protected from any acts of union discrimination, including dismissal for participating in union activities, under the *LAS*. The *LAS* ensures that employers cannot dismiss trade union representatives or employees for engaging in union activities or due to their union affiliation, as dismissals must be based on objective grounds.¹⁵³ It is apparent from reading the *LAS* that participation in union activities or union membership does not constitute objective grounds for dismissal and would be viewed unfavourably by Swedish courts.

The *LAS* also requires employers to notify the employee or trade union representative in advance if their services are to be terminated and, upon request, to provide the reasons for the dismissal.¹⁵⁴ This pre-dismissal procedure ensures that employees and trade union representatives are informed of the grounds for termination and can verify that the decision is not based on union activities or

¹⁵⁰ See Convention C087, downloaded from the ILO website at www.ilo.org, on 20 March 2023.

¹⁵¹ See Convention C098, downloaded from the ILO website at www.ilo.org, on 20 March 2023.

¹⁵² Article 1 of Convention C098.

¹⁵³ Section 7 of the *Employment Protection Act* 1982:80.

¹⁵⁴ Section 19 of the *Employment Protection Act* 1982:80.

membership. Section 30 of the *LAS* expressly states that if an employee is a trade union member or representative, the notice must be sent to their union at the same time as it is delivered to the employee.¹⁵⁵ This provision serves as an additional measure to ensure that disciplinary measures are not motivated by union involvement. Furthermore, Section 30 grants the union the right to consult with the employer, and once such a request has been made, the employer may not proceed with the termination until consultations have concluded.¹⁵⁶ This mechanism provides the union with an opportunity to engage with the employer, ascertain true reason for the possible termination, and opens the door to dialogue and collective bargaining. It is also pertinent to note that these protections under the *LAS* also directly ensure Sweden's compliance with Article 2 of the Convention, which provides the following:

"Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration."¹⁵⁷

The next piece of Swedish legislation that ensures compliance with not only with Article 1 of the Convention but also articles 2, 3 and 4 is the *MBL*. The primary purpose of the *MBL* is to regulate and guarantee the right to collective bargaining between unions and employers, which corresponds directly with Articles 3 and 4 of the Convention. Article 3 provides the following:

"Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles."¹⁵⁸

Article 4 provides the following:

"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."¹⁵⁹

¹⁵⁵ Section 30 of the *Employment Protection Act* 1982:80.

¹⁵⁶ Section 30 of the *Employment Protection Act* 1982:80.

¹⁵⁷ Article 2 of Convention C098.

¹⁵⁸ Article 3 of Convention C098.

¹⁵⁹ Article 4 of Convention C098.

The *MBL* as a whole guarantees that the right to organise and the right to collective bargaining are firmly embedded in Swedish legislation. More specifically, Section 10 of the *MBL* provides the following: The *MBL* as a whole guarantees that the right to organise and the right to collective bargaining are firmly embedded in Swedish legislation. More specifically, section 10 of the *MBL* provides:

"An employees' organisation shall have the right to negotiate with an employer on any matter relating to the relationship between the employer and any member of the organisation who is, or has been, employed by that employer. An employer shall have an equivalent right to negotiate with an employees' organisation.

Employees' organisations shall also have the right to negotiate, in accordance with the first paragraph, in relation to any organisation of which the employer is a member, and similarly employers' organisations in relation to any organisation of which the employee is a member."¹⁶⁰

The right to organise and to engage in collective bargaining has a direct and substantial impact on the protection afforded to trade union representatives. Trade unions hold a general right to consult with employers on any matter relating to the employment relationship, including dismissal or pre-dismissal proceedings involving a trade union representative or a union member.¹⁶¹ Furthermore, as previously noted, Section 12 of the *MBL* requires employers to consult with the relevant trade union before implementing any decision that concerns a trade union representative or union member.¹⁶² This provision reinforces protection against anti-union discrimination, as set out in Article 1 of the Convention,¹⁶³ by mandating prior consultation before any decision is made. It provides trade unions with a formal platform to safeguard their interests and to ensure that the intended decision is not motivated by any anti-union considerations.

The *MBL* contains a section titled "Right of Association," under which Sections 7 to 9 fall.¹⁶⁴ These provisions directly correspond to Articles 1 to 4 of the Convention,¹⁶⁵ as the purpose of the Convention is reflected in the protections and rights afforded

¹⁶⁰ Section 10 of the Co-Determination in the Workplace Act (1976:580).

¹⁶¹ Section 10 of the Co-Determination in the Workplace Act (1976:580).

¹⁶² Section 12 of the Co-Determination in the Workplace Act (1976:580).

¹⁶³ Article 1 of Convention C098.

¹⁶⁴ Sections 7 – 9 of the Co-Determination in the Workplace Act (1976:580).

¹⁶⁵ Article 1 – 4 of Convention C098.

to employees under these sections of the *MBL*.¹⁶⁶ Section 7 of the *MBL* defines the term “right of association” as follows:

“The term “right of association” means the right of employers and employees to belong to an employers’ organisation or an employees’ organisation, to exercise the rights of membership in such organisation, and to participate in such organisation or the establishment thereof.”¹⁶⁷

The above-mentioned definition in the *MBL* summarises the purpose of the Convention effectively. Swedish legislators further strengthen this protection by stipulating in Section 8 of the *MBL* that:

“The right of association may not be infringed. Infringement of the right of association shall be deemed to have occurred where an employer or employee, or the representative of either, takes action that is detrimental to the other party as a consequence of such party's exercise of its/her/his right of association or where an employer or employee, or the representative of either, takes action directed at other party for the purpose of inducing that party not to exercise its/her/his right of association. Such infringement shall also be deemed to have occurred notwithstanding that the action was taken for the purpose of fulfilling an obligation towards a third party.

An employers' organisation or an employees' organisation need not tolerate any infringement of the right of association that constitutes an infringement of its activities. Where there is both a local and a central organisation, these provisions shall apply to the central organisation.

Where infringement of the right of association takes place through the termination of an agreement or through some other legal act, or by reason of a provision contained in a collective bargaining agreement or other contract, such legal act or provision shall be invalid.”¹⁶⁸

Considering Sections 7 and 8 of the *MBL*, it is evident that any infringement of these provisions includes situations where an employer takes disciplinary action against a trade union representative for reasons related to the performance of their duties as a representative or for pursuing and protecting members’ rights in the workplace. Swedish legislators have gone further by imposing an obligation on employers’ organisations to ensure that their members - *i.e.* employers – do not engage in any conduct that infringes upon employees’ right of association.¹⁶⁹

¹⁶⁶ Sections 9 – 7 of the Co-Determination in the Workplace Act (1976:580).

¹⁶⁷ Section 7 of the Co-Determination in the Workplace Act (1976:580).

¹⁶⁸ Section 8 of the Co-Determination in the Workplace Act (1976:580).

¹⁶⁹ Section 9 of the Co-Determination in the Workplace Act (1976:580).

The *Discrimination Act*¹⁷⁰ also ensures compliance with the Convention. As previously noted, Section 11 of the Act prohibits any employer from discriminating against an employee or trade union representative based on their participation in trade unions activities or their membership in a .¹⁷¹ This provision is comprehensive, as participation ranges from being elected as a trade union representative and actively pursuing their members' rights to simply holding union membership.

Lastly, the *Trade Union Representatives (Status at the Workplace) Act*¹⁷² further ensures Sweden's compliance with the Convention. As previously stated, Section 3 of the *FML* protects trade union representatives by prohibiting from preventing them from performing their duties.¹⁷³ This provision directly corresponds to Article 2 of the Convention.¹⁷⁴

Section 4 of the *FML* provides:

"A trade union representative shall not be subjected to worse conditions of work or terms of employment as a result of his appointment."¹⁷⁵

To reiterate, it is evident from the various sections and legislation discussed above that Sweden fully aligns to the *Right to Organise and Collective Bargaining Convention*.¹⁷⁶

The next Convention to which Sweden adheres is the *Workers' Representative Convention*,¹⁷⁷ the purpose of which can be summarised Articles 1 and 2 of the Convention. Article 1 of the Convention provides the following:

"Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements."¹⁷⁸

¹⁷⁰ Discrimination Act (2008:567).

¹⁷¹ Section 11 of the *Discrimination Act* (2008:567).

¹⁷² Trade Union Representatives (Status at the Workplace) Act (1974:358).

¹⁷³ Section 3 of the Trade Union Representatives (Status at the Workplace) Act (1974:358).

¹⁷⁴ Article 2 of Convention C098.

¹⁷⁵ Section 4 of the Trade Union Representatives (Status at the Workplace) Act (1974:358).

¹⁷⁶ See Convention C098, downloaded from the ILO website at www.ilo.org, on 20 March 2023.

¹⁷⁷ See Convention C135, downloaded from the ILO website at www.ilo.org, on 20 March 2023.

¹⁷⁸ Article 1 of Convention C135.

Article 2 of the Convention provides that the protection afforded to trade union representatives must enable them to carry out their functions promptly and efficiently.¹⁷⁹

In the context of this Convention, it is important to note that the terms “workers’ representative” and “trade union representative” are used interchangeably, as clarified in Article 3.¹⁸⁰

As previously discussed, the *LAS* applies to all employees, including trade union representatives.¹⁸¹ It stipulates that an employer may only dismiss a trade union representative for objective reasons.¹⁸² If the reason for the dismissal relate to any matter addressed in Article 1 of the Convention, such dismissal would not constitute an objective reason under the *LAS* and would therefore be deemed unfair. Furthermore, Section 30 of the *LAS* provides additional protection by requiring that notice of disciplinary action be forwarded to the trade union and that consultation with the union occur before the employer proceeds with dismissal.¹⁸³ This mechanism open dialogue between employers and trade unions, creating a platform to verify that disciplinary measures are not based on anti-union discrimination or activities forming part of the representative’s duties, as mentioned in article 2 of the Convention.¹⁸⁴

The next piece of Swedish legislation that ensures compliance with the Convention is the *MBL*.¹⁸⁵ The protections afforded under Articles 1 and 2 of the Convention are reflected in Sections 7 to 9 of the *MBL*, which safeguard trade union representatives against any employer action that infringes upon their status, participation in the union, or ability to perform their duties.¹⁸⁶ Similarly to Section 30 of the *LAS*, Section

¹⁷⁹ Article 2 of Convention C135.

¹⁸⁰ Article 3(a) of Convention C135.

¹⁸¹ As mentioned in Chapter 3, para 3.

¹⁸² Section 7 of the *Employment Protection Act* 1982:80.

¹⁸³ Section 30 of the *Employment Protection Act* 1982:80.

¹⁸⁴ Article 2 of Convention C135.

¹⁸⁵ Co-Determination in the Workplace Act (1976:580).

¹⁸⁶ Section 8 of the Co-Determination in the Workplace Act (1976:580).

12 of the *MBL* explicitly requires employers to consult with the relevant trade union before initiating dismissal procedures against a trade union representative.¹⁸⁷

The *Discrimination Act* is another piece of legislation ensures trade union representatives receive the protections outlined in Articles 1 and 2 of the Convention. Section 11 of the *Discrimination Act* prohibits employers from discriminating against a trade union representative on the basis of their participation in union activities or the office they hold within the union.¹⁸⁸

The final piece of legislation that guarantees protection for trade union representatives upholds the rights set out in Articles 1 and 2 of the Convention is the *FML*.¹⁸⁹ Section 3 of the *FML* prohibits employers from preventing a trade union representative from fulfilling their duties, while Section 4 provides additional protection by forbidding employers from prejudicing representatives in any way.¹⁹⁰ Pre-dismissal protections are detailed in section 5 of the *FML*, which mirrors section 30 of the *LAS*. Before any disciplinary action is taken against a trade union representative, the employer must inform the trade union, and if the trade union requests consultation, the employer must suspend any action until the consultation process is concluded.¹⁹¹

It is evident that Sweden fully aligns with the *Workers' Representative Convention*,¹⁹² as Swedish legislation ensures that trade union representatives can fearlessly and effectively pursue the interests of their union.

The final Convention to be discussed is the *Termination of Employment Convention*,¹⁹³ which regulates the circumstances under which an employer may

¹⁸⁷ Section 12 of the Co-Determination in the Workplace Act (1976:580).

¹⁸⁸ Section 11 of the *Discrimination Act* (2008:567).

¹⁸⁹ Trade Union Representatives (Status at the Workplace) Act (1974:358).

¹⁹⁰ Section 3 and section 4 of the Trade Union Representatives (Status at the Workplace) Act (1974:358).

¹⁹¹ Section 30 of the *LAS* and section 5 of the *FML*.

¹⁹² See Convention C135, downloaded from the ILO website at www.ilo.org, on 20 March 2023.

¹⁹³ See Convention C158, downloaded from the ILO website at www.ilo.org, on 20 March 2023.

fairly and lawfully dismiss an employee or trade union representative and sets out the pre-dismissal procedure for such cases.¹⁹⁴ Article 4 of the Convention provides:

"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."¹⁹⁵

Examples of reasons what would not constitute fair reasons for dismissal are contained in Articles 5 and 6 of the Convention. For the purposes of this study, Article 5(a) and (b) is relevant, which provides the following protections:

"The following, inter alia, shall not constitute valid reasons for termination:

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) seeking office as, or acting or having acted in the capacity of, a workers' representative."¹⁹⁶

Article 5 of the Convention ensures that trade union representatives can perform their duties without fear of prejudice from employers. The Convention then sets out the pre-dismissal procedure in Article 7, which stipulates that an employee may not be dismissed for reasons related to conduct or performance without first being given an opportunity to state their case in their defence.¹⁹⁷ Article 7 further provides that this opportunity must be granted unless it would be unreasonable to expect the employer to do so.¹⁹⁸ It is important to note that neither Article 7 nor any other provision of the *Termination of Employment Convention* prescribes a special procedure for pre-dismissal procedures involving trade union representatives.¹⁹⁹ As previously explained, a trade union representative is, first and foremost, still an employee.

The protections afforded under Swedish legislation to prevent the dismissal employees or trade union representatives for reasons prohibited by Articles 4 and

¹⁹⁴ See Convention C158, downloaded from the ILO website at www.ilo.org, on 20 March 2023.

¹⁹⁵ Article 4 of Convention C158.

¹⁹⁶ Article 5(a) and (b) of Convention C158.

¹⁹⁷ Article 7 of Convention C158.

¹⁹⁸ Article 7 of Convention C158.

¹⁹⁹ See Convention C158, downloaded from the ILO website at www.ilo.org, on 20 March 2023.

5(a) and (b) have been analysed in detail. Accordingly, the relevant sections and statutes specifically addressing dismissal are listed below:

1. The *Employment Protection Act*.²⁰⁰
 - Section 7 of the *LAS*.²⁰¹
 - Section 18 of the *LAS*.²⁰²
2. The *Co-Determination in the Workplace Act*.²⁰³
 - Section 8 of the *MBL*.²⁰⁴

It is clear from Swedish legislation that a dismissal will only be deemed to be fair if it is based on one of the reasons set out in article 4 of the Convention.²⁰⁵ The Committee of Experts on the Application of Conventions and Recommendations has repeatedly emphasised that Article 4 of the Convention is the cornerstone of the entire instrument.²⁰⁶ The question that remains is how Sweden complies with the pre-dismissal procedure outlined in Article 7 of the Convention.

Pre-dismissal procedures for employees and trade union representatives are set out in the *LAS*, *MBL* and *FML* respectively.

Section 30 of the *LAS* stipulates that before an employer intends to dismiss an employee, the employee must receive prior written notice of such action. This notice must include the reasons for the dismissal and be delivered personally to the employee. The purpose of this requirement is to provide the employee with an opportunity to prepare a defence and seek legal advice if necessary. Section 30 also specifies the notice periods, being two weeks' notice if the employer intends to terminate the services of the employee with notice, and one week if the termination is to be effected.

²⁰⁰ Employment Protection Act 1982:80.

²⁰¹ Section 7 of the *Employment Protection Act* 1982:80.

²⁰² Section 18 of the *Employment Protection Act* 1982:80.

²⁰³ Co-Determination in the Workplace Act (1976:580).

²⁰⁴ Section 8 of the Co-Determination in the Workplace Act (1976:580).

²⁰⁵ Article 4 of Convention C158.

²⁰⁶ Committee of Experts on the Application of Conventions and Recommendations, *General Survey Protection against unjustified dismissal (1995)*, at para 21.

Section 30 further provides that, where an employee is a member of a trade union, the employer must notify the trade union of the potential dismissal at the same time that the employee receives the notice. This constitutes an additional pre-dismissal requirement that applies specifically when the employee is a member of a trade union.

Once notice has been received by the employee or trade union, they are entitled to consult with the employer regarding the potential termination and the reasons outlined in the notice. Where the employee or trade union invoked their right to consultation, the employer may not proceed with the termination of the employee's services until the consultations process has been concluded. Section 30 further provides that a request for consultation must be initiated within one week of the notice being issued.

It is evident from the above that an employee or trade union member is afforded an opportunity to defend themselves, consistent with Article 7 of the Convention. The Committee of Experts has clarified that the purpose of Article 7 is to ensure dialogue between the employee and/or trade union and the employer prior to any dismissal of an employee and/or trade union representative.²⁰⁷ Importantly, the Committee of Experts emphasized that countries, such as Sweden, are not required to adopt the exact terminology contained in the Convention, provided that the substantive protections it envisages are incorporated into domestic legislation.²⁰⁸ The pre-dismissal procedures set out in the *LAS* clearly reflect these substantive provisions, as consultation prior to dismissal is expressly required.

The *MBL* also sets out pre-dismissal procedures that employers in Sweden must follow, with particular emphasis on the protections afforded to trade union members, including trade union representatives. Trade unions have the right to consult with an employer on any matter relating to the employment relationship,

²⁰⁷ Committee of Experts on the Application of Conventions and Recommendations, *General Survey Protection against unjustified dismissal (1995)*, at para 148.

²⁰⁸ Committee of Experts on the Application of Conventions and Recommendations, *General Survey Protection against unjustified dismissal (1995)*, at para 22.

including potential dismissals.²⁰⁹ An employer is therefore obligated to consult with the relevant trade union before making any decision affecting one of its members, regardless of whether the member is an ordinary employee or a trade union representative.²¹⁰ Consequently, where an employer contemplates a dismissal, consultation with the trade union must take place beforehand. However, in cases of “special cause”, an employer may proceed with the dismissal before consultation has occurred.²¹¹

The *MBL* further ensures compliance with Article 7 of the Convention by including a similar provision permitting an employer to proceed with dismissal if special cause exists, which aligns with the Convention’s formulation of circumstances in which an employer “cannot reasonably be expected” to continue the employment relationship.²¹² This framework once again guarantees that trade union members are afforded an opportunity to state their case under Swedish legislation before dismissal is affected.

The *FML*’s pre-dismissal procedures apply specifically to trade union representatives in the workplace. Section 5 provides that, similar to the *LAS* and the *MBL*, the employer must inform both the trade union representative and the trade union of the employer’s intention to potentially terminate representative’s employment.²¹³ The trade union and the employer must then engage in consultations regarding the proposed dismissal, and the employer may not implement the decision until the opportunity for deliberation has been afforded.²¹⁴ Importantly, section 5 also states that, where consultation is not possible, the employer may proceed with the dismissal as soon as practicable. Importantly, Section 5 also states that, where consultation is not possible, the employer may proceed with the dismissal as soon as practicable. Moreover, the wording that the “employer shall not be entitled to implement the anticipated measure until the opportunity for deliberations has been

²⁰⁹ Section 10 of the *MBL*.

²¹⁰ Section 12 of the *MBL*.

²¹¹ Section 12 of the *MBL*.

²¹² Note the Committee of Experts on the Application of Conventions and Recommendations, *General Survey Protection against unjustified dismissal (1995)*, at para 22.

²¹³ Section 5 of the *FML*.

²¹⁴ Section 5 of the *FML*.

afforded” does not require the parties to reach consensus; it merely requires that the trade union be given an opportunity to consult with the employer.²¹⁵ . Accordingly, the employer complies with the *FML*’s pre-dismissal requirements as long as such an opportunity has been provided, or where it is not reasonable to expect the employer to consult before acting. Accordingly, the employer complies with the pre-dismissal procedure set-out in the *FML* as long as such opportunity has been provided, or where it is not reasonable to expect the employer to consult before acting. The *FML* therefore ensures compliance with Article 7 of the Convention, as discussed above.

It is crucial to note that Article 7 of the Convention, which regulates pre-dismissal procedures, does not contain any special protections or differentiated provisions for employees who are union members or trade union representatives. Under the Convention, trade union representatives and ordinary employees are treated similarly with respect to the procedural steps an employer must follow before proceeding with a dismissal. In contrast, Swedish legislation imposes a plethora of additional requirements when an employer seeks to dismiss a trade union member representative, as seen in the *LAS*, *MBL* and *FML*. As outlined above, whenever an employer in Sweden contemplates the dismissal of a trade union member or representative, the employer must first notify the trade union to which the trade union representative belongs and then engages in consultations with the union before implementing any decision.

It is also noteworthy that Article 7 addresses only the procedure to be followed when an employer intends to dismiss an employee or trade union representative - it does not require employers to provide an opportunity for the employee to state their case in relation to sanctions short of dismissal, such as warnings. The *LAS* adopts a similar approach in regulating only terminations, whereas both the *MBL* and *FML* extend procedural protections to decisions that relate more broadly to trade union members or representatives. These two points will be dealt with in greater detail in the conclusion of this study.

²¹⁵ Section 5 of the *FML*.

From the above analysis, it appears that Sweden not only adheres to the Convention but also goes beyond its requirements by incorporating additional pre-dismissal procedures for trade union representatives and trade union members in its domestic legislation. Having examined the Convention, it is now prudent to turn to the ILO instrument that supplements and supports the *Termination of Employment Convention*, namely the *Termination of Employment Recommendation* (Recommendation R166).²¹⁶ As explained earlier in this study, ILO Recommendations serve as non-binding guidelines; however, they typically supplement a Convention by providing more detailed guidance on how members states may implement its provisions.²¹⁷ Because Recommendation R166 is not binding, Sweden cannot “ratify” it in the same manner as a Convention. Nevertheless, it functions to expand upon and reinforce the principles contained in Convention C158. The focus here will be limited to the pre-dismissal procedures which Recommendation R166 provides under paragraph 7, which supports Article 7 of Convention C158. Paragraph 7 of Recommendation R166 provides as follows:

- “7. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.
8. The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.
9. A worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation.
10. The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.

²¹⁶ Recommendation R166 of 1982.

²¹⁷ Introduction and Background.

11. The employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment.
12. The employer should notify a worker in writing of a decision to terminate his employment.
13. (1) A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.

(2) Subparagraph (1) of this Paragraph need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of the Termination of Employment Convention, 1982, if the procedure provided for therein is followed.”²¹⁸

It is evident that paragraph 7 of the Recommendation supports the principle of progressive discipline. Sweden complies with the Recommendation to the extent that its legislation requires employers to provide the written notice of termination to the employee and, upon request, to provide the reasons for the termination²¹⁹ Sweden also aligns with the Recommendation’s provision that an employer may consult with a trade union representative before making a decision in individual dismissal cases. However, Swedish legislation goes further by stipulating that trade unions are entitled to consultations, deliberations and negotiations. Once such processes have been initiated by the trade union, the employer may not implement any decision until the consultations have been concluded, unless special cause exists.²²⁰

Swedish legislation does not explicitly provide that an employee is entitled to be assisted by another person when preparing their defense. Nonetheless, as discussed earlier, the time periods that employers must observe before proceeding with dismissal under the *LAS*, *MBL* and *FML* offer employees sufficient opportunity to seek assistance in preparing their defense. Moreover, where an employee is a trade union member, their trade union is entitled to consult with the employer, thereby

²¹⁸ Paragraph 7 of Recommendation R166 of 1982.

²¹⁹ Section 18 and section 8 of the *LAS*.

²²⁰ Section 12 of the *MBL*, Section 5 of the *FML* and Section 30 of the *LAS*.

effectively providing support and representation to the employee throughout the process.²²¹

Recommendation R166 likewise does also not provide any special treatment for trade union representatives when employers contemplate their dismissal. However, as discussed earlier, Swedish legislation contains additional protections and procedural requirements for trade union representatives that go beyond what is recommended by Recommendation R166 and what is required by Convention C158.

3.4 Conclusion

In conclusion, it is evident that Sweden fully aligns with the following ILO Conventions:

1. Freedom of Association and Protection of the Right to Organise Convention (C087).
2. Right to Organise and Collective Bargaining Convention (C098).
3. Convention on Workers' Representatives (C135).
4. Termination of Employment Convention (C158).

Sweden also complies with the Termination of Employment Recommendation (R166), despite its non-binding nature. Not only does Sweden adhere to the requirements of the above-mentioned Conventions and the Recommendation, but it appears to exceed its international obligations by providing more extensive protections in its domestic legislation.

This naturally gives rise to the question: How does Swedish legislation compare to that of South Africa?

²²¹ Section 30 of the *LAS* and Section 12 of the *MBL*.

Chapter 4 Similarities and differences between South African and Swedish legislation relating to discipline against trade union representatives

4.1 Introduction

Swedish legislation relating to disciplinary action against trade union representatives has been discussed in detail, as has South African legislation on the same issue. It is important to note that South Africa has not ratified Convention C158, which is the cornerstone of unfair dismissal protection and sets out the procedural requirements that employers must follow prior to dismissing an employee.²²²

South Africa has also not ratified Convention C135, which was specifically created to ensure that trade union representatives are protected from dismissal or any other prejudicial acts.²²³ Sweden, by contrast, has ratified both Convention C158 and Convention C135.²²⁴ One might therefore assume that Swedish labour legislation and South African labour legislation would differ significantly. One might therefore assume that Sweden labour legislation and South African labour legislation would differ significantly. However, South African law requires courts and the public to take international law into account, as mandated by the Constitution of the Republic of South Africa,²²⁵ the Labour Relations Act (LRA),²²⁶ and relevant case law.²²⁷ The appropriate comparison, therefore, lies between the *LRA* and the Code of Good Practice on Dismissal on the one hand, and the *LAS*, *MBL* and *FML* on the other.

Section 188 of the LRA sets out the circumstances under which a dismissal will be considered fair in South African law. These grounds include the employee's conduct, the employee's capacity, or the employer's operational requirements.²²⁸ Similarly,

²²² See Convention C158, downloaded from the ILO website at www.ilo.org, on 25 March 2023

²²³ See Convention C135, downloaded from the ILO website at www.ilo.org, on 25 March 2023.

²²⁴ Ratifications of C158 and C135, NORMLEX.

²²⁵ Section 233 of the Constitution of the Republic of South Africa 1996.

²²⁶ Section 1 and section 3 of the *LRA*.

²²⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd* (2007) 12 BLLR 1097 (CC) at para 61.

²²⁸ Section 188 of the *LRA*.

Section 7 of the *LAS* provides that a dismissal is fair if it is based on objective reasons, including lack of work or circumstances personally attributable to the employee.²²⁹ The latter corresponds to the employee's conduct or capacity, while "lack of work" is equivalent to South Africa's notion of operational requirements.. It is therefore evident that both jurisdictions comply with article 4 of Convention C158.²³⁰

Therefore, in both South Africa and Sweden, a trade union representative may be fairly dismissed only on grounds relating conduct, capacity or operational requirements. Trade union representatives in South Africa are protected from any anti-union prejudice through sections 187, 5, 14 and 188 of the *LRA*,²³¹ while in Sweden similar protections are afforded under sections 7 to 9 of the *MBL*, section 11 of the *Discrimination Act*, sections 3 and 4 of the *FML*, as well as section 7 of the *LAS*.²³² Both jurisdictions therefore provide extensive protection to trade union representatives and union members against anti-union discrimination, consistent with Article 5 of Convention C158, and make it unequivocally clear that dismissal based on union membership, union participation, or trade union representative status is unfair.²³³

Furthermore, the legislation of both Sweden and South Africa fully aligns with Conventions C087 and C098. Although South Africa has also not ratified Convention C135, the protections contained in the *LRA* nevertheless gives effect to the Convention's main purpose, which is ensuring trade union representatives are protected from anti-union prejudice and dismissal, and that they are able to fulfil their obligations to their constituents without fear.

4.2 The Code of Good Practice: Dismissal

South Africa's pre-dismissal procedures are regulated by Schedule 8 of the *LRA*, known as the Code of Good Practice: Dismissal (hereinafter referred to as "the

²²⁹ Section 7 of the *LAS*.

²³⁰ Article 4 of Convention C158.

²³¹ *LRA*.

²³² *LAS*, *MBL* and *FML*.

²³³ Article 5 of Convention C158.

Code”), with Item 4 of the Code being of particular relevance.²³⁴ Sweden’s pre-dismissal procedures, by contrast, are regulated by section 30 of the *LAS*, section 12 of the *MBL* and section 5 of the *FML*. Item 4(1) of the Code provides the following:

“Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.”²³⁵

The first requirement in Item 4(1) of the Code is that an employer should normally conduct an investigation to determine whether sufficient grounds exist to potentially dismiss an employee. The wording, specifically wording such as, “normally” and “should”, is important for interpreting this requirement. Grogan notes that the pre-hearing investigation envisaged by Item 4(1) of the Code is not an inflexible requirement. Accordingly, where an employee is found guilty after a fair hearing, the absence of a preliminary investigation will not render the dismissal unfair unless the employee has suffered serious prejudice as a result.²³⁶

Swedish legislation does not contain an explicit requirement to conduct a pre-hearing investigation. However, it is implicit that some form of investigation into potential misconduct must occur before an employer issues a notice of termination, as this is necessary to ensure that the reason for the dismissal is indeed based on objective reasons as set out in section 7 of the *LAS*.²³⁷

The second component of Item 4(1) of the Code provides that the enquiry need not be formal. This requirement aligns with the principle that the employee should be given an opportunity to state his or her defense to the allegations. South African courts and the Commission for Conciliation, Mediation and Arbitration (hereinafter

²³⁴ Schedule 8 Code of Good Practice: Dismissal.

²³⁵ Item 4(1) of Schedule 8.

²³⁶ Grogan Dismissal 4th ed page 249.

²³⁷ Section 7 of the *LAS*.

“the CCMA”) have interpreted these provisions on numerous occasions. For example, in *Nitrosphoksa (Pty) Ltd v CCMA and others*,²³⁸ the court found that interviewing an employee informally and asking the employee questions was sufficient to meet the procedural requirements, as the Code expressly states that the enquiry does not need to be formal, provided the employee is afforded an opportunity to present a defence.

A similar approach was taken in *PRASA v Moreki and others*,²³⁹ where the court confirmed that the Code does not require a formal hearing and that allowing an employee to submit written presentations before a potential dismissal may constitute a fair procedure.

However, in another Labour Court matter, it was held that the mere refusal of the employer to allow the employee to cross-examine a witness in an internal hearing was procedurally unfair.²⁴⁰ The court reasoned that the right to cross-examination directly affected the employee’s ability to state his defence, thereby undermining the fairness of the process.

South Africa, interestingly, still largely follows a strict, court-like process when conducting internal disciplinary hearings, despite the Code of Good Practice and subsequent case law making it clear that disciplinary action should generally be informal. Grogan, for example, discusses the principles of procedural fairness in an entire chapter in his book, emphasising the importance of an impartial chairperson and outlining how a disciplinary hearing should be properly constituted.²⁴¹ In practice, however, most employers continue to conduct highly formal disciplinary hearings akin to CCMA arbitrations, often with legal representatives and advocates present.

Furthermore, many employers have adopted their own disciplinary codes and procedures that prescribe rigid rules for conducting disciplinary hearings, even

²³⁸ (2011) 8 BLLR 765 (LC).

²³⁹ (2017) ZALCJHB 114 (LC).

²⁴⁰ *Richardo Schouten v SSSBC and others* (2025) C44/2022 (LC).

²⁴¹ Grogan Dismissal 4th ed page 244 – 289.

though the Code is intended to provide more flexibility. Employers are frequently penalised for failing to comply with these self-imposed stricter policies. No case illustrates this tension more clearly than *Riekert v CCMA and others*,²⁴² where the Labour Court found the dismissal procedurally unfair. Although the CCMA Commissioner had found that the employer complied with the basic requirements of natural justice, despite not following their own disciplinary policy, the Court held that the employer could not deviate from its own code without a compelling justification. The chairperson of the hearing's failure to keep minutes of the hearing or explain the basis for the finding of guilt further rendered the process procedurally defective.²⁴³

The Code itself also contributes to some uncertainty. Item 3(1) provides that larger business will generally require a more formal approach to discipline.²⁴⁴ On the one hand, the Code states that a dismissal need not occur through a formal enquiry, but on the other hand, it suggests that larger employers in South Africa are expected to adopt more formal disciplinary processes.

The intention of the Code, however, was to make pre-dismissal procedures as informal as possible. The Code neither prescribes nor provides guidance how employers should conduct a pre-dismissal hearing. This intention is reinforced in *Morapane v Gilbeys Distillers and Vintners*,²⁴⁵ and *Mondi Timber Products v Tope*,²⁴⁶ where the courts emphasised that pre-dismissal procedures should not be assessed with undue rigidity. As discussed earlier, the *locus classicus* on procedural fairness in South Africa is *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others*,²⁴⁷ in which the court found that an employer is merely required to conduct an investigation, give the employee or their representative an opportunity to respond to the allegations after a reasonable period and thereafter take a decision and communicate it to the employee.²⁴⁸ The principle of *audi alteram partem*

²⁴² (2006) 4 BLLR 353 (LC).

²⁴³ *Riekert v CCMA and others* (2006) 4 BLLR 353 (LC).

²⁴⁴ Item 3(1) of Schedule 8 of the *LRA*.

²⁴⁵ (1998) 19 ILJ 635 (LC).

²⁴⁶ (1997) 18 ILJ 149 (LAC).

²⁴⁷ (2006) 27 ILJ 1644 (LC).

²⁴⁸ *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* (2006) 27 ILJ 1644 (LC).

remains the cornerstone of genuine procedural fairness in South African labour law. Grogan summarises the procedural fairness requirement as follows:

"The rules of natural justice requires no more than that employers should act according to the commonsense precepts of fairness."²⁴⁹

4.3 A Comparative analysis between South Africa and Sweden

Sweden follows a similar approach, as its pre-dismissal procedures are also informal in nature. Section 30 of the *LAS* stipulates that an employee is entitled to consult with the employer regarding the information and the notice of potential dismissal.²⁵⁰ The use of the term "consultation" indication an inherently informal process and makes no reference to a formal hearing.²⁵¹ The informal nature of the meeting between the employee and employer is further reinforced by the optional nature of the consultation requirement, where the employer is obliged to consult only if the employee requests such consultation after receiving the notice.²⁵² The employer may not proceed with the dismissal until the consultation process has been concluded. This consultation period therefore provides the employee with an opportunity to state their case in defence to the potential dismissal.

Similarly to South Africa, Sweden subscribes to the principle of *audi alteram partem*, as is evident from the wording of section 30 of the *LAS* and in the judgment in *AD 2020 nr 23*, where the Swedish Labour Court held that the dismissal to be unfair because the employer failed to provide the employee with a clear opportunity to respond to the potential dismissal. Both Sweden and South Africa therefore comply with the first part of article 7 of Convention C158, as far as it requires that an employee be afforded an opportunity to defend themselves before a dismissal is effected.²⁵³ It is apparent, however, that South Africa's approach to discipline is more formal in practice than that of Sweden.

²⁴⁹ Grogan Dismissal 4th ed page 245.

²⁵⁰ Section 30 of the *LAS*.

²⁵¹ AD 2024 nr 75.

²⁵² Section 30 of the *LAS*.

²⁵³ Article 7 of Convention C158.

The remaining requirements of Item 4 (1) of the Code will now be explained in full. The Code stipulates that an employer must notify the employee of the allegations in a language and form that the employee reasonably understands. The employee must also be afforded a reasonable period to prepare for the enquiry. In addition, the employee is entitled to be represented by a fellow employee or trade union representative. Finally, the employer's decision should be communicated to the employee, and the employer should preferably furnish the employee with written notification of that decision.²⁵⁴ In *EOH Abantu (Pty) Ltd v CCMA*,²⁵⁵ the LAC stated the following:

"One of the key elements of fairness is that an employee must be made aware of the charges against him. It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them. The employer ordinarily cannot change the charge, or add new charges, after the commencement of the hearing where it would be prejudicial to do so. However, by the same token, courts and arbitrators must not adopt too formalistic or technical an approach. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance."²⁵⁶

It is apparent from the above that, provided the employee is aware of the misconduct with which he or she is charged and is given advance notice prior to the hearing, the employer will have complied with this portion of Item 4(1) of the Code. In the older yet authoritative case of *Miksch v Edgards Retail Trading (Pty) Ltd*,²⁵⁷ the court held that the dismissal of the employee was procedurally unfair because her hearing commenced a few hours after she had been notified of a plethora of serious charges.

Grogan remarks that the period of advance notice will depend on several considerations, including the complexity of the allegations, the time the employee

²⁵⁴ Item 4(1) of Schedule 8.

²⁵⁵ (2019) 12 BLLR 1304 (LAC).

²⁵⁶ *EOH Abantu (Pty) Ltd v CCMA* (2019) 12 BLLR 1304 (LAC).

²⁵⁷ (1995) 16 ILJ 1575 (IC).

may need to obtain proper advice or representation, and the employee's prior knowledge of the alleged misconduct.²⁵⁸

While employers in South Africa typically provide 48 hours' notice, the appropriate timeframe ultimately depends on the circumstances and must overall fairness.

In Sweden, the employer is subject to similar pre-dismissal procedural requirements. Sections 10 and 20 of the *LAS* provide that notice of termination must be served on the employee personally, and if the employee cannot be reached, the employer may deliver the notice by registered post. In addition, section 30 of the *LAS* obliges the employer to give the employee advance notice of a potential dismissal. Section 30 of the *LAS* clarifies the meaning of "advance notice" in terms of Swedish legislation, where an employer is considering terminating an employee with notice, the employee must be given a minimum of two weeks' notice, and where summary termination is contemplated for gross misconduct, the employee must receive at least one weeks' notice. This period enables the employee to prepare a defence and obtain assistance if they so do require. Swedish legislation also requires the employer to provide advance notice not only to the employee, but also to the relevant trade union, regardless of whether the employee is merely a union member or a trade union representative. This ensures that the trade union is immediately informed of the potential dismissal and can assist the employee in presenting his or her defence. Furthermore, section 12 of the *MBL* obliges employers to consult with the trade union before making any decision that concerns a member of the trade union, however if special cause exists the employer may dispense with the obligation to consult.²⁵⁹

Swedish legislation stipulates that employees must give notice within a specific time frame, such as one or two weeks. In contrast, South African legislation requires that employees be afforded a reasonable time to prepare, regardless of whether the charges are of a gross nature. Furthermore, Swedish legislation prescribes that the employer must notify the relevant trade union in advance if the employee is a trade

²⁵⁸ Grogan Dismissal 4th ed page 257.

²⁵⁹ Section 12 of the *MBL*.

union member, whereas South African law only requires that the employee be notified. Item 4(1) of the Code, however, provides that an employee is entitled to assistance from either a trade union representative or a fellow employee.²⁶⁰ It can therefore be assumed that an employee may seek advice from their trade union or its representative in the workplace, before presenting their defence. In South Africa, employees may notify their trade union on their own initiative if they face misconduct charges, whereas Swedish employers are obliged to inform the trade union on behalf of the employee if dismissal is contemplated. Notably, Swedish legislation does not provide for assistance by a fellow employee, and representation rights are limited to the employee and the trade union itself.²⁶¹ In South Africa, the right to representation by either a fellow colleague or trade union representative has been recognised by the courts as a fundamental requirement for procedural fairness.²⁶²

Lastly, Item 4(1) of the Code provides that the employer should communicate the decision taken and that such communication should preferably be in writing. The use of the word “preferably” suggests that, in certain circumstances, employers may communicate the decision verbally without rendering the procedure unfair. Nevertheless, employers are advised to provide written reasons to avoid unnecessary legal complications. In contrast, Swedish legislation makes it clear that the employer’s decision must be in writing, leaving no room for interpretation.²⁶³ Section 38(a) of the *LAS* further stipulates that if an employer fails to comply with the procedural pre-requisites under the *LAS*, the employer may be liable to pay compensation to the employee even though the dismissal was based on objective reasons.²⁶⁴

It is important to note that the pre-dismissal procedures outlined above are applicable to all employees, including trade union representatives. However, Item 4(2) of the Code specifically addresses trade union representatives and prescribed

²⁶⁰ Item 4(1) of Schedule 8.

²⁶¹ Section 30 of the *LAS* and section 12 of the *MBL*.

²⁶² *Molope v Mbha NO and others* (2005) 3 BLLR 267 (LC).

²⁶³ Section 8 of the *LAS* and section 18 of the *LAS*.

²⁶⁴ Section 38a of the *LAS*.

an additional that employers must take before proceeding with a possible dismissal of such representatives.

Item 4(2) of the Code provides the following:

“Discipline against a trade union representative or an employee who is an office bearer or official of a trade union should not be instituted without first informing and consulting the trade union.”²⁶⁵

The wording used in Item 4(2) of the Code, particularly the term “discipline”, indicates that this provision applies not only to pre-dismissal procedures but to any disciplinary steps the employer intends to take against a trade union representative, such as warnings or demotions.²⁶⁶ The practicable implication is that employers cannot even issue a verbal warning for late coming to a trade union representative without first informing and consulting the trade union representative’s trade union.

As discussed earlier, trade union representatives remain employees and are subject to the same rules and regulations as a normal employee. Grogan confirms that a trade union representative is obliged to comply with their duties and obligations as per their contract of employment.²⁶⁷ In *NUMSA obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others*,²⁶⁸ the court explained the reason surrounding the special protection afforded to trade union representatives. The court confirmed that a trade union representative should fearlessly pursue the interest of their constituency and ought to be protected against any form of victimisation for doing so, but that this does not mean that there is a licence to resort to defiance and needless confrontation. The court confirmed that a trade union representative remains an employee, from whom his or her employer is entitled to expect conduct appropriate to that relationship.²⁶⁹

²⁶⁵ Item 4(2) of Schedule 8.

²⁶⁶ Smit (2010) Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995.

²⁶⁷ Grogan Dismissal, Discrimination and Unfair Labour Practices (2007) 324.

²⁶⁸ [2017] 5 BLLR 483 (LAC).

²⁶⁹ National Union of Metal Workers of South Africa (NUMSA) obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others [2017] 5 BLLR 483 (LAC).

A substantial body of case law on this issue has already been discussed in this study. However, the matter of *FAWU obo Mbatha & others v SASKO Milling and Baking*²⁷⁰ best illustrates the true purpose of Item 4(2) of the Code. In this case, the commissioner clarified that “informing and consulting” means that the trade union must be made aware of the potential dismissal of the trade union representative.²⁷¹ Gorgan similarly states that “informing and consulting” simply requires the employer to inform the trade union of the potential dismissal.²⁷² Smit suggests that the only distinction between the disciplinary procedures applicable to trade union representatives and those applicable to ordinary employees is that the trade union representatives are entitled to representation by trade union officials, and that the trade union should, where practically possible, be informed in advance of the potential dismissal..²⁷³

Swedish legislation contains similar provisions regarding pre-dismissal procedures and disciplinary actions against trade union representatives. In *AD 2007 nr 53*, the Swedish Labour Court affirmed that, as in South Africa, a trade union representative is first and foremost an employee.²⁷⁴ The procedural requirements that employers must follow before initiating potential dismissal or disciplinary action have been discussed excessively in this study, therefore, this chapter provides only a summary of the different sections and legislation. The primary regulation affording protection to trade union representatives is found in section 30 of the *LAS*, which provides that as soon as a trade union representative is notified of a potential dismissal, the employer must simultaneously notify the trade union. Both the trade union and the trade union representative are then entitled to consultations with the employer, and the employer is prohibited from proceeding with the dismissal until these consultations have been concluded.²⁷⁵ Notably, section 30 of the *LAS* specifically mentions that the employer is prohibited from proceeding with dismissal of the trade

²⁷⁰ (2007) 3 BALR 256 (CCMA).

²⁷¹ *FAWU obo Mbatha & others v SASKO Milling and Baking* (2007) 3 BALR 256 (CCMA) at 52.

²⁷² Gorgan *Dismissal* 4th ed page 329.

²⁷³ Smit (2010) *Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995* at 136.

²⁷⁴ *AD 2007 No. 53*.

²⁷⁵ Section 30 of the *LAS*.

union representative until the consultations has been concluded. This provision mirrors the protections afforded to ordinary employees by section 30 of the *LAS*, with the only distinction being that the trade union to which the representative belongs is also notified and is entitled to consult with the employer alongside their member.

Section 12 of the *MBL* contains similar provisions, requiring an employer to negotiate with a trade union if the trade union requests such engagement before the employer implements or takes a decision that impacts a union member.²⁷⁶ Notably, the obligation to consult or negotiate arises only if the trade union initiates the request. Consequently, a situation may occur where a trade union member or representative receives a warning, and the trade union elects not to consult with the employer, thereby relieving the employer of any duty to engage in consultation. In short, section 5 of the *FML* provides similar protections to those listed above.²⁷⁷

A literal interpretation of the wording in the above-mentioned sections suggests that if an employer intends to dismiss a trade union representative, the employer must notify the trade union to which the trade union representative belongs and provide both the representative and the trade union an opportunity to consult with the employer and state their case.²⁷⁸ Conversely, if the employer merely wishes to issue a warning, for example for late arrival to work, the trade union representative may, at their own discretion, inform their trade union, which may then request consultations with the employer.²⁷⁹ This approach reflects a more nuanced framework in Swedish legislation, which arguably should be mirrored in South African law. This approach provides a more nuanced framework in Swedish legislation, which arguably should be mirrored in South Africans law. It allows employers to issue warnings to trade union representatives without unnecessary procedural hurdles, unless the trade union wishes to engage in consultation regarding the warning.

²⁷⁶ Section 12 of the *MBL*.

²⁷⁷ Section 5 of the *FML*.

²⁷⁸ Section 30 of the *LAS*.

²⁷⁹ Section 12 of the *MBL*.

When Swedish legislation is compared against South African law, particularly the requirement in the Code of Good Practice that an employer must “inform and consult” the trade union before taking any disciplinary steps against a trade union representative, it becomes evident that both countries are similar in practice. Although the wording of the respective regulations differs, the underlying procedures for trade union representatives align closely when considering Grogan’s interpretation of the true meaning of “informing and consulting,” as well as Smit’s observations discussed earlier.²⁸⁰

Item 4(3) of the Code states the following:

“If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.”²⁸¹

In the matter between *Zungo v Mantshule*,²⁸² the Labour Court held the following:

“[17] It is clear, therefore, that, even if item 4(3) may not constitute a substantive provision of our law, it is not entirely meaningless and the failure to abide by it may have serious repercussions for an employer.

[18] Item 4 of this Code is, in fact, entitled “Fair procedure”: so where an employer fails to remind an employee in terms of the Code, this is something which will be taken into account when assessing whether the dismissal was conducted in accordance with a fair procedure (i.e. in determining procedural fairness).”²⁸³

It is important to note, however, that although the court indicated that compliance with Item 4(3) of the Code would be considered when determining procedural fairness, the case in question concerned a condonation application rather than a matter focused solely on the procedural fairness or non-compliance with Item 4(3). In practice, it is generally accepted in South Africa that employers provide brief

²⁸⁰ Grogan Dismissal 4th ed page 329 and Smit (2010) Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995 at 136.

²⁸¹ Item 4(3) of the Schedule 8.

²⁸² (2016) ZALCJHB 291 (LC).

²⁸³ *Zungo v Mantshule* (2016) ZALCJHB 291 (LC) at para 17 and 18.

reasons for an employee's dismissal.²⁸⁴ The Code, however, does not explicitly require that these reasons, or the right to refer the matter, be provided in writing.

Swedish legislation contains similar provisions, as sections 8 and 19 of the *LAS* require that notice of dismissal must be in writing and must specify the procedures the employee should follow if they wish to challenge the dismissal.²⁸⁵ Furthermore, employers are obligated to provide the reasons for the dismissal in writing upon the employee's request.²⁸⁶ Section 9 of the *LAS* states the following:

"The employer is obligated, upon request by the employee, to state the circumstances on which notice of termination is based. This statement must be in writing, where the employee so requests."²⁸⁷

In the Swedish Labour Court case of *AD 2011 nr 46*, as previously mentioned, the employer did not provide the union with the grounds for dismissal and the Labour Court found the dismissal of the union member invalid.²⁸⁸

The key distinction between the two jurisdiction is that, in Sweden, the employer is legally obligated to provide the notice of dismissal in writing, and that notice must contain the procedures the employee must follow if they wish to challenge the dismissal. By contrast, Item 4(3) of South Africa's Code of Good Practice does not require the notice to be in writing. Furthermore, Swedish law obliges the employer to provide written reasons for dismissal upon the employee's request, whereas in South Africa, employers are expected to provide reasons for dismissal regardless of whether the employee requests them, although there is no requirement that these reasons be in writing. Note that this procedure is also applicable to trade union representatives.

Swedish legislation contains a similar provision, referring to "special cause," which permits an employer to proceed without fulfilling the procedural requirements where such cause is present. Item 4(4) of the Code was discussed in detail in Chapter 2 of this study; however, in summary, it provides that if exceptional circumstances exist

²⁸⁴ See *Madikane v Personnel Consultants* (1998) 3 BALR 283 (CCMA).

²⁸⁵ Section 8 and 19 of the *LAS*.

²⁸⁶ Section 9 and section 19 of the *LAS*.

²⁸⁷ Section 9 of the *LAS*.

²⁸⁸ *Arbetsdomstolen*, case AD 2011 nr 46.

the employer may ignore the pre-dismissal procedures set out in the Code.²⁸⁹ Swedish legislation contains a similar provision, referring to “special cause,” which permits an employer to proceed without fulfilling the procedural requirements where such cause is present.²⁹⁰ In *AD 2006 nr 127*, the Swedish Labour Court upheld the dismissal of a union member despite the employer’s failure to consult with the trade union beforehand, as the misconduct - throwing a knife at a colleague – was gross in nature and special caused therefore existed.²⁹¹ Similarly, in South Africa, in *National Union of Furniture & Allied Workers South Africa obo Javulani v Dreamworx Bedding (Pty) Ltd*,²⁹² the dismissal of a trade union representative was found to be fair despite the employer’s non-compliance with the requirement to inform the trade union. The representative had made death threats and incited violence and bullying. In deliberating the matter, the Commissioner considered not only the gravity of the misconduct but also referred to Item 4(4) of Schedule 8.²⁹³ In both cases, employers were permitted to dispense with the procedural requirements because the misconduct posed an immediate threat to health, safety, and the daily operations of the employer. Thus, in both jurisdictions, employers may dispense with the procedural requirements where truly exceptional circumstances exist.

4.4 Conclusion

It is evident that Swedish and South African legislation relating to pre-dismissal procedures are largely similar when examined holistically, with only a few subtle differences as discussed above. Although South Africa has not ratified Convention C158 or Convention C135, it is apparent that South African law substantially aligns with the principles embodied in these conventions, much like Swedish legislation.

²⁸⁹ Item 4(4) of Schedule 8.

²⁹⁰ Section 12 of the *MBL*.

²⁹¹ *Arbetsdomstolen*, case AD 2006 nr 127.

²⁹² (2020) 12 BALR 1267 (FBC).

²⁹³ *National Union of Furniture & Allied Workers South Africa obo Javulani v Dreamworx Bedding (Pty) Ltd* (2020) 12 BALR 1267 (FBC).

Chapter 5 Conclusions, limitations and recommendations

5.1 The primary purpose of this research was:

- i. To provide insight into and develop an understanding of the correct process for taking disciplinary action against a trade union representative in two countries namely, South Africa and Sweden, and how this process differs from disciplinary action against an ordinary employee; and
- ii. Examine how the legal frameworks of Sweden and South Africa shape the rights, obligations, and protections afforded to trade union representatives in their respective jurisdictions; and
- iii. Identify the differences and similarities in the approaches of these two countries, both in terms of their legal frameworks and their membership to the International Labour Organisation (ILO), including the obligations to comply with international labour standards arising from such membership.

To achieve this purpose, the following steps were undertaken:

- i. The role, function and position of trade union representatives in the workplace was analysed.
- ii. The international labour standards of the ILO relating to disciplinary action by employers against trade union representatives was reviewed.
- iii. South African labour legislation regulating disciplinary action against trade union representatives was examined.
- iv. Swedish labour legislation regulating disciplinary action against trade union representatives was examined.
- v. Swedish labour legislation was further assessed to determine how Sweden complies with ILO standards, in comparison to South Africa.
- vi. The similarities and differences between South African and Swedish legislation concerning disciplinary action against trade union representatives were identified and analysed.

- vii. A review of relevant jurisprudence, academic literature, and publications on pre-dismissal procedures and disciplinary action was conducted.

5.2 Summary of the research

Chapter 1 provided an overview of the background to the research topic. It outlined the purpose and approach of the study and explained why a qualitative research methodology was adopted. The chapter also discussed the research aim and rationale for selecting South Africa and Sweden as the focus countries.

Chapter 2 examined the ILO standards that relates to discipline against trade union representatives and analysed the provisions and jurisprudence within South African labour legislation governing such disciplinary measures.

Chapter 3 reviewed Swedish labour legislation concerning pre-dismissal procedures applicable before an employer may take disciplinary action against a trade union representative. It also compared Swedish legislative provisions with the relevant ILO conventions and recommendation.

Chapter 4 presented a comparative analysis of South African and Swedish labour legislation relating to disciplinary action against trade union representatives, highlighting the key similarities and differences between the two jurisdictions.

5.3 Limitations encountered during the study:

The challenges that were faced during this study were the following:

- i. Swedish legislation is originally published in Swedish and only translated into English by the Swedish Ministry of Employment and Labour. The same applies to Swedish case law, which was particularly difficult to access and is primarily available in Swedish.
- ii. As became during this study, judicial opinions often differ on the same subject, and courts interpret the concept of fairness in varying ways. It was therefore prudent not to evaluate every individual case concerning

disciplinary action against trade union representatives, but rather to adopt a holistic approach.

5.4 Recommendations:

It is apparent that both South African and Sweden have strict provisions and regulations within their respective labour frameworks concerning disciplinary action against trade union representatives. However, these additional protections were likely never intended by the legislators to impose special procedural steps beyond those applicable to an ordinary employee. The underlying intention in both jurisdictions appears to be the prevention of anti-union prejudice and ensuring that representatives are not dismissed or disciplined merely because of their union role or activities. A trade union representative remains, first and foremost, an employee. The underlying intention in each jurisdiction appears to be the prevention of anti-union prejudice and ensuring that representatives are not dismissed or disciplined merely because of their union role or activities. These procedural safeguards aim to secure compliance with ILO standards beyond Convention C158 and R166, such as the Right to Organise and Collective Bargaining Convention and the Freedom of Association and Protection of the Right to Organise Convention.

Academic scholars have recommended amending the wording of Schedule 8 of the Code of Good Practice to align more closely with the *Avril Elizabeth Home for the Handicapped* judgement, thereby harmonizing South African law with ILO standards. Authors such as Grogan, supported by a plethora of case law, have clarified the true intention of Item 4 of the Code regarding pre-dismissal procedures for trade union representatives. This study also analysed Swedish legislation on disciplinary action against trade union representatives, revealing that its provisions are similar in nature. South Africa could benefit from adopting aspects of Sweden's approach to reduce ambiguity and enhance procedural clarity. Swedish law is firmly grounded in the principle of the *audi alteram partem*, requiring employers to notify the trade union of a potential dismissal and provide both the trade union and the

representative an opportunity to consult if they so wish.²⁹⁴ Grogan and Smit advocate a similar interpretation, emphasising that a trade union representative should be entitled to representation by a union official and that the union should be notified of any potential dismissal, thereby satisfying Item 4(2) of the Code.²⁹⁵

With the proposed amendments to South Africa's labour legislation, already processed through the National Economic Development and Labour Council and soon to be open for public comment, the overly restrictive procedural requirements, which are not explicitly mandated by jurisprudence or legislation, may finally become a thing of the past.

²⁹⁴ See discussion in Chapter 3.

²⁹⁵ See discussion in Chapter 4.

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