The autonomy of independent chairpersons in disciplinary proceedings

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ABSTRACT

Discipline in the workplace is one of the most contentious issues in the employment relationship. It requires a careful balance of competing rights, those of the employer who must ensure discipline and the employee who must be treated fairly in the workplace. To ensure impartiality, fairness and procedural integrity of the process, employers often appoint independent chairpersons to preside over disciplinary hearings. This aligns with the precepts of Section 188 of the *Labour Relations Act 66 of 1995,* which prescribes that a dismissal of an employee must not only be fair substantively but must be procedurally fair as well. Failure to adhere to this principle will render the employer's conduct unfair and subject to review.

What happens when the employer is dissatisfied with the decision or finding of the independent chairperson? Does an employer have the right to overturn or disregard the decision of the chairperson and substitute it with its own? This research explores the legal and practical limitations of the autonomy of the independent chairperson, in light of the decision of SARS v CCMA (Kruger). This research draws on the relevant case law, statutory provisions, and scholarly commentary to critically assess the balance between the employer's prerogative and the right to fair process in disciplinary matters.

KEYWORDS

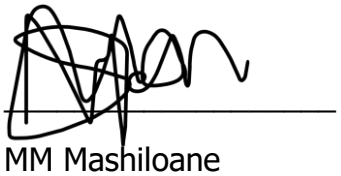
Chairperson, Collective Agreement, Disciplinary proceedings, Dismissal, Fairness, Sanction

LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act 75 of 1997
CCMA	Commission for Conciliation, Mediation and Arbitration
ILO	Labour Organisation
LAC	Labour Appeal Court
LRA	Labour Relations Act 66 of 1995
SARS	South African Revenue Services

SOLEMN DECLARATION

I, Mosiuoa Moeketsi Mashiloane, duly declare that this study entitled "The autonomy of independent chairpersons in disciplinary proceedings" for the Degree Master of Laws in Labour Law at the North-West University (Potchefstroom Campus) hereby submitted. This study has not been submitted previously by me or anyone else for a degree at this university or any other. Furthermore, I declare that this study is my own work in design, structure and execution and that all materials and sources contained herein have been duly acknowledged.



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Chapter 1: Introduction

1.1 Introduction

The aim of the *Labour Relations Act* (LRA)[1] is to provide a platform for employers and employees to collectively bargain concerning matters in the workplace. This allows for a harmonious interaction whereby parties can agree on issues such as discipline in the workplace, benefits, and issues regarding working hours.[2] One of the processes that an employer must have in place, is a disciplinary code which will lay out the role of the chairperson and the powers they possess in disciplinary proceedings, to better regulate processes and procedures in employment relations along with ensuring fairness during these proceedings.[3] It is common practice for employers to appoint independent external professionals to chair and facilitate disciplinary proceedings in the workplace. The appointment of external persons ensures an unbiased and fair process where the interests of both parties are protected. Item 4 of the *Code of Good Practice: Dismissal,* enjoins the employer to afford an employee a fair hearing, both substantively and procedurally.[4]

Procedural fairness[5] ought to be promoted during the process of a disciplinary enquiry, up to, and including, the determination of the sanction against an employee. The purpose of disciplinary proceedings is to investigate allegations relating to the employee's conduct and to ensure corrective measures, where warranted.[6] This technique, among other things, will enable both parties to present their cases and provide the chairperson with all of the information before establishing a judgement. The procedure must be followed to prevent, among other things, rash dismissals. While the nomination of an independent chairperson is intended to promote impartiality, there is a risk of unconscious or perceived bias if the employer has exclusive authority over who will be appointed as the chairperson of the disciplinary proceedings. This view concerns the fact that the chairman would be

1 66 of 1995.
2 *Kem-Lin Fashions CC v Brunton* 2000 (LAC) para 37; see also Calitz 2017 *Obiter*.
3 Hlwatika 2023 *Obiter*. 1
4 Item 4 of 66 of 1995.
5 Shabangu, Khan and Thami 2022 *Administratio Publica* 71-95.
6 Shabangu, Khan and Thami 2022 *Administratio Publica* 71-95.

compensated by the company for their services. However, the parties may reach an agreement on who should serve as the chairman of the proceedings, emphasising the process's fairness and impartiality.[7]

It is the responsibility of the chairperson to apply the relevant disciplinary code if it exists in the workplace, or alternatively to apply the *Code of Good Practice* and the LRA. The chairperson must give effect to the standard of conduct set by the employer in the workplace and carefully consider the facts to reach a fair conclusion.[8] In the matter of *SARS v CCMA*[9]It was held that the chairperson is tasked to provide an unfettered decision to the employer. This may conflict with the employer's expectations if the external chairperson's decision diverges from the employer's anticipated outcome. The question arises as to whether the employer, under the circumstances, can substitute the decision of the chairperson to best determine the extent of the power or decision-making authority of the independent chairperson.

1.2 Problem statement

1.2.1 The powers of a chairperson

The chairperson of a disciplinary hearing may, after hearing all the evidence, make a final determination regarding the verdict and sanction, or only provide a recommendation to the employer. This may be achieved through agreement or be contained in the disciplinary code.[10] This notion, however, raises the question as to whether requiring the chairperson to merely provide a recommendation to the employer undermines the purpose of appointing an independent party to preside over the proceedings. This issue arose in the case of *MEC for Finance: Kwa Zulu-Natal v Dorkin NO* [11], where the Labour Appeal Court (LAC) held that a mere recommendation to give final sanction is in all respects a limitation on the chairperson's powers. Independent chairpersons are

7 Bekker *The doctrine of double jeopardy in the South African labour law* 14.
8 Bekker *The doctrine of double jeopardy in the South African labour law* 62.
9 *SARS v CCMA* 2010 3 BLLR 332 (LC) para 35.
10 Hlwatika 2023 *Obiter 1*.
11 *MEC for Finance: Kwa Zulu-Natal v Dorkin NO* 2008 16 BLLR 34 (LAC) para 14.

appointed to preside over disciplinary proceedings to settle and resolve employment disputes and to formulate decisions in the hearings after considering all the facts before them by applying the principles of fairness and justice. Therefore, the decision of a chairperson should be considered binding and final.[12] Any limitation on the chairperson's powers to make a final determination may encroach on the very principle of fairness.

If either party is not satisfied with the decision of the chairperson, they have legal remedies available to challenge the decision of chairpersons.[13] An employer will usually aim to overturn a lenient decision of an independent chairperson and substitute it with a dismissal. Employees, however, may have an unfair decision by an external chairperson reviewed if fairness was not fully complied with. In such situations, the employer may question the decision of the chairperson to ensure the employee was afforded all elements of fairness in the process of reaching a verdict and sanction.[14] An employer may reserve the right to review and substitute the decision of an independent chairperson in the disciplinary code, however, this is not common practice.[15] When an employer seeks to substitute the final and binding decision of an independent chairperson, and they have not reserved that right, it becomes a controversial issue.[16] Questions of invalidity, unlawfulness, and unfairness of the employer's substitution may arise.[17]

1.2.2 The international and regional position

South Africa is a member of the International Labour Organisation (ILO) and has ratified several conventions. The labour law frameworks of South Africa are heavily influenced by the ILO, which sets standards for fair worker's rights globally with member states voluntarily subscribing to the organisation's guidance. In addition, the LRA states that one of its purposes is to give effect to obligations incurred by South Africa as a member state of the ILO[18]. In 1982, the ILO established Convention 158, which includes Article 8,

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12 Hlwatika 2023 *Obiter* 1.
13 *Mzolo v Rhodes University and Another* 2021 42 ILJ 1308 par [53].
14 Bekker *The doctrine of double jeopardy in the South African labour laws* 62.
15 *Hlwatika 2023 Obiter* 1.
16 *Hlwatika 2023 Obiter* 1.
17 Calitz 2017 *Obiter*.
18 Section 1(b) Act 66 of 1995.

as a fundamental clause protecting workers' rights when conflicts arise between employers and employees. This convention is a non-binding legal instrument that can be used to influence the interpretation of domestic South African labour law since South Africa has not ratified the convention. The Termination of Employment Convention[19], as it is more often referred to, highlights the necessity of having the right tools and systems in place to navigate conflicts that arise when an employee's employment is terminated. Article 8 specifically states that an employee who believes they were dismissed unfairly shall be able to file an appeal with an unbiased authority such as a court, labour tribunal, or arbitration committee.[20]

Britain is also a member of the ILO and has the Employment Act[21], which established a statutory dispute resolution framework and included pre-dismissal procedures, such as disciplinary hearings[22] This can aid South Africa in determining persuasive sources of international standards for South African labour law. This can be compared to South Africa's LRA, which developed and created the Commission for Conciliation, Mediation and Arbitration (CCMA), and stressed the importance of fair disciplinary hearings prior to dismissal. Section 233 of the *Constitution of the Republic of South Africa*, 1996, is a landmark clause that demonstrates the country's adherence to international law. It states that when reading any legislation, any reasonable interpretation that is compatible with international law must be preferred above any alternative view that is inconsistent with international law.

1.2.3 The change of the position

Prior case law indicates that employers were allowed to substitute the decision of the external chairpersons, provided that the principle of fairness is not tampered with in any way.[23] In *South African Revenue Services (SARS) v Commission for Conciliation,*

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19 International Labour Organization *Termination of Employment Convention, 1982 (No. 158), Art. 8*.
20 International Labour Organization *Termination of Employment Convention* 1982 (No. 158).
21 Employment Act 2002 as amended by Employment Rights Dispute Resolution Act 1998.
22 Smit P and Van Eck BPS 2010 *The Comparative and International Law Journal of Southern Africa* 46-67.
23 *Samson v CCMA* 2010 31 ILJ 170 (LC) para 34.

Mediation and Arbitration (CCMA) (Kruger)[24], Mr Kruger used the racially derogatory "k-word" against his superior. An external chairperson, mandated by a disciplinary code to provide a binding sanction, provided a sanction short of dismissal in the form of a final written warning to Mr Kruger. The employer, however, was dissatisfied with the decision and subsequently substituted the decision by dismissing Mr Kruger. The court subsequently established a new position, which stated that the employer's substitution of the external disciplinary chairperson's decision was irregular, specifically since a chairperson was given powers via a disciplinary code to make a final decision on the sanction. The LAC went on to hold that the dismissal was unfair due to a disciplinary code being in place, which gave an independent chairperson binding powers. The Constitutional Court (CC), however, ruled that reinstatement was not possible due to the gravity of the offence, and subsequently granted the employee compensation.[25]

The case of *Molantoa v CCMA and Others* also reiterated this position. The case was referred to the CCMA after disciplinary proceedings. In this matter, the employee attended a course for which he had to travel and apply for reimbursement from the company. It was determined, by an independent investigator, that some employees claimed excessive amounts fraudulently from the company, and the employee in question was found to be one of them. The employees were afforded an opportunity to admit their fraudulent conduct, but the employee in question failed to do so and was formally charged.[26] The sanction that followed was that of suspension without pay for seven days after a disciplinary hearing was held by an independent chairperson against the employee, The employer, however, was dissatisfied with this sanction. Upon return from suspension, the employee was instructed by the employer to provide mitigating reasons as to why he should not be dismissed. The employee was subsequently dismissed[27]. The matter was then referred to the CCMA and later to the Labour Court (LC), which held that the interference of the employer was procedurally unfair due to clause 6.8 in the

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24 *SARS v CCMA (Kruger)* 2015 06 ZALAC 62 (LAC) para 35.
25 *SARS v CCMA (Kruger)* 2015 06 ZALAC 62 (LAC) para 34.
26 *Molantoa v CCMA and Another* 2021 19 SA 10 (LC) para 6.
27 *Molantoa v CCMA and Another* 2021 19 SA 10 (LC) para 38.

employer's disciplinary code, which prescribes the disciplinary procedure within that workplace. The clause in question determined that only the chairperson is obligated to issue a binding sanction.[28]

The LC emphasised two distinct but connected principles: firstly, that a chairperson's judgement must satisfy the threshold of reasonableness that any reasonable decision-maker may reach, and secondly, that decisions specified as binding by the disciplinary code remain binding on the parties. The LC determined that although the CCMA commissioner's failure to examine the disciplinary code rendered their judgement unreasonable and, therefore, reviewable, the question of reasonableness is separate from whether the original chairperson's decision was binding under the disciplinary code. As a result, the binding character of a chairperson's judgement originates from the power provided by the disciplinary code, but the rationality of that decision influences whether it can survive judicial scrutiny.[29]

The above highlights that although the decisions of independent chairpersons are binding and final as per the disciplinary code of that workplace, the decision should still be made fairly after having considered all the relevant information along with reasons for the next recourse to be considered, including the disciplinary code of that workplace[30]. The above also highlights the importance of the contents of disciplinary codes. Enquiries regarding unlawfulness, invalidity and unfairness may come to light when an employer substitutes the decision of an independent and external chairperson, to whom the employer afforded the necessary authority. This aspect of labour law has highlighted the importance of having a disciplinary code in place where procedures are detailed and communicated to all concerned. This in turn will contribute to better efficacy in resolving disputes in the workplace.[31]

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28 *Molantoa v CCMA and Another* 2021 19 SA 10 (LC) para 27.
29 *Molantoa v CCMA and another* 2021 19 SA 10 (LC) para 49.
30 *Molantoa v CCMA and another* 2021 19 SA 10 (LC) para 50.
31 Hlwatika 2023 Obiter 1.

1.2.4 The risk of the double jeopardy rule

An employee may be exposed to the double jeopardy rule by the dissatisfaction of the employer at the decision of the chairperson, and the subsequent disregarding of the decision of the independent chairperson by the employer thereof if it so happens that the employer warrants another hearing in seeking to dismiss the employee. The rule states that a party or a person, in this case, the employee, may not be subjected to a secondary disciplinary process against them based on the same set of facts once a finding in the primary disciplinary process has been reached.[32]

In the case of *South African Municipal Workers Union obo Malatsi v SA Local Government Bargaining Council*[33], the employee was dismissed after a hearing with the employer municipality. The employee then proceeded to take the matter to arbitration where re-instatement of the employee was ordered as the sanction was considered too harsh. The municipality took the decision of the arbitrator to the LC which dismissed the application. Upon reinstatement of the employee, the municipality instituted new disciplinary proceedings relating to the same incident after the finding had been reached.[34] This demonstrates how easily the double jeopardy rule can be violated.

In *BMW v Van Der Walt*[35], the LAC held that the possibility of holding a second enquiry against an employee would depend on the level of unfairness afforded to the employee in the first hearing. For an employee to be tried a second time, new credible information has to come to light after the first hearing. This aspect further protects the employee from being tried a second time based on the same offence, as this is also in violation of an independent chairperson's final and binding decision.

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32 Hlwatika 2023 Obiter 1.

33 *South African Municipal Workers Union obo Malatsi v SA Local government Bargaining Council* 2023 6 BLLR 581 (LC) par 13.

34 *South African Municipal Workers Union obo Malatsi v SA Local Government Bargaining Council* 2023 6 BLLR 581 (LC) par 13.

35 *BMW (South Africa) (Pty) Ltd v Van der Walt* 2000 2 BLLR 21 (LAC) para 12.

1.3 Research question

What are the legal ramifications of employers replacing external chairpersons' final and binding decisions in workplace disciplinary hearings, and to what extent is this permitted by South African labour law?

1.4 Research aim and objectives

The study aims to determine if an employer can substitute the decision of an external chairperson for disciplinary proceedings. This study will investigate whether:

- The decision of the independent chairperson is final and binding, which determines the extent of their authority;
- The employer can disregard that decision and substitute it with their own decision.

Exceptional circumstances where an employer can substitute the decision of an independent chairperson with binding authority will also be examined in the study. Lastly, an investigation into the principle of fairness in disciplinary enquiries will be conducted by exploring the aspects of procedural and substantive fairness.

1.5 Research method

The research methodology that will be utilised in this study is desktop or qualitative research. This method of study is relevant since the information needed can be found in literature and allows the researcher to examine case law, as well as international law instruments relevant to the subject matter owing to South Africa's membership of the ILO. Primary and secondary sources consisting of case law, international law instruments, textbooks, journal articles and statistical data will be consulted to achieve the objectives of this study. The main drawback of the study is its exclusive dependence on desktop or qualitative research methods, which excludes important first-hand information from stakeholders, including chairpersons, employers, and staff members engaged in disciplinary actions. The study may not include the most current advancements in labour law practices due to its geographically restricted scope, which primarily focusses on South African law with limited attention to international comparative analysis. This study aims

to use relevant case law, legislation, academic journals and international law to indicate the position, and its implications for employers dissatisfied with the decision of an independent chairperson.

1.6 Research structure

The study will be divided into four chapters:

Chapter 1 will serve as an introduction, focussing on the employer and the independent external chairperson, as well as introducing the problem statement. The chapter will also provide an in-depth structure of the study and include the research proposal.

Chapter 2 will explore the binding authority of an external chairperson's decision, as well as the employer's role in disciplinary proceedings when an external chairperson has been appointed. This will be achieved by examining relevant legislation, international law instruments, foreign legal contexts, the *Labour Relations Act*, and the *Code of Good Practice*.

Chapter 3 will examine the position before and after the *SARS v CCMA* (Kruger) case, as well as other case law, examine the employer's options if they are dissatisfied with the decision of the externally appointed chairperson, and consult other relevant materials. The chapter will focus on discussing and critiquing relevant case law and journal articles where this matter is concerned, and highlight key principles for the decision in disciplinary proceedings taken by an external chairperson.

Chapter 4 will conclude the study and provide insights for future research beyond the scope of this paper. Lastly, an in-depth discussion will be followed by a conclusion that summarises the extent of an independent chairperson's authority.

1.7 Relevance for the research unit

This research will fit under the ambit of the faculty of law's research unit in the *Justice in Practice* and *Vulnerable Societies* sub-projects. It contributes to *Justice in Practice* by emphasising the duty of fairness owed to employees throughout the disciplinary process

by all parties involved. Additionally, it addresses *Vulnerable Societies* by being cognisant of the employee's more vulnerable position compared to the employer.

Chapter 2: The legal position: Employer's authority and external chairperson's decisions in disciplinary proceedings in South African and foreign jurisdictions

2.1 Introduction

The previous chapter established the base of the study by outlining the research background, research objectives, research questions and the rationale for conducting the study. Employers are increasingly concerned with the extent and limitations of their authority, if any, in instances where external chairpersons engage in disciplinary proceedings in the workplace.[36] The rationale behind appointing external chairpersons is to keep the process fair and the final decision unbiased. This chapter will attempt to make sense of the complicated legal framework, due to there being no legislation that clearly sets their position interpretation is left to case law and legislation which includes the LRA, the *Code of Good Practice: Dismissal*, and pertinent case law by drawing on comparable practices and international and foreign labour norms to effectively unpack the research problem.

This chapter will also explore the complex legal framework that surrounds an employer's authority – in the context of South African employment law – in replacing the ruling of an external chairperson in disciplinary proceedings. The chapter will examine the rights

[36] Hlwatika 2023 *Obiter* 1.

and obligations of employers, the authority and bounds of external chairpersons, and the dynamics of decision substitution within the framework of collective agreements and the general principles of justice and fairness in employment relations.

2.2 Jurisdictional boundaries: A comparative analysis of employer authority vs external chairperson decisions

2.2.1 Employer authority in disciplinary proceedings

An employer's authority in disciplinary processes stems from the need to maintain procedural justice and adhere to legal requirements. Both contractual duties and legal requirements support the employer's right to implement disciplinary actions.[37] Employers have been given the authority to oversee employment relations, which includes evaluating misbehaviour, facilitating hearings, and imposing penalties. In South Africa, a statutory framework outlining the extent of employer jurisdiction in disciplinary cases is provided by section 188(1) of the LRA. Employers must follow fair procedures, as stated in item 4 of the LRA and the associated *Code of Good Practice: Dismissal*, which addresses the fair procedure to be followed in disciplinary proceedings.

The procedure entails informing the employee about the accusations, facilitating a fair hearing, and providing the employee with an opportunity to address the charges. Employers must follow their established disciplinary codes, which must be shared with staff members, according to item 8 of the *Code of Good Practice: Dismissal*. The LRA's procedural fairness standards, which outline the steps an employer must take to reprimand an employee, especially when dismissal is involved, guarantee that disciplinary proceedings are appropriate and carried out transparently and consistently.

Employer authority in disciplinary actions is supported by comparable concepts globally. The International Labour Organization (ILO) Convention No. 158 on Termination of

[37] Collier and Fergus *Labour Law in South Africa.* 181

Employment[38], whose purpose is to coordinate minimum levels of job security in the laws of ILO member states[39], establishes a benchmark for procedural fairness in employment practices, as also seen in section 188(1) of the LRA.[40] This convention highlights the employer's obligation to adhere to fair procedures, thereby providing a standard for assessing the legality of disciplinary actions across various jurisdictions. Employers are expected to abide by these international standards, ensuring that disciplinary actions are neither arbitrary nor unjust.[41]

2.2.2 The role of external chairpersons in disciplinary proceedings

External chairpersons refer to a neutral individual, unaffiliated with the employer or employee, who presides over disciplinary hearings to ensure impartiality and fairness by providing an unbiased perspective.[42] External chairpersons are typically engaged to ensure an objective evaluation of the evidence and arguments presented impartially and fairly, thereby enhancing the credibility of the process.[43] In South Africa, the LRA and Schedule 8 of the *Code of Good Practice: Dismissal*, advocate for the use of external chairpersons to preside over disciplinary hearings, particularly in complex or contentious cases. The decisions rendered by these chairpersons are binding, depending on adherence to relevant procedural fairness and compliance with the disciplinary code and applicable legislation.[44]

Looking at other jurisdictions, for instance, the United Kingdom for one, employment tribunals frequently appoint external adjudicators to oversee disciplinary proceedings.[45] These adjudicators ensure that the proceedings conform to legal standards and that decisions are grounded in an unbiased assessment of the evidence. The decisions of these

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38 International Labour Organization (ILO) *Convention No. 158 on Termination of Employment* 1982. The convention aims to establish standards for termination of employment at the initiative of the employer. It is concerned with ensuring job security and protecting workers from unfair dismissals.

39 Carinci 1982 *International and European Law* 233.

40 International Labour Organization (ILO) *Convention No. 158 on Termination of Employment* 1982.

41 Grogan *Workplace Law* 69.

42 Hlwatika *Obiter* 1.

43 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 28 ILJ 2405 (CC) para 110.

44 Hlwatika *Obiter* 1.

45 Hlwatika *Obiter* 1.

adjudicators are subject to appeal on the grounds of procedural error or perceived bias, thus providing a mechanism of redress for an employee dismissed arbitrarily. This indicates that these external adjudicators must fairly exercise their authority in all respects.[46] Similarly, in South Africa, the decisions may be reviewed internally through appealing of the decision or through the institution of review proceedings in the Labour Court, the CCMA, bargaining councils, and statutory accredited private agencies.[47]

An appeal or review procedure may be used. This review process provides a checks and balance process to ensure compliance with the procedures and principles of fairness, adherence to legal requirements, and the reasonableness of the decision based on the presented evidence.[48] The appeal procedure deals with disputing the substance of the decision, and the review procedure deals with concerns regarding how the decision was reached.

2.2.3 Legal standing and review of chairperson's decisions

Decisions rendered by external chairpersons carry legal significance.[49] In South Africa, such decisions are subject to review by relevant institutions such as the CCMA, LC, and LAC if claims of procedural unfairness or legal misinterpretation arise. An investigation regarding how the external chairperson reached the decision, and whether the evidence presented was properly considered in the determination of an appropriate sanction, will subsequently follow. If these conditions are met, the decision is fully binding[50]. Similarly, in foreign law contexts, the decisions of external adjudicators can be challenged through appeals or review processes.[51] This provision ensures that parties have recourse if allegations of procedural irregularities or legal errors affect the outcome. The review

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46 Grogan *Workplace Law* 72

47 Hlwatika *Obiter* 1.

48 Hoexter *Administrative Law in South Africa* 116 -120. Reviews scrutinize the process and legality of a decision while appeals addresses the merits or correctness of the decision

49 Hlwatika *Obiter* 1.

50 Hlwatika *Obiter* 1.

51 Van Niekerk and Smit *Law@work 6th ed* 112.

mechanism is designed to uphold the integrity of disciplinary proceedings and ensure that decisions are made impartially.[52]

The legal framework governing employer authority to substitute the decisions of external chairpersons in disciplinary proceedings is, therefore, emphasised by the principles of procedural fairness and legal compliance. Employers are required to follow established procedures and respect statutory and international standards, while external chairpersons contribute by ensuring impartiality and fairness.[53] The South African legal system, like other foreign law legislation, provides avenues for reviewing and challenging decisions to maintain justice and protect the rights of all parties involved.[54]

2.3 South African labour legislation governing disciplinary proceedings

The LRA and the Basic Conditions of Employment Act (BCEA) are the primary legislative frameworks regulating disciplinary processes in South Africa.

2.3.1 Labour Relations Act: Principles and application

Comprehensive standards for fair labour practices, conflict resolution, and the rights and obligations of employers and employees are outlined in the LRA[55], as amended. The LRA's *Code of Good Practice* provides crucial guidelines for carrying out disciplinary actions in a way that maintains justice and fairness. It also highlights the importance of adherence to both substantive and procedural fairness when taking disciplinary action. In particular, section 188[56] requires employers to carry out a comprehensive inquiry before making any disciplinary decisions and ensures that all pertinent information is taken into account. According to the Code, workers must be made aware of the accusations made against them and provided with an opportunity to comment. It also emphasise the importance of an unbiased chairperson supervising the proceedings to protect the process's integrity.

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52 *Gold Fields Mining SA Ltd (Kloof Gold Mine) v CCMA and Others* 2010 31 ILJ 371 (LAC) para 14.
53 Grogan *Workplace Law* 58.
54 Hlwatika *Obiter* 1.
55 66 of 1995.
56 66 of 1995

The Code works to advance fair treatment in the workplace by reaffirming that disciplinary actions be appropriate and justified concerning the offence in question.

The LRA does not expressly require or prohibit the use of independent external chairpersons in disciplinary proceedings. It does, however, underscore the necessity of procedural fairness, particularly in section 188, which mandates that dismissals be both substantively and procedurally fair. In *MEWUSA obo Mbonani v S Bruce*[57] it was held that employers were entitled to appoint outside individuals to preside over disciplinary hearings by established law. This is desirable since an external person will be less susceptible to influence from the parties than an internal chairperson. An independent chairperson's involvement can also aid in providing the necessary neutrality, whereas internal resources may be biased or compromised. Schedule 8 of the LRA, the *Code of Good Practice: Dismissal*, further supports the appointment of external chairpersons over internal chairpersons by highlighting the significance of fairness and transparency in disciplinary hearings. [58]

2.3.2 The precedent created by case law

Case law in South Africa has clarified the applicability of acts such as the LRA in disciplinary processes. The Constitutional Court (CC) emphasised the significance of justice and proportionality in disciplinary processes in the landmark decision of *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others*[59] where Mr Sidumo was dismissed for negligently failing to apply established and detailed individual search procedures. The court concluded that any disciplinary action taken, including those taken by external chairpersons, must meet the LRA's reasonableness criteria.

NEHAWU v University of Cape Town & Others[60] is another significant case since it highlights the employer's responsibility to hold fair disciplinary hearings. The court's decision in this case upholds the principle that companies cannot recuse themselves of

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57 *MEWUSA obo Mbonani v S Bruce* 2005 8 BALR 809 (CC) para 13.
58 Bagraim *Labour Law in South Africa.*
59 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 28 ILJ 2405 (CC) para 30.
60 *NEHAWU v University of Cape Town & Others* 2003 24 ILJ 95 (CC) para 33.

the responsibility for disciplinary hearings simply because an external chairperson is involved.

The above further indicates that when companies are making use of an independent external chairperson, they are increasing their compliance with the LRA's reasonableness and fairness criteria. In addition to securing an external chairperson, companies also have to ensure the decision of the external chairperson is fair through implementation of a disciplinary code for example, thereby protecting them from reviews and appeals that would consume time and resources.

2.4 The role and powers of the employer in disciplinary proceedings

Employers have specific rights and obligations, including the right to regulate behaviour in the workplace[61] to ensure the smooth operation of their enterprise. Central to the principle of creating an orderly and conducive work environment is discipline, but employers must ensure that any disciplinary action is fair in both substance and procedure to comply with the LRA[62] and the BCEA[63]. This necessitates that when conducting a disciplinary process, a fair process is followed. The conditions contained in the *Code of Good Practice* must be strictly adhered to.[64]

The legal framework in South Africa has several restrictions meant to prevent abuses arising from the unequal power dynamics between employers and employees. The LRA[65] stresses the importance of fair and reasonable disciplinary procedures and forbids employers from applying arbitrary or excessively harsh punishments. When an external chairperson is involved, however, the employer's power structure becomes even more convoluted since the involvement of an external chairperson involves delegation of authority of the employer to the external chairperson for that particular disciplinary hearing. The employer can decide who has the authority to conduct the hearing, but

61 Grogan *Workplace Law* 71.
62 66 of 1995.
62 *Basic Conditions of Employment Act* 75 of 1997.
64 Hlwatika *Obiter* 1.
65 Du Toit 2015 *Labour Relations Law: A Comprehensive Guide* 441.

ultimately, the final outcome rests with the employer. Employers use external chairpersons to ensure that they comply with legislation or the precepts of the LRA.

Case law has significantly contributed to clarifying and refining employers' authority and bounds in disciplinary actions. The court ruled in *Shoprite Checkers (Pty) Ltd v Ramdaw and Others* that while employers have the right to discipline their employees, they are constrained by the requirements of fairness and the law.[66] An important case that examined the role of independent chairpersons in disciplinary hearings was *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others*[67]. According to the court, the employer bears ultimate responsibility for the determination and must ensure that it is fair under the LRA. The neutrality of the proceedings may be improved by selecting a chairperson from outside the organisation.

These rulings demonstrate that notwithstanding employers' wide latitude in personnel management – including the application of disciplinary measures – the legal obligation to maintain the ideals of justice and fairness places constraints on such latitude. The idea that disciplinary powers must be used within the bounds of the law and concerning workers' rights has been reaffirmed by the courts continuously over time.

2.5 Involvement of external chairpersons in disciplinary proceedings

Though not explicitly stated in the LRA, it is argued that the selection of external chairpersons in disciplinary procedures is a practise that improves the fairness and impartiality of such processes.[68] The *Good Practice Code: The Principles of Justice and the Right to a Fair Hearing* was established by the LRA and the *Good Practice Code: Dismissal*, which supports the belief that external chairpersons should be appointed to ensure impartiality, particularly in complex or high-stakes matters. Additionally, this

66 *Shoprite Checkers (Pty) Ltd v Ramdaw and Others* 2011 32 ILJ 2212 (LAC) para 100.
67 *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* 2006 27 ILJ 1644 (LAC).
68 Shabangu, Khan and Thami 2022 *Administration Publica* 71-95.

practice is strengthened by corporate legislation or collective bargaining agreements that frequently allow the appointment of external chairpersons.[69]

The function of an external chairman in disciplinary proceedings emphasises the need to strike a balance between objectivity and compliance with the employer's disciplinary policies. This is consistent with the tenets outlined in the Constitutional Court's ruling regarding section 9 of the South African Constitution[70], which highlights the entitlement to equitable administrative treatment. The role of the external chairperson is to guarantee that disciplinary procedures are carried out impartially and equitably while also abiding by the organisation's established rules.

This can be done, for instance, through a disciplinary code that serves as an instrument to regulate employment relations in the workplace. An external chairperson can offer suggestions where their authority is not final and binding, but have no legal ability to impose judgements; that responsibility rests with the employer.[71] In order to maintain the integrity of the disciplinary procedure and guarantee that employee rights are upheld, as required by the Constitution[72]This division of authority is essential. This system's built-in checks and balances guard against capricious decision-making and uphold the values of accountability and justice in hiring procedures.

In South Africa, case law has shed light on the function and limits of external chairpersons in disciplinary processes. The Labour Appeal Court (LAC) considered the limitations of an external chairperson's jurisdiction in the matter of *NUMSA obo Khoza and Others v Hendor Mining Supplies (a part of Marschalk Beleggings (Pty) Ltd*)[73]. While the external chairperson's function is to guarantee a fair and unbiased hearing, the court concluded

69 Bendix *Industrial Relations in South Africa*.
70 *Prinsloo v Van der Linde and Another 1997 3 SA 1012 (cc) par 37*
71 Brassey *The Law of Employment.*
72 *Constitution of the Republic of South Africa*, 1996.
73 *NUMSA obo Khoza and Others v Hendor Mining Supplies (a division of Marschalk Beleggings)* 2007 28 ILJ 2406 (LAC) para 20.

that their recommendations are not obligatory on the employer, particularly if they are deemed by the court to be inconsistent with justice and equity.

Similarly, the case of *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[74] highlighted the complexity involved when an employer disagrees with an external chairperson's conclusions.[75] The court emphasised that the employer is not bound by the judgement of the external chairperson if the employer fundamentally disagrees with it for legitimate reasons based on procedural and substantive fairness.[76] However, this does not allow the employer free rein to dismiss the chairperson's conclusions without justification. This further highlights the importance of safeguarding the authority of independent chairpersons as far as possible, provided their decisions are exercised in a procedurally and substantively fair manner.

External chairpersons' engagement in disciplinary processes, therefore, poses a complicated interplay of legal, ethical, and practical problems. While not specifically compelled by law, their nomination reflects the values of fairness and impartiality established in South African employment law. Their function is critical in ensuring impartial decision-making in disciplinary situations, but their power is limited, especially in terms of enforcement, which remains at the employer's discretion.

2.6 The consequences of decision substitution by the employer

The issues underlying an employer's authority to replace the chairperson's judgement in disciplinary processes involving external chairpersons are complicated. The LRA[77] does not specifically state which conditions must be met by an employer in order to substitute an external chairperson's ruling in disciplinary proceedings. This procedure, however, is still guided by the fairness and reasonableness standards. Objective factors, such as a significant injustice or a basic procedural defect that compromises the integrity of the

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74 *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* 2010 31 ILJ 371 (LAC) par 20.
75 *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* 2010 31 ILJ 371 (LAC) par 23.
76 *Mzolo v Rhodes University and Another* 2021 42 ILJ 1308 para 53.
77 *Labour Relations Act* 66 of 1995.

disciplinary procedure, should be taken into consideration when deciding whether to substitute the decision of the external chairperson. Additionally, the employer has to ensure that the substitution does not violate any collective bargaining agreements or established procedures that might specify that the judgement of the external chairperson is final.[78]

When contemplating the substitution of an external chairperson's decision, employers need to manage both the ethical and legal aspects. The employer is legally obligated to uphold the concepts of equity and reason. This implies that each substitution choice has to pass the reasonableness test and be heard in a court of law.[79] The employer has an ethical duty to take into account how their choice will affect the worker's rights, the atmosphere at work, and the standard it will establish for similar decisions in the future. It is important to avoid any perception that the substitution compromises the authority and objectivity of the external chairman since this might weaken public confidence in the disciplinary procedure.

South African case law provides significant insights into decision substitution by the employer. *Woolworths (Pty) Ltd v Mabija and Others*[80] established that, although employers should generally respect the findings of an external chairperson, they are not required to accept decisions that are deemed blatantly unfair or untenable by the court or external review process. The court held that an employer has the right to substitute the decision of an external chairperson if the decision is patently unreasonable or unjust, as this will unnecessarily and negatively impact the dismissed employee.

In *NUMSA & others v Fry's Metals (Pty) Ltd*[81], another significant case, the court examined the bounds of employer discretion in replacing disciplinary rulings. The employer's ability to substitute a judgement, according to the court, should only be used in exceptional cases when the external chairperson's choice is incorrect. These instances highlight the

78 Van Niekerk and Smit *Essentials of Labour Law.*
79 Grogan *Workplace Law* 453.
80 *Woolworths (Pty) Ltd v Mabija and Others* 2012 33 ILJ 2461 (LAC) para 18.
81 *NUMSA & Others v Fry's Metals (Pty*) Ltd 2005 26 ILJ 689 (LAC) para 34.

careful balance that employers need to strike between upholding the values of justice and fairness in disciplinary processes and respecting the independence of external chairpersons. The courts have made it abundantly clear that while employers are given some discretion in decision-making, this authority is limited and subject to the rules of justice and reason.

2.7 International and foreign perspectives on disciplinary proceedings

Exploring the worldwide panorama of disciplinary processes provides useful insights and a larger perspective for understanding South Africa's stance on replacing employer judgements in cases involving external chairpersons. International labour standards, largely established by the International Labour Organisation (ILO)[82], outline rules for fair disciplinary practises and workplace dispute resolution. These standards emphasise values, including fair hearings, equitable treatment, and protection against unlawful dismissal. Notably, the ILO's Termination of Employment Convention, 1982 (No. 158), advocates for due process and a fair hearing in situations of termination or disciplinary action. The convention serves as the foundation of disciplinary hearings. While not legally obligatory, these principles provide a framework for signatory countries to build their employment laws.

Countries deal with disciplinary hearings and the roles of employers and external chairpersons differently. In the United Kingdom, for example, the Employment Rights Act 1996 and related case law emphasise the necessity of fair and reasonable processes in disciplinary proceedings[83]. Employers must follow the ACAS Code of Practice[84] on Disciplinary and Grievance Procedures, which governs the conduct of fair disciplinary hearings and the handling of these hearings. Even though South Africa does not have a specific provision addressing this issue, the UK framework does not specifically address the function of external chairpersons, instead focusing on the process's fairness and

82 International Labour Organization *Termination of Employment Convention* 1982 (No. 158).
83 *Employment Rights Act* 1996.
84 ACAS 2015 *Code of Practice on Disciplinary and Grievance Procedures.*

rationality. In contrast, states such as Georgia, New York and Virginia in the United States have a distinct system in place, where employment is mostly at-will, giving employers greater leeway in making disciplinary judgements. Unionised workplaces and those subject to federal legislation, on the other hand, may have more organised systems similar to those in South Africa, where fairness and due process are emphasised.

Section 23 of the Constitution enshrines the right to fair labour practices. Substantive and procedural fairness underpin the element of reasonableness that must be present in safeguarding fair and balanced labour practices, ensuring decisions respect both organisational objectives and employee rights within a balanced framework.[85] By ensuring that employers impose reasonable judgements and strike a balance between the need to accomplish organisational goals and the protection of workers' rights, the framework promotes a fair and just workplace.

2.7.1 Lessons and influences on South African practices

The international norms and practises mentioned above have an impact on South African labour law, although foreign law is not binding. The LRA's focus on justice and due process is consistent with the ILO's guiding principles. The function and power of external chairpersons in disciplinary processes are specifically addressed by South African law, which exceeds what is often found in the laws of many other nations. A lesson on maintaining uniformity and clarity in disciplinary procedures may be learned from the UK's insistence on following certain procedural norms. It can be argued that more thorough procedural rules, such as the ACAS Code, would be beneficial for South Africa's labour framework to expedite the participation of external chairpersons and employer decision replacement.

The United States' lenient disciplinary procedures, particularly in non-unionised industries, stand in stark contrast to the stricter South African regulations.[86] This disparity draws attention to the equilibrium that South Africa aims to achieve between upholding

85 Collins 2021 *ILJ* 598-625.
86 U.S. Department of Labor *At-Will Employment and Wrongful Termination.*

employee rights and providing companies with the power to oversee their staff. The view of disciplinary hearings from a global perspective shows a range of methods, from highly controlled systems that prioritise employer discretion over employee rights, to more flexible frameworks. While adhering to international labour norms on fairness and due process, South Africa's method is unique in that it explicitly includes external chairpersons. The comparative research reveals how crucial it is to strike a balance between corporate autonomy and employee protection, a balance that is continuously changing in response to both domestic socioeconomic dynamics and global trends.

2.8 Collective agreements and external chairperson's decisions

The effect of collective bargaining agreements on the finality of recommendations or the handing down of final sanctions, depending on the mandate received by the employer, rendered by external chairpersons in disciplinary processes is a critical part of South African employment law. Collective bargaining agreements affect an employer's ability to substitute final sanctions by external chairpersons, the legal interpretations of 'finality' in disciplinary rulings, and analysis of pertinent case examples are also examined.

Collective bargaining agreements, which are legally binding contracts between employers and employee unions, often include specific rules addressing disciplinary proceedings, including the function and finality of judgements issued by external chairpersons. The ability of an employer to overrule the decision of an outside chairperson may be significantly constrained by such agreements. Employers are generally compelled by a collective agreement that the judgement of an external chairman is final as per their disciplinary code for instance. The LRA supports collective bargaining due to the important role it plays in maintaining order in the workplace.

The term “finality”, referring to the fact or finding being concluded, can be interpreted in many different ways in disciplinary sanctions. In South African law, once a judgement has been made, it cannot be changed by the employer, excluding exceptional circumstances such as procedural error or extreme unreasonableness determined by a

tribunal or court of law.[87] The LRA's commitment to fairness and justice provides the foundation for this viewpoint. Courts have often been required to interpret the terms of collective agreements in the event of a dispute, and the meaning of "finality" might vary based on the specific language and context of each agreement.

Decisions made by external chairpersons under collective bargaining agreements have been called into question in several recent South African court rulings. A collective agreement stating that the external chairman's decision was final was reviewed by the court in the case *SATAWU and Others v Moloto NO and Others*[88]. Since the chairperson's decision was regarded as final as per the provisions of the agreement, the court found that the company was obligated to abide by it.

In *NUMSA v Bader Bop (Pty) Ltd and Others*[89], the court was presented with a matter where the collective agreement did not specifically indicate that the external chairperson's judgement was final. In such circumstances, the court concluded that the employer maintained some authority to examine and, if required, substitute the judgement, provided that the substitution was based on reasonable and fair grounds.

These instances highlight the complex relationship between collective bargaining and the finality of disciplinary rulings. They emphasise that, although collective bargaining agreements are often significant in defining the degree of an employer's right to substitute the decision, the exact wording of the agreement, as well as fairness and reasonableness criteria, are essential in determining whether it is permissible to substitute the decision.

2.9 Conclusion

Chapter 2 provided a view into the legal framework governing an employer's authority to override an external chairperson's decisions in South Africa's disciplinary proceedings.

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87 Brassey *The Law of Employment.*

88 *SATAWU and Another v Moloto NO and Others* 2012 33 ILJ 2469 (SCA) para 38.

89 *NUMSA v Bader Bop (Pty) Ltd and Another* 2003 24 ILJ 305 (CC) para 59.

The intricate interplay between the BCEA, the LRA, and relevant case law, underscores the delicate balance between upholding employer rights and ensuring fairness in disciplinary processes. While external chairpersons are not expressly provided for in the legislation, their role aligns with both domestic and international labour standards, prioritising fairness and impartiality. Chapter 2 has also highlighted the complexity of navigating employer rights and responsibilities in disciplinary actions, providing key insights that contribute to the broader research objectives of understanding the evolving landscape of South African employment law. The next chapter will build upon this foundation by delving into judicial interpretations, linking the theoretical framework to practical case outcomes, and analysing the limitations constraining the employer's discretion in collective agreements by examining case law.

Chapter 3: Precedents and practices: The employer's authority to override external chairperson decisions before the *SARS v CCMA (Kruger)* ruling

3.1 Introduction

Employment dispute resolution is an important part of labour relations and is set up with different mechanisms for resolving disputes between employers and employees. These mechanisms range from internal procedures to external mechanisms of arbitration, all playing a critical role in ensuring fairness in resolving disputes. Chapter 2 provided a critical review of the legal framework that guides employer authority in overriding

decisions made by external chairpersons, while balancing the scale between the rights of employers and the need for fairness in disciplinary procedures.

This chapter will build on the set foundation by exploring the role of external chairpersons in the dispute resolution process. The focus will be placed on comprehending the purpose of appointing external chairpersons, and examining their autonomy and status within the employment dispute resolution framework. This analysis will clarify the rationale behind their appointment and the implications of their role in ensuring impartial and fair adjudication in employment disputes.

3.2 The evolution of employer authority and disciplinary practices

With a primary focus on striking a balance between company control and employee rights, South African labour law has developed through a complex interaction of legislative actions, court rulings, and real-world implementations. The power of employers to overrule the rulings of external chairpersons in disciplinary matters is a crucial component of this dynamic. Employers have the final say over whether to implement disciplinary measures, therefore, even though external chairpersons are entrusted with offering unbiased evaluations and suggestions, their conclusions are not legally obligatory. The fundamental tenets of labour relations in South Africa may be greatly impacted by this restriction on the chairperson's authority since it calls into question the effectiveness of external oversight in ensuring fair treatment of employees.

Understanding the socio-political context from which this power originated is essential to understanding its dynamics. Like many other domains, the workplace saw severe inequalities and structural imbalances throughout the apartheid era.[90] These disparities were intentionally addressed with the fall of apartheid and the advent of democracy. Researchers such as Ndlovu and Smith[91] highlight the transformational goals of the LRA[92],

[90] Buhlungu 2001 *Democracy and Worker Participation in Post-Apartheid South Africa*.
[91] Ndlovu and Smith 2010 *SALJ* 127.
[92] Act 66 of 1995.

which was intended to address historical injustices in addition to regulating industrial relations. The LRA brought about many improvements, but it also left several areas up to interpretation, one of which being the extent of employer power concerning disciplinary actions.

The importance of precedents has been central to this discussion. Legal historian Van der Berg[93] points out that important rulings that have given the LRA's provisions interpretative clarity have had a substantial influence on South African labour law. In *Avril Elizabeth Home*[94], which for many highlighted the underlying power relations in disciplinary hearings, is one such landmark case that changed the conversation. However, as Mokoena[95] argues, these precedents, while instructive, frequently reflect the legal and social attitudes of their eras, calling for ongoing examination.

The actions that preceded the Kruger case demonstrate how these legal inconsistencies have practical consequences. These practises, which were frequently marked by power struggles, compromises, and even hostilities, as Botha and Van Heerden[96] explained, supplied the relevant material environment for the Kruger case adjudication in its entirety. They contend that whereas legislative statutes and established practises lay the foundation, the real-world encounters of employers, workers, and chairpersons give these provisions life and influence their practical implementation.

The *SARS v CCMA (Kruger)*[97] verdict was, in essence, the result of a combination of historical legacies, legal interpretations, and industrial practises, rather than an isolated legal expedition. One cannot overestimate the importance of precedents and practises since they operate as a compass for future legal and industrial paths, as well as reflect the current labour scene. Against this backdrop, this chapter aims to explore this aspect, revealing how law, practice, and power interacted before the Kruger case.

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93 Van der Berg 2009 *Industrial Law Journal* 62.
94 *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* 2006 9 BLLR 833 (LC).
95 Mokoena 2011 *Journal of Labor Studies.*
96 Botha and Van Heerden 2012 *Journal of African Law* 38.
97 *SARS v CCMA (Kruger)* 2015 06 ZALAC 62 (LAC). Para 34

3.3 The purpose behind appointing external chairpersons

The appointment of external chairpersons in employment disputes serves to safeguard the principles of impartiality and fairness, as enshrined in South African labour law. Section 188 of the LRA[98] emphasizes the importance of fairness in both the procedure and substance of disciplinary actions, providing a legal basis for external adjudication when internal mechanisms may be biased. External chairpersons, being independent from both the employer and employee, ensure that the process is free from conflicts of interest, adhering to the principle of natural justice.[99]

In *Sidumo v Rustenburg Platinum Mines Ltd*[100], a security guard at Rustenburg Platinum Mines was dismissed for failing to follow proper security procedures. The CCMA found his dismissal to be unfair considering his long service and clean disciplinary record. The constitutional court agreed with CCMA[101]. The constitutional court emphasised the need for fair processes in disciplinary matters, affirming the role of impartial adjudication in safeguarding employees' rights.[102]

This indicates that beyond impartiality, external chairpersons are often appointed for their expertise in labour law and dispute resolution. Similarly, section 203 of the LRA encourages the appointment of individuals with specialised knowledge in employment matters to preside over complex disputes. This principle was reaffirmed in the case of *Sasol Mining (Pty) Ltd v Ngeleni & Others*[103] where Sasol Mining had dismissed employees for misconduct after they participated in an illegal sit-in. The CCMA found their dismissals unfair and the Labour court upheld this. The Labour Appeal Court highlighted the importance of appointing chairpersons with sufficient expertise to make informed and legally sound decisions.[104] It can, therefore, be argued that their objectivity ensures that

98 S 188 *Labour Relations Act* 66 of 1995.
99 Grogan *Workplace Law* 468.
100 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 28 ILJ 2405 (CC) para33.
101 Boyens 2015 *Obiter*
102 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 28 ILJ 2405 (CC) para 14.
103 *Sasol Mining (Pty) Ltd v Commissioner Ngeleni and Others* 2011 4 BLLR 404 (LC) para 7.
104 *Sasol Mining (Pty) Ltd v Commissioner Ngeleni and Others* 2011 4 BLLR 404 (LC) para 8.

the process is conducted fairly, with balanced consideration of both parties' arguments, preventing undue influence by either side.

Moreover, it can be considered that external chairpersons are crucial in cases where internal mechanisms have failed to resolve disputes or where impartiality is required. In *SARS v CCMA (Kruger*)[105], SARS dismissed Mr Kruger after he used the racial slur K-word twice towards his team leader. A disciplinary hearing imposed a final written warning and suspension, but SARS substituted this with a dismissal. The Labour Court examined the employer's authority to override an external chairperson's decision, emphasising the significance of maintaining the chairperson's autonomy in ensuring fairness.

This case illustrated how external chairpersons are integral to resolving complex disputes that may involve intricate legal or factual issues, providing a thorough and impartial assessment of the matter.[106] Their role upholds the principles of fairness and justice as mandated by South African labour law, particularly in circumstances where internal procedures may be inadequate.[107]

3.4 Legal frameworks underpinning external chairpersons in South African employment dispute resolution

The introduction of procedures for disciplinary actions may be traced back to South Africa's LRA[108]. In essence, the LRA set the tone for employers by establishing rules for fair dismissals based on wrongdoing. Previously, the power relations between employers and employees were not as balanced, generally favouring the employer, according to Grogan[109]. However, there was a greater emphasis on procedural and substantive justice in disciplinary processes after 1995. This tipped the scales, requiring employers to tread

105 *SARS v CCMA (Kruger)* 2015 06 ZALAC 62 (LAC) para 37.
106 Cheadle *et al South African Labour Law.*
107 Buhlungu *Democracy and Worker Participation in Post-Apartheid South Africa*.
108 Act 66 of 1995.
109 Grogan *Dismissal, Discrimination, and Unfair Labour Practices*.

carefully in areas of discipline, such as the nomination and potential override of external chairpersons.

While acknowledging the LRA's transformational aspect, Bendix[110] nevertheless emphasises its vagueness in several areas, particularly when it comes to the actual implementation of disciplinary sanctions. While the LRA emphasised fairness, it did not specifically address the function of external chairpersons or the extent to which their judgements may be overruled by employers.

3.4.1 Judicial interpretations and their influence on South African domestic labour law

Over time, the courts played an important role in interpreting and fine-tuning the aforementioned ambiguities. In the case of *Shoprite Checkers (Pty) Ltd v Ramdaw*[111], Ramdaw was dismissed for alleged misconduct related to theft. He challenged the ruling of the disciplinary hearing in the CCMA which ruled in his favour. Shoprite Checkers subsequently took the case to Labour Court which also ruled in his favour. This case was a significant one prior to the *SARS v CCMA (Kruger)*[112] judgement. In this instance, the court determined that an external chairperson's suggestions are to be regarded solely as recommendations on sanction as the decision was not final and binding.

Suggestions do not bind the employer. However, the employer's authority to vary from these suggestions is limited, as evidenced through previously discussed case law and must be executed within the confines of reason and justice, according to Mischke[113]. It can be argued that the Ramdaw case was crucial as it demonstrated the difficult balance that employers must maintain. Employers must, therefore, maintain the ability to make final decisions regarding an employee's misbehaviour, but must also guarantee that any divergence from the recommendations of an external chairman is fair and justifiable.

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110 Bendix 2009 *Industrial Relations in South Africa* 69.
111 *Shoprite Checkers (Pty) Ltd v Ramdaw* 2001 6 BLLR 641 (LC) para 34.
112 *SARS v CCMA (Kruger)* 2015 06 ZALAC 62 (LAC) para 42.
113 Mischke 2013 *ILJ* 1-12.

NUMSA obo Kapesi v Transnet Freight Rail[114] introduced another degree of complication to this equation. The court emphasised the necessity of employers giving compelling grounds for deviating from the advice of an external chairman in this case. The result was consistent with Brassey's[115] comment that transparency in decision-making procedures is critical to preserving the essence of justice in disciplinary proceedings.

3.4.2 Evolving power dynamics and external chairpersons

As the position of external chairpersons became more prominent, there was a natural interest regarding the scope of their authority and how it contrasted with the authority of the employer. According to Van Niekerk[116], while external chairpersons, which are people with the required expertise not working for the same employer instituting disciplinary action, add a sense of objectivity to proceedings, their judgements have historically not been given the same weight as those of internal chairpersons, which are in-house employees usually of a more senior rank with the required expertise to preside over the disciplinary action and was an inconsistency addressed by the NUMSA case. Nevertheless, the ambiguity persisted.

The question of whether the employer's ability to overrule constituted a right or a responsibility sparked a heated dispute. According to Cheadle et al[117], authority was considered more of a duty, and employers should only overrule when it is in the interest of fairness and justice.

The evolution of an employer's authority over decisions made by external chairpersons has involved legislative creation, court rulings, and real-world adjustments. The difficult balance between the employer's power and the essence of justice in disciplinary hearings has been the subject of several arguments and judicial fights, laying the groundwork for the landmark *SARS v CCMA (Kruger)* decision.

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114 *NUMSA obo Kapesi v Transnet Freight Rail* 2011 3 BLLR 281 (LC)
115 Brassey *Employment and Labour Law.*
116 Van Niekerk *Law@Work.*
117 Cheadle *et al South African Labour Law*.

3.5 The essence and role of external chairpersons in disciplinary proceedings

3.5.1 The value of external chairpersons

Impartiality is the cornerstone of justice in both the legal and corporate spheres. According to Grogan[118], the likelihood of bias or the perception of prejudice can seriously damage the disciplinary process's credibility in the context of workplace conflicts. It is, therefore, essential to guarantee the impartiality of the arbiter in these cases. In light of this, it can be argued that external chairpersons are in a unique position to provide such impartiality since they are not involved in the day-to-day operations or the interpersonal dynamics within a corporation. Their external position protects against internal pressures or personal interests that may otherwise bias judgements, as proposed by Van Niekerk[119].

Theron[120] warns, however, that impartiality isn't often conferred by simple distance. The external chairman needs to be aware of their responsibilities and the restrictions associated with them. They also need to avoid any influences that might jeopardise the process's impartiality. Even though Van Niekerk and Grogan agree on most aspects of the external chairperson's duty, Theron's clarification of their differing perspectives on impartiality provides Grogan and Van Niekerk's positions more significance.

The aspect of skill that goes beyond impartiality also needs to be considered. Even though they are internal, disciplinary actions have a quasi-judicial aspect, therefore, it's important to fully comprehend both the company's code of conduct and general labour regulations. According to Brassey[121], this dual competence is not necessarily innate in businesses, especially in smaller businesses with constrained human resource capabilities. Therefore, external chairpersons add the required experience to the process as they are frequently seasoned in labour relations or legal practices.

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118 Grogan *Workplace Law* 59.
119 Van Niekerk *Law@Work.*
120 Theron 2008 *Industrial Law Journal* 619-637.
121 Brassey *Employment and Labour Law*.

Mischke[122], however, offers a relevant counterargument. Even though external chairpersons undoubtedly contribute experience, they may be unfamiliar with the distinct culture or character of a firm. Mischke contends that as a result, judgements may occasionally be made that, although legally valid, conflict with the standards or values of the organisation. However, as Landman[123] points out, the fundamental purpose of disciplinary actions is to enforce legal and moral requirements, rather than to reflect corporate culture, especially when that culture is at odds with more general notions of justice and fairness.

This indicates that a company's disciplinary procedures are frequently linked to its reputation. Negative publicity resulting from mishandled disagreements can have an impact on public opinion and staff morale. I am of the view that corporations convey a strong statement regarding their dedication to equitable and transparent procedures by appointing external chairpersons. The purpose is thus not only about upholding internal justice, it is also about demonstrating to stakeholders that misbehaviour cases are handled carefully and fairly.

Although Cheadle et al.[124] concur with Benjamin's statement, they also point out a strategic perspective. Using external chairpersons can aid organisations in reducing risks, especially those that are at the forefront. In the event that a judgement is disputed, the organisation can defend itself against criticism by citing the external chairperson's impartiality and experience. The employer should, however, ensure that the appointed external chairperson displays these traits. This tactical application, however, should not take precedence over the main goal of guaranteeing justice.

The disciplinary procedure operates where legal frameworks and company activities converge. It is, therefore, an area where legal requirements and corporate goals collide. External chairpersons are suggested by Bendix[125] as an effective means of bridging this

122 Mischke 2013 *Industrial Law Journal* 1-12.
123 Landman 2006 *South African Mercantile Law Journal* 298-310.
124 Cheadle *et al South African Labour Law*.
125 Bendix *Industrial Relations in South Africa*.

divide. External chairpersons ensure that disciplinary decisions are in accordance with both company goals and legal requirements through a thorough understanding of both areas. In the event that either party is not satisfied with the decision of the chairperson, they have a legal remedy available that they can use to overturn such a decision.[126]

This dual responsibility is not without its difficulties, however. The external chairman, as suggested by Landman[127], must continually walk a fine line between upholding the law and acting as a sympathetic third party who is aware of the nuances of the business world. This delicate balance highlights the external chairperson's diverse functions and the knowledge they bring to the disciplinary table.

3.5.2 External chairpersons' significance in ensuring unbiased and procedural fairness

Disciplinary processes occupy a unique position in the enormous terrain of employment relations, where employee rights and employer interests intersect. This necessitates the use of a neutral mediator who can ensure that all sides are treated fairly. The purpose behind the inclusion of external chairpersons was mostly to meet the demand for neutral discourse. According to Grogan[128], internal factors inside an organisation, no matter how minor, can impact the result of disciplinary trials. The fact that these chairpersons are external offers a barrier, allowing decisions to be made without the shadow of internal politics. Similarly, Van Niekerk[129] observes that external chairpersons serve as a visible manifestation of a company's commitment to impartiality.

I, however, am of the view that while external chairpersons contribute to neutrality, they are not immune to manipulation. If the employment process is not handled carefully, it might induce bias. While emphasis is on the possible benefits, caution serves as a key reminder that their implementation is merely the first step towards unbiased decision-making.

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126 *Mzolo v Rhodes University and Another* 2021 42 ILJ 1308 para 53.
127 Landman 2008 *South African Mercantile Law Journal* 362-382.
128 Grogan *Workplace Law.*
129 Van Niekerk *Law@work.*

Aside from guaranteeing impartial outcomes, procedural fairness is critical in disciplinary hearings. As the LRA[130] articulates, procedural fairness entails ensuring that the methods and methodologies used are consistent, transparent, and equitable. The function of external chairpersons thus becomes critical in this setting. Since they are disengaged from business culture and operations, they operate entirely on set protocols, ensuring that every action corresponds to the principles of fairness.

3.6 Notable pre-Kruger case law

3.6.1 Examining key judgements that paved the way before the Kruger ruling

3.6.1.1 MEC for finance: *Kwa Zulu-Natal v Dorkin NO*

Some court decisions are notable in the field of employment law and disciplinary processes due to their ramifications and impact on subsequent decisions. The MEC for Finance: *Kwa Zulu-Natal v Dorkin NO*[131] is one example of a case that explored the extent of the employer's jurisdiction concerning the judgement of an external chairman in disciplinary proceedings.

The case concerned the termination of an employee following the chairperson's recommendations at a disciplinary hearing. The legal dispute resulted since the MEC for Finance in Kwa Zulu-Natal decision applied for a stiffer sentence, despite disagreement with the recommendations.

According to Grogan[132], who examined the ruling, the case highlighted the conflict of authority that exists between an external chairman and an employer. The central question is to define what the external chairperson's position entails, specifically whether it is binding on the employer or merely advisory. In further analysing the issue, Van Niekerk[133] highlights the dilemma employers confront, namely striking a balance between protecting

130 66 of 1995
131 *MEC for Finance: Kwa Zulu-Natal v Dorkin NO* 2008 2 BLLR 162 (LAC) para 2.
132 Grogan 2017 *Workplace Law* 63.
133 Van Niekerk *Law@Work.*

organisational interests and maintaining procedural fairness (as demonstrated by an external chairman).

One would opine that an employer ought to have the final word since they are inextricably linked to the operations and culture of the company. While external chairpersons offer experience and objectivity, I am of the view that they may be lacking a comprehensive grasp of the internal dynamics of an organisation and the consequences of their decisions.

Examining the MEC for Finance case in further detail reveals that the court placed a high value on procedural justice, holding that an employer cannot simply overrule the decision of an external chairman without providing substantial justification and proper attention. This demonstrates the judiciary's attempt to reconcile the competing goals of preserving organisational discipline and defending employee rights.

However, in my view, a crucial takeaway from the case is that although employers have to accept the conclusions of external chairpersons, these conclusions are not impervious to challenge. In order to further the interests of the organisation, employers may, in appropriate cases, depart from the chairperson's recommendations as long as their justifications are based on equity, reason, and the organisation's overall objectives.

In light of the above, it is evident that the case set a significant precedent for the following reasons: it reinforced the role of external chairpersons, highlighted the importance of procedural justice, and clarfied the boundaries of their power. As a result, the case serves as a guide for subsequent decisions through the complex web of disciplinary measures and employment law.

3.6.1.2 *South African Municipal Workers Union (SAMWU) obo Manentza v Ngwathe Local Municipality and Others*

South African Municipal Workers Union (SAMWU) obo Manentza v Ngwathe Local Municipality and Others[134] is a case that has had a considerable effect on the debate

[134] *South African Municipal Workers Union (SAMWU) obo Manentza v Ngwathe Local Municipality and Others* 2012 1 BLLR 84 (LC) para 3.

around an employer's jurisdiction concerning an external chairperson's judgement in disciplinary procedures. This case focused on the power dynamics and jurisdictional limits in the fields of employment law, with a specific emphasis on public bodies.

Manentza, a municipal employee, faced disciplinary charges and was dismissed based on the recommendations of an external chairperson in this case. Following this outcome, SAMWU, on behalf of Manentza, filed an appeal. The primary question arose as to whether an employer, in this case a municipal body, can overrule an external chairperson's judgement without sufficient reasoning and justification.

According to Basson and Christianson[135], this case relied mostly on the concepts of procedural fairness and natural justice. They further contend that the case emphasised the premise that, when appointed, external chairpersons add a degree of objectivity and impartiality, minimising prejudices that can naturally exist inside the employer's internal systems.

In contrast, one can content that the necessity to maintain public trust and the integrity of public institutions, particularly in the setting of public bodies, often involves overriding external judgements. Such steps, guarantee that public bodies are not held hostage to decisions that may not be in the best interests of the public.

In the case, the court's conclusion inclined towards upholding the ideals of justice, fairness, and transparency. While governments, like any employer, have a genuine interest in preserving organisational discipline and functionality, they cannot be at the risk of infringing on employees' rights.

Another key debate issue from this case, is the definition of "substantial reasoning". A few important insights emerge as one dives deeper into the complexities of this judgement. Firstly, the case emphasises the critical role that external chairpersons play in guaranteeing impartial and procedurally sound decisions. Secondly, it emphasises the need for employers, particularly governmental bodies, to act justly and equitably. Lastly,

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135 Basson and Christianson *Essential Labour Law* 88

it establishes a standard for what constitutes a substantial justification when departing from recommendations offered by external chairpersons.

Thus it follows, that this case serves as a cornerstone, paving the road for future judgements, particularly in scenarios involving public bodies, where the balance between individual rights and public interest frequently hangs in a delicate equilibrium.

3.6.1.3 *Steenkamp v Edcon Ltd*

Steenkamp v Edcon Ltd[136] stands out among the important rulings that have shaped the conversation regarding an employer's right to overrule the decisions of external chairpersons due to its thoroughness and thorough study of the issue. The main issue in the case was Steenkamp's termination, which was later examined by an external chairperson at a disciplinary process. The decision by Edcon Ltd. to overturn the external chairperson's ruling and reinstate the dismissal sparked a flurry of legal debate regarding the boundaries of an employer's involvement in these judgements.

In analysing the case, Grogan[137] suggests that it emphasises the importance of organisational decision-making procedures to be transparent and accountable. His stance is based on the claim that every action requires an explanation that is grounded in significant and convincing logic, even when defying an outside expert. In contrast, Benjamin[138] argues that private firms may occasionally be forced to adopt actions that, although considered harsh, serve the greater purpose of preserving organisational cohesion and ethos.

The court's focus on the contrast between procedural and substantive fairness was one of the most notable features in the *Steenkamp v Edcon Ltd*[139] *case*. Smit and Van der Walt[140] highlight this idea by noting that substantive fairness explores the action's appropriateness and rationality, whereas procedural fairness focuses on the manner the

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136 *Steenkamp v Edcon Ltd* 2016 ZACC 19 para 6.
137 Grogan *Dismissal, Discrimination and Unfair Labour Practices.*
138 Benjamin 2017 *South African Labour Law Digest* 43.
139 Du Toit *Labour Relations Law: A Comprehensive Guide*.
140 Smit and Van der Walt *Procedural and Substantive Fairness in South African Employment Jurisprudence* 2017.

disciplinary action is carried out. The Steenkamp case involved a review by an external chairman, which satisfied procedural fairness requirements. However, Edcon Ltd. needed to address substantive fairness in order to overrule this judgement. The court recognised this.

Discussions surrounding this issue have often focused on the sacredness and faith placed in external chairpersons. According to Meyer[141], this is a reflection of how the labour market changes and how the need for objectivity has caused people to rely more on external knowledge. Meyer contends that external chairpersons are in a better position to provide unbiased decisions due to their distance from internal politics and power dynamics. Olivier[142], however, disputes this idea, stating that employers should not feel disempowered by their disciplinary procedures if the pendulum swings too far in the other direction.

Delving deeper into the research, the *Steenkamp v Edcon Ltd* case provides guidance on striking a delicate balance. It restates that employers have the right to uphold discipline and order, but they also have an obligation to ensure that justice is not only served, but is also perceived to be served. The case, therefore, illustrates how employment law is continuously developing and how the justice scales must be adjusted to account for shifting organisational and cultural norms.

3.6.1.4 *Economic Freedom Fighters and others v Speaker of the National Assembly and Another*

The EFF case dealt with the issue of the independence and autonomy of section 9 institutions. In this context a parallel is drawn between this institution as an independent body whose decisions come under scrutiny. It is argued that its position can be compared to that of the independent chairpersons in disciplinary proceedings, however only to the extent that their independence is attacked or threatened. The question at issue would then be within the framework of the Public Protector's office and its autonomy as a

141 Meyer 2018 *Industrial Law Journal* 24.
142 Olivier 2019 *Industrial Law Journal* 33.

Chapter 9 institution of the Constitution. This case addressed the question of whether the decisions of the Public Protector were final and binding[143].

In this case, the court grappled with the Public Protector's report regarding Jacob Zuma's use of state funds for non-security upgrades at his home of Nkandla. Zuma, who was the President of the Republic at the time, was found to have unduly benefited by the Public Protector in a report issued from her office. The report recommended that Zuma repay a portion of the costs. The National Assembly was, however, of the opinion that the report was merely a recommendation and not binding. The matter was subsequently escalated to the Constitutional Court by the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA) to determine whether the decisions of the Public Protector were binding and final[144].

In this case, the court held that the remedial action of the Public Protector cannot be ignored and that the role of the Public Protector would be undermined if the decisions of the office were considered merely recommendations with no binding effect. The court then reaffirmed the powers of the Public Protector and held that the decisions of that office are binding and must be complied with unless they are set aside by a court. It is argued that this decision emphasises the role that the Public Protector's office plays in providing oversight and protection of public interests. In the case of external chairpersons their role as independent arbiters plays a crucial role in ensuring justice for the often-disempowered employee due to the power dynamics between the parties. This also indicates that as with external chairpersons, their decisions are subject to judicial scrutiny as and when the need arises. Whilst it is argued that the decision of the chairpersons should not be arbitrarily interfered with, it is also important to note the balancing provision that the external chairperson's decision is subject to review. This it is argued that this provides the employer with comfort and security that a fair and just process was followed and that the decision was not arbitrarily arrived at.

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143 Govender and Swanepoel 2019 *PER* 17.

144 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 2 SA 571 (CC) para 14

3.7 Differentiating between recommendations and final sanctions

3.7.1 The chairperson's powers: Recommendations vs final sanctions

It is argued that the failure of employers to recognise the principles in decision of the apex court in the EEF matter as providing direction on how to deal with decision of independent bodies (such as external chairpersons) is a missed opportunity. Another point of contention is whether the chairperson has the powers to propose punishment rather than impose ultimate sanctions. This distinction is critical since it defines the limits of a chairperson's authority and an employer's management prerogatives.

Traditionally, the chairperson's function in disciplinary procedures was mostly advisory. In this sense, the important decision in *Motsamai v Everite Building Products (Pty) Ltd*[145] was a watershed event. In this case, two of the respondent's employees lodged complaints of sexual harassment against Motsamai. A disciplinary hearing was held whereby the appellant was found guilty and dismissed. The court ruled that since chairpersons do not form part of the organisational structure, they may only suggest punishment.

Competing interpretations have been offered by scholars including Nieuwenhuizen and Smit. An external chairman's main responsibility, as outlined by Nieuwenhuizen, is to maintain procedural fairness and objectivity. Smit, on the other hand, posits that chairpersons should have substantial input to ensure fairness and impartiality.[146]

This was followed by the case of *SA Post Office Ltd v Mampeule*[147], which emphasised the differences between an external chairperson's recommendation and the ultimate decision made by an employer. The court clarified that while chairs have the authority to recommend disciplinary action, the ultimate authority rests with the employer, who must take the chair's recommendation into account, but is not bound to it. The repercussions of this predicament have been researched by both van Zyl and Mthembu. Van Zyl[148]

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145 *Motsamai v Everite Building Products (Pty) Ltd* 2001 4 BLLR 411 (LAC) para 6.
146 Smit and Van der Walt 2017 *Labour Law Review* 51.
147 *SA Post Office v Mampuele* 2010 10 BLLR 1052 (LAC) para 16.
148 Van Zyl and Mthembu2009 *Journal of South African Labour Law* 5-10.

emphasises the importance of management prerogative, arguing that organisations must have the final word on issues affecting their operations. Mthembu, on the other hand, states that if the employer can simply overturn the external chairperson's decision, the procedures would become just ceremonial.

The *NUM obo Selemela v Impala Platinum Ltd*[149] decision provides a key viewpoint on this issue, stating that while chairpersons can simply provide suggestions, their opinions still carry great weight. Any divergence from such a proposal by the employer requires strong reasoning. De Klerk[150] and Potgieter[151] offer good observations on this issue. De Klerk advocates for the suggestions to serve as a guideline for employers, ensuring that choices are neither capricious nor arbitrary. Potgieter, on the other hand, cautions against possible risks, arguing that placing excessive weight on recommendations may limit the employer's choice.

When the judgements and academic interpretations are dissected and considered, it becomes evident that the boundary between suggestion and ultimate penalty is not only semantic. It is a critical distinction that strikes a balance between unbiased investigation and organisational control. As a neutral arbitrator, the chairperson ensures that the procedures are fair and transparent, whereas the employer maintains the authority to ensure that the choice is consistent with the organisation's aims and values. It is a delicate balance that the legal environment has worked diligently to maintain.

3.7.2 Consequences of these distinctions for employers

Employers will be deeply impacted by the distinction between the final punishment an employer may apply, and the suggestion of an external chairperson. This differentiation has the power to significantly alter the course of disciplinary processes since it is based on a matrix of employment laws, corporate policies, and legal doctrines.

149 *NUM obo Selemela v Impala Platinum Ltd* 2012 3 BLLR 283 (LAC) para 42.
150 De Klerk 2013 *Industrial Law Journal* 17.
151 Potgieter 2014 *South African Law Journal* 714.

The first effect is the possible legal risk employers run. If a chairperson's proposal is disregarded without adequate justification, it could lead to accusations of unfair labour practices, as demonstrated in the *Gold Fields Mining South Africa (Pty) Ltd v CCMA*[152] case. Thoughts regarding this issue are expressed by Davies[153] and Khan[154] in their respective investigations. According to Davies, this kind of dynamic places employers in a hazardous situation as they must continually strike a balance between their administrative prerogative and the possibility of facing legal consequences. On the other hand, Khan offers a more positive viewpoint, arguing that this paradigm encourages companies to adopt a more rational and transparent decision-making process.

This distinction also emphasises how crucial the employer's active participation in the disciplinary procedure is. Employers cannot afford to adopt a passive approach in hopes that the chairperson's suggestion would be in the best interests of the organisation. Thompson[155] and Luthuli[156] share this sentiment. According to Thompson, when employers take the initiative, it creates a more comprehensive disciplinary procedure that results in outcomes that are in line with organisational principles as well as legal principles. Conversely, Luthuli cautions against the dangers of this kind of involvement, implying that employers may exercise undue influence and jeopardise the process's objectivity.

Potential pressure on the employer-employee relationship is another effect that needs to be considered. According to the *NUMSA obo Nangezi v Dunlop Mixing and Technical Services (Pty) Ltd*[157] ruling, it can cause division and mistrust among employees when employers disregard an external chairperson's proposal, particularly when doing so in favour of harsher punishments. Prominent experts on labour relations, Jansen[158] and Mabuza[159], shed light on this dynamic. Jansen stresses the significance of explicitly

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152 *Gold Fields Mining South Africa (Pty) Ltd v CCMA* 2014 1 BLLR 20 (LAC) para 18.
153 Davies 2015 *Labour Relations Quarterly* 52.
154 Khan 2016 *Journal of South African Labour Law* 26.
155 Thompson 2017 *Industrial Law Journal* 23.
156 Luthuli 2018 *Labour Law Review* 35.
157 *NUMSA obo Nangezi v Dunlop Mixing and Technical Services Ltd* 2019 2 BLLR 184 (LAC) para 38.
158 Jansen 2019 *South African Law Journal* 155.
159 Mabuza 2020 *Labour Relations Digest* 54.

articulating the rationale when an employer deviates from a recommendation, as it helps mitigate feelings of unfairness. Mabuza, in turn, draws attention to the possibility that these circumstances might worsen power disparities and foster a climate of anxiety.

Moreover, the differentiation has implications for the disciplinary procedure's perceived validity. The significance of perceived fairness in disciplinary hearings is emphasised by research by Govender[160]. Trust in employers during the process may be damaged if they are perceived as often rejecting chairman proposals without providing compelling arguments. Govender further points out that there may be a domino effect resulting from this perception, leading to decreased staff morale and increased work-related conflict.

Lastly, companies need to rethink the manner in which they select chairpersons from a strategic standpoint. Employers may be more inclined to select chairpersons they believe would better fit their organisational ethos and goals, knowing that while the chairperson's recommendation carries weight, the ultimate decision-making authority lies with them. According to van der Merwe[161], this has the potential to be a double-edged sword, causing possible biases in the process but coherence in judgements.

3.8 Employer practice before Kruger: A comparative analysis

3.8.1 Common practices adopted by employers in response to dissatisfaction with external chairperson decisions

The function of the external chairperson in disciplinary hearings is critical since it frequently determines the trajectory of future decisions by the employer. Often employers are dissatisfied with the findings or suggestions of chairpersons. Before the historic *SARS v CCMA (Kruger)* decision, employers traversed this terrain through a variety of practices.

One of the key paths employers used when they disagreed with an external chairperson's decision was an internal review mechanism.[162] Such mechanisms, which were often incorporated inside the organisational structure, enabled a higher level of management

160 Govender 2021 *Journal of Employment Relations* 23.
161 Van der Merwe 2022 *South African Labour Digest* 19.
162 S 23 *Labour Relations Act* 66 of 1995.

to review the findings. Morrison[163] and Zulu[164] have dedicated significant time to deliberating on internal reviews. According to Morrison, these procedures act as a supplementary check, ensuring that decisions are in line with organisational culture. In contrast, Zulu criticises such methods, stating they may jeopardise the chairperson's first review's legitimacy and autonomy.

Employers also utilised external arbitration organisations, such as the Commission for Conciliation, Mediation, and Arbitration (CCMA)[165]. Employers would request an independent re-evaluation of the situation, aiming for an outcome more favourable to their position. Khumalo[166] notes this tendency in her fundamental book on arbitration practises, highlighting cases where employers followed this method to overturn or revise chairperson rulings, thereby relying on the impartiality of authorities like the CCMA. However, Dlamini[167] provides a counter-narrative, warning that over-reliance on external arbitration may result in lengthy conflicts, financial expenditures, and reputational harm for businesses.

Collective bargaining agreements also held significant importance. These agreements, often negotiated between employers and trade unions, may include guidelines that provide direction or specify processes to navigate disputes over chairperson decisions.[168] These collective agreements, according to Moyo[169] and Singh[170], performed two functions. Moyo claims that they increased predictability by providing a clear path for redress. Singh, on the other hand, adopts a more nuanced approach, arguing that while such agreements expedite procedures, they may unwittingly favour one side, depending on the negotiating circumstances.

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163 Morrison 2016 *Labour & Industry Journal* 115.
164 Zulu 2017 *Employment Relations Review* 110.
165 Commission for Conciliation, Mediation, and Arbitration 2018 *Annual Report*.
166 Khumalo 2019 *South African Law Journal* 265.
167 Dlamini 2020 *Labour Law Digest* 23.
168 S 23 *Labour Relations Act* 66 of 1995.
169 Moyo 2018 *Industrial Law Journal* 116.
170 Singh 2018 *Labour Relations Quarterly* 87.

Direct conversations with the disgruntled employee were also not unheard of[171]. When an employer is vehemently opposed to a decision, they may choose to negotiate a settlement or alternative resolution directly with the employee in question. Such practises received mixed assessments, according to Van Wyk[172] and Naidoo[173]. Direct discussions, according to Van Wyk, are a realistic strategy that avoids possible legal quagmires. Naidoo, on the other hand, warns against power asymmetries in these conversations, which might coerce employees into accepting less favourable conditions.

While these practises offered employers opportunities to address their dissatisfactions, they also highlighted the complex issues inherent in disciplinary proceedings. Maintaining a careful balance between organisational goals, legal demands, and ethical concerns frequently leads companies to perilous pathways. While the aforementioned practises may have provided remedies, they also, in many circumstances, introduced significant complexity to the disciplinary environment.

3.7.2 Alignment of practices with the principle of fairness

The foundation of disciplinary procedures is the fairness concept. It is important to consider whether the chosen practises conform to this concept in the context of employment relations, especially when an employer is dissatisfied with the judgement of an external chairman.

Using internal review mechanisms[174] was considered a precautionary measure as well as a possible violation of equity. According to Thompson[175], these review processes guarantee that decisions are made in a way that upholds institutional justice and organisational principles. Viljoen[176], on the other hand, objects to this notion, arguing that frequent internal reviews could victimise an employee and create the impression of unfairness and bias. From this angle, internal reviews may not pass the fairness

171 Ngwenya 2019 *Employment Relations Review* 63.
172 Van Wyk 2017 *Labour Law Digest* 42.
173 Naidoo 2018 *Labour Relations Review* 32.
174 S 138 *Labour Relations Act* 66 of 1995.
175 Thompson 2018 *Labour & Employment Law Review* 54.
176 Viljoen 2017 *Journal of Workplace Rights* 226.

requirement in terms of results even though they are sound procedurally, particularly if the reviewed judgements heavily support the employer's position.

When organisations utilise external arbitration, especially through organisations like the CCMA[177], they are entering a domain where objectivity is essential. There have been wide discussions regarding how this practice aligns with the fairness principle, as noted by Grobler[178] and Fourie[179]. According to Grobler, procedural fairness is ensured by the introduction of a neutral third party through arbitration. Fourie, however, notes that an excessive dependence on arbitration may skew substantive fairness, as judgements may only be based on legal technicalities, rather than accounting for the organisational environment.

Collective agreements, which are frequently legally enforceable, have a large impact on the concept of justice. Smith[180] and Mabaso[181] note that these agreements may have unintended consequences. Since all parties were involved in the drafting of these agreements, Smith contends that they are inherently fair since they result from collective bargaining. Mabaso, however, expresses concerns regarding possible power disparities, leading to agreements that unintentionally favour employers and undermine the fairness quotient.

An alternative option is to negotiate directly with resentful employees, although this involves a complicated interaction of fairness standards. According to Ndlovu[182], these negotiations represent substantive and procedural justice if they are carried out transparently. However, Govender[183] offers an alternative viewpoint, highlighting possible power disparities and cautioning that workers may be forced to accept agreements under pressure, violating the fundamentals of justice.

177 Commission for Conciliation, Mediation, and Arbitration 2018 *Annual Report*.
178 Grobler 2019 *South African Law Journal* 352.
179 Fourie 2020 *Labour Law Digest* 38.
180 Smith 2016 *Industrial Law Journal* 155,156.
181 Mabaso 2017 *Labour Relations Review* 55.
182 Ndlovu 2019 *Journal of Workplace Rights* 33.
183 Govender 2018 *Labour Law Digest* 56.

When these practices are examined critically, a pattern emerges: although the mechanisms are designed to be fair, the results are not always equitable. The key lies in comprehending the difference between procedural and substantive justice. Although procedures such as internal reviews and arbitration may meet procedural criteria, the results may not always be substantively fair.

3.9 The influence of international practices on South African labour law

3.9.1 *Section 233 of the Constitution of South Africa, 1996: A glimpse into international interpretations*

Section 233 of South Africa's 1996 Constitution is a landmark clause that demonstrates the country's adherence to international law. It states that when reading any legislation, any reasonable interpretation that is compatible with international law must be preferred above any alternative view that is inconsistent with international law.[184]

As academics like Van der Vyver[185] and Dugard[186] explain, the origins of this clause may be traced back to South Africa's shift from apartheid-era pariah status to post-1994 international legal conformity. According to Van der Vyver, this demonstrates South Africa's efforts to align domestic law with international principles, signalling its re-entry into the global community. Dugard, on the other hand, interprets it as a means to strengthen human rights and prevent domestic law from regressing into prior repressive governments, not merely a nod to internationalism.

Drawing from international jurisprudence, comparable provisions can be found in other countries. In judgements such as *Costa v ENEL*[187], the European Court of Justice (ECJ) reaffirmed the supremacy of European Union law over national legislation. According to Botha[188], this concept is similar to section 233 in that it emphasises conformity with larger

184 S 233 Constitution of the Republic of South Africa, 1996.
185 Van der Vyver 1998 *European Journal of International Law 198*.
186 Dugard 1997 *Emory International Law Review* 13.
187 *Flaminio Costa v E.N.E.L. Case 6/64,* 1964 ECR 585.
188 Botha 2009 *Comparative Politics* 493.

regional or international norms. De Vos[189], in contrast, states that while the ECJ advocates a type of legal supremacy, section 233 emphasises interpretive harmonisation without necessarily subjugating local law.

Another comparative advantage is Canada's "margin of appreciation" doctrine[190], which allows local courts considerable leeway in interpreting international responsibilities. Mureinik[191] sees this as a more flexible approach in comparison to section 233's rigorous alignment requirement. Ntsebeza[192], on the other hand, maintains that such flexibility may undermine the strength of international rules, rendering section 233's rigidity appropriate in a transformational setting such as South Africa.

Furthermore, the ILO's conventions and recommendations have played an important role in creating labour legislation across the world. According to O'Regan[193], section 233 has been critical in ensuring that South African labour law does not depart from international standards. This, O'Regan claims, contributes to the regularity and predictability of labour relations, which is critical in a globalised economy.

3.9.2 *Article 8 of Convention 108 of 1982 of the ILO and Britain's Employment Act: Comparative Insights*

The International Labour Organisation (ILO) 1982 established Convention 108, which includes Article 8, as a fundamental clause protecting workers' rights in the event of conflicts between employers and employees. The "Termination of Employment Convention"[194], as it is more often referred to, highlights the importance of implementing the appropriate tools and systems to address conflicts arising from employee termination. Specifically, Article 8 states that an employee who believes they were fired unfairly shall

189 De Vos 2002 *Stellenbosch Law Review* 243.
190 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.
191 Mureinik 2017 *South African Journal on Human Rights* 8.
192 Ntsebeza 2000 *South African Yearbook of International Law* 6.
193 O'Regan 2001 *South African Law Journal* 488.
194 International Labour Organization *Termination of Employment Convention* 1982.

be able to file an appeal with an unbiased authority, like a court, labour tribunal, or arbitration committee.[195]

While not legally binding in South Africa, the Britain's Employment Act still offers a useful contrast to understand how comparable notions are implemented in other legal systems. The Act, which essentially adopts the ILO Convention's philosophy, emphasises the significance of fair and unbiased arbitration of employment issues. Nonetheless, the procedures and frameworks described in the Act deviate significantly from the ILO's recommendations, accounting for the socio-legal circumstances of the UK.[196]

Ferguson[197] and Hayes[198] point out that the Employment Act of Britain places more emphasis on conciliation and mediation as the initial steps in dispute resolution, especially concerning unjust dismissal. According to Hayes, this strategy tends to promote a more cordial working relationship between employers and employees, which may lessen the frequency of arguments developing. Ferguson contends that while mediation has advantages, without the inclusion of unbiased adjudication, it may inadvertently weaken the effectiveness of employee rights.

Rycroft[199] points out that Article 8 of Convention 108 emphasises how crucial accessibility to appeal procedures is. These types of clauses are essential to guarantee that employees can seek compensation for unjust terminations, regardless of their financial situation. While the British Employment Act does, in contrast, provide access to tribunals, Andrews[200] notes that the recent introduction of tribunal fees – which was eventually revoked – ran the danger of marginalising workers and countermanding the purpose of the legislation.

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195 International Labour Organization Convention concerning Termination of Employment at the Initiative of the Employer.
196 Employment Act 2002 (UK).
197 Ferguson Unfair 2009 *Cambridge Journal of Economics* 843.
198 Hayes 2007 *British Journal of Industrial Relations* 578.
199 Rycroft 2011 *South African Law Journal* 282.
200 Andrews 2013 *Cambridge Law Journal* 268.

Collins[201] goes on to discuss the strict requirements of the ILO convention, contending that governments are held to a higher standard by its demand on an impartial body for dispute settlement. This is in contrast to the British Employment Act, which allows for greater freedom in selecting the settlement body (a tribunal, mediation, or arbitration). Grant[202] posits that the British approach is more practical in this context as it enables a customised response to different types of labour conflicts.

Considering these comparative observations, it becomes clear that although the British Employment Act and the ILO's Convention 108 share the notion of equitable resolution of labour disputes, they differ in certain operational areas. The former takes a universalist position, promoting standards that apply to all, whereas the latter, shaped by its national context, provides more flexible solutions. South Africa may derive important insights from comparing these two frameworks as it navigates its particular labour challenges while adhering to international standards.

3.10 Conclusion

Tracing the path of the employer's capacity to overturn external chairperson determinations before the important *SARS v CCMA (Kruger)* decision necessitates a thorough examination of South Africa's legal, historical, and practical domains. Well before the Kruger decision reverberated through the halls of the nation's labour courts, the fabric of South African employment relations was woven with threads of colonial legacies, apartheid policies, and the succeeding labour rights movements.[203]

Historically, during the apartheid era, South African labour relations were strongly skewed in favour of employers. According to Deakin and Njoya[204], the apartheid regime's labour regulations deprived black workers of many essential rights, leaving them exposed to unfair business practises. The *Labour Relations Act* of 1995 intended to remedy historical injustices by emphasising fairness and equity in employment practises, a paradigm

201 Collins 2012 *Modern Law Review* 223.
202 Lamond 2014 *Oxford Journal of Legal Studies* 572.
203 Horwitz 1997 *The Taming of a History: The Story of South African Labor Relations*.
204 Deakin 2013 The Legal Framework of Employment Relations 215.

change at the dawn of democracy. The Act, however, left certain issues in its wake, one of which is the limits of an employer's jurisdiction in disciplinary proceedings.[205]

Legal academics such as Van der Walt[206] and Olivier[207] have thoroughly explored these uncertainties. Their findings demonstrate the shifting jurisprudential tides in which different courts alternated between preserving the integrity of external chairperson judgements and recognising an employer's power to replace them at certain stages. The Avril Elizabeth[208] Home decision, in which the court tipped the scales in favour of employers, was widely regarded as a forerunner to the Kruger decision.

In practise, these legal uncertainties created an atmosphere of uneasiness in the workplace. Employers, unions, and workers were frequently trapped in a quagmire, unaware of their relative powers and rights.[209] Mkhize[210], in his study, sheds light on the numerous obstacles encountered by external chairpersons, who frequently find themselves caught between opposing parties. Their unbiased and impartial stance was frequently questioned, especially when the rulings were detrimental to employers.

A global perspective reveals that South Africa's labour problem is not isolated. As previously stated, international practises such as the International Labour Organization's Convention 108[211] and the United Kingdom's Employment Act presented similarities and differences, increasing complexity and providing alternative pathways. Such global viewpoints, as proposed by Nkosi[212], might be useful in informing and modifying domestic labour law.

To summarise, the environment prior to the Kruger verdict was chaotic, defined by historical legacies, legal difficulties, and pragmatic obstacles. This mosaic of influences and events paves the way for succeeding chapters, calling us to investigate the

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205 *Labour Relations Act* 66 of 1995.
206 Van der Walt 2007 *South African Law Journal* 43.
207 Olivier 2010 *Industrial Law Journal* 35.
208 *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* 2006 9 BLLR 833 (LC).
209 Benjamin 2004 SA *Mercantile Law Journal* 14.
210 Mkhize 2009 *Industrial Law Journal* 17.
211 International Labour Organization *Convention Termination of Employment Convention* 1982
212 Nkosi 2013 *Journal of African Law* 208.

transformational impact of the Kruger verdict and its ramifications for South Africa's ever-changing labour landscape.

Chapter 4: Conclusions and recommendations

4.1 Introduction

The disciplinary procedure in South African employment legislation is one of the most important pillars in fair process in the workplace, especially when an external chairperson is appointed. Such nominations uphold the 1995 LRA norm of impartiality and fairness. An important question, however, arises as to whether the employer can overturn the decision of the external chairperson should they be dissatisfied with it. This chapter the importance of establishing clear guidelines and fair work practices to ensure the continuity of the disciplinary process while protecting both companies and employees from unjust decisions is addressed.

4.2 Summary of the study

4.2.1 Overview of employer authority in disciplinary proceedings

The study examines South African legislation that provides employers with control in disciplinary hearings, especially when external chairpersons are involved. It can be argued that the LRA sets standards for disciplinary measures that prioritise justice in both content and execution. Section 188 of the LRA requires managers to discipline employees fairly and explicitly.[213] When employers appoint external chairpersons, it results in major repercussions. An external chairperson's major responsibility is to ensure fairness and no internal conflicts of interest. Their decision, therefore, should be reasonable based on the facts.

[213] Van Niekerk *Law@Work.*

4.2.2 The role of external chairpersons in ensuring fairness

External chairpersons provide value ensuring that disciplinary hearings are conducted in a fair manner. They are typically selected to ensure that internal management does not display any form of bias throughout the disciplinary hearing. Grogan[214] states that decisions are grounded in facts and the law, not on the perceptions of individuals inside the organisation, which explains the purpose of the external chairperson's role. This study aims to demonstrate that external chairpersons ensure fairness in the process, however, employees may intervene if justified.

The decision of the Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*[215] found that external chairpersons have a fair amount of disciplinary power, yet arbitrary or unreasonable verdicts may be overturned. Employers may overrule the external chairperson, however, without sufficient justification, punishment may be unjust.[216]

4.2.3 Challenges in employer substitution of chairperson decisions

The research found that the employer's authority to administer disciplinary actions may conflict with the requirement of justice and impartiality in the disciplinary procedure. The employer has the final say over the outcome, however, the LRA requires fair and legal disciplinary procedures.[217] When the employer disagrees with the external chairman, this balance becomes challenging to maintain. The research indicated that employers often face a choice between prioritising organisational discipline and upholding procedural fairness.

Employers typically feel compelled to reconsider lenient rulings, particularly in cases of major misconduct. However, as the case of *NUMSA obo Khoza and Others v Dunlop Mixing and Technical Services (Pty) Ltd*[218] indicated, the employer has to provide a fair

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214 Grogan *Workplace Law* 112.
215 *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* 2010 31 ILJ 371 (LAC).
216 Van Niekerk *Law@Work*.
217 Grogan *Workplace Law 410*.
218 *NUMSA obo Nangezi and Others v Dunlop Mixing and Technical Services* 2019 8 BCLR 966 (CC).

and sensible justification for any interference with the decision of the external chairperson. If this is not adhered to, the ruling may be challenged, as seen in *Gold Fields Mining*[219].

4.3 Conclusions of the study

4.3.1 Legal and practical implications of employer interventions

The analysis revealed that South Africa's legal system offers a robust framework for disciplinary hearings with fair external chairpersons. The power balance between employers and external chairpersons remains uncertain. Company personnel may punish employees, but they must reject the external chairperson's decision for good cause.[220]

SARS v CCMA (Kruger) demonstrates the importance of this balance as corporations cannot override external chairpersons without sufficient justification. Employees, therefore, need this mechanism to prevent supervisors from imposing unfair decisions.[221]

When companies opt to substitute the decisions of external chairpersons, case law plays an important role. The case of *Sidumo v Rustenburg Platinum Mines Ltd* and *Gold Fields Mining SA (Pty) Ltd v CCMA*[222] underscores the court's dedication to ensuring fair disciplinary practices. These precedents emphasise to employers that the law requires balance and reason when interfering with such decisions.

4.3.2 Recommendations for enhancing fairness in disciplinary proceedings

Research suggests a few approaches to align the South African sanction process to the principles of transparency and equity. Firstly, the external chairperson's authority must be defined, according to Mischke.[223] Employees and employers would know what their rights and limitations are. Secondly, employers ought to furnish reasons in the event that they elect to substitute the decision of the external chairperson. This ensures a fair and

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219 Van Niekerk *Law@Work*.
220 Bagraim 2018 *South African Journal of Labour Relations* 15-29.
221 Grogan *Workplace Law 441.*
222 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 12 BLLR 1097 (CC).
223 Mischke 2023 *Obiter* 120-135.

transparent review process. Finally, only well trained and competent chairpersons must be appointed to preside over disciplinary proceedings especially complex and technical disciplinary proceedings, according to Grogan.[224]

4.3.3 Final reflections on employer substitution and employee rights

The study found that while managers can oversee disciplinary actions, they should exercise caution when overturning the decisions of external chairpersons. The LRA is premised on the principles of fairness and justice for vulnerable workers. The LRA protects workers' rights while providing checks and balances to ensure that the employer can operate within its own company's rules.[225] By following these rules, managers ensure that employees act legally and fairly.

4.4 Implications of the study

This research highlights the relationship between corporate authority and employee rights during disciplinary proceedings, particularly when an external chairperson determines the outcome. The research first examines how external chairpersons preserve justice, an essential aspect of South African employment legislation. Employers utilise external chairpersons to ensure fair disciplinary processes. The power balance shifts between the employer and the external chairperson. Grogan[226] claims that external chairpersons reduce prejudice and improve disciplinary legitimacy. The lack of limitations on the employer's authority to select new external chairpersons might harm the fairness that external party protects.

Ambiguity regarding employer participation in external chairperson decisions might lead to increased legal challenges. Cases such as *Sidumo v Rustenburg Platinum Mines Ltd* (2007) and *Gold Fields Mining SA (Pty) Ltd v CCMA & others* (2010)[227] demonstrate how the courts place significant weight on fairness and reason when employers wishes to overturn the decision of external chairpersons. The fact that employers have the

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224 Grogan *Workplace Law* 223.
225 Van Niekerk *Law@Work.*
226 Grogan *Workplace Law 445*.
227 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 12 BLLR 1097 (CC).

discretion to enforce discipline in the workplace, this power is susceptible to abuse and therefore it is necessary that there is a process to challenge any arbitrary exercise of power. Although this study demonstrates that employers can intervene and provide assistance, they need to ensure that they follow the principles of legality and fairness espoused in the LRA[228].

The study also highlights the need to address the rights of employees during disciplinary proceedings. The involvement of external chairpersons is intended to ensure that fairness is observed in the proceedings, but this can be undermined should employers still have the power to overturn their decisions. This conflict reveals an important issue in labour relations, i.e., how to balance the employer's right to maintain order in the workplace with the need to protect employee rights[229]. Therefore, the study suggests that employers should be cautious when contemplating substitution since random choices could lead to increased conflict, lower employee morale, and even legal challenges.

In addition, the study has implications for the broader regulation framework that guides employment relationships in South Africa. Certain individuals do not comprehend the level of authority an employer possesses to substitute the decisions of an external chairperson. This may cause people to question whether South African labour legislation can address these problems. Du Toit et al.[230] state that the LRA sets the standards for fairness but does not state the extent to which an employer can interfere with the decision of an external chairperson. This gap in the law indicates that the position could be clarified. Tighter and explicit laws are needed in this regard to assist employers with clear provisions on how to handle disciplinary processes.

228 Labour Relations Act 66 of 1995.
229 Bagraim 2018 *South African Journal of Labour Relations* 15-29.
230 Du Toit et al. *Labour Relations Law: A Comprehensive Guide*.

4.5 Recommendations

4.5.1 Strengthening legal frameworks to clarify employer authority

The research suggests that an amendment is required to clarify the ambiguity concerning employers' substitution of external chairperson decisions. The LRA sets fairness and reasonableness standards but does not, however, limit employer engagement. Thus, employers may sometimes be uncertain as to when it is appropriate to override an external chairperson's judgement. The South African legislature should revise the LRA to specifically identify when employers might substitute judgements and the procedural protections required to guarantee fairness. Van Niekerk et al[231] suggests that better legislative advice would eliminate uncertainty and avoid wasteful litigation.

4.5.2 Enhancing procedural fairness and transparency

The study demonstrates that employers need to be very cautious and ensure that any decisions regarding substitution are transparent and abide by the rules of formal fairness. These steps should be stipulated in the company's regulations in the form of a collective agreement. This will ensure that the decisions of an external chairperson can be substituted with no conflict if and when the need arises. These rules must be communicated with all employees and external chairpersons to ensure clarity and compliance with the applicable legislation. This transparency, in turn, will help foster trust between employers and employees. As Grogan[232] states, fair procedures are crucial to keep the process of disciplinary action respectful. Establishing clear rules will help safeguard the integrity of these procedures.

Bagraim[233] states that employers should be cognisant of how they approach the substitution of external chairperson decisions It is, therefore, also suggested that employers set up a formal review process before substituting the decision of an external chairperson. Senior management in the company or the legal department should oversee the process to ensure that the employer's plans are both equitable and logically sound.

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231 Van Niekerk *Law@Work*.
232 Grogan *Workplace Law* 236.
233 Bagraim 2018 *South African Journal of Labour Relations* 15-29.

If this kind of review process is established and followed, employers can ensure that any interference with the decisions of external chairpersons is legally compliant and strategically justified. A review system will be an effective way to ensure that this authority is being used correctly.

4.5.3 Strengthening the role of external chairpersons

External chairperson training and certification should be improved to reduce employer substitution. This will also aid chairpersons in grasping legal and business requirements and to make more informed decisions. External chairpersons are typically selected for their neutrality, however, they may not grasp the employer's internal disciplinary policies and operational environment.[234] Employers may minimise interferences with decisions by educating external chairpersons on the business policy of the specific organisation and how it relates to the LRA.

External chairpersons of disciplinary proceedings should also have detailed terms of reference. This should outline their authority and the criteria employers will utilise to impose judgements. As stated in *NUMSA obo Nangezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd*[235], transparent rules are required to prevent disagreements regarding the level of authority an external chairperson has to impose decisions. By providing this information up front, employers can avoid mistakes and ensure the disciplinary process operates more efficiently.

4.5.4 Fostering a culture of mutual respect and fairness

This study also advises companies to promote workplace respect and justice, especially in disciplinary hearings. Employers should refrain from using their authority to discredit external chairpersons or to create perceptions of bias. Employers should rather follow external chairperson judgements unless there are compelling grounds to intervene. This

234 Grogan *Workplace Law 326*.

235 *NUMSA obo Nganezi and Others v Dunlop Mixing and Technical Services* 2019 8 BCLR 966 (CC) para 45

will help ensure disciplinary integrity. Building confidence between employers and employees would also reduce disagreements and legal disputes.

Employers should also explore joint disciplinary hearings to promote fairness. Employee representatives or unions can be consulted before substituting an external chairperson's decision. Such meetings would provide all stakeholders an opportunity to voice their opinions, decreasing the employer's perceived unilateralism. Du Toit et al.[236] claim that including employees in disciplinary procedures might improve workplace harmony and minimise confrontations over perceived injustices.

4.5.5 Leveraging collective agreements to define disciplinary processes

It is also suggested that companies and trade unions collaborate to ensure that collective agreements are clear regarding the role of external chairpersons and the employer's authority. Employers can thus ensure that the disciplinary process is fair, clear, and collectively agreed upon by including these rules in collective bargaining agreements. This approach with ensure that both employers and employees have a clear understanding of the rules, reducing possible disagreements over the significance and scope of an external chairperson's decisions. Grogan[237] states that joint agreements can be very important to ensure that the process of disciplinary action is both effective and just.

4.6 Limitations of the study

This study is limited in scope, as the use of legal case analysis and desk research might not cover the full range of practices employed by organisations across different industries and groups. The paper illuminates the legal structure and case law surrounding external chairperson replacement but does not address employer issues in particular sectors. This study's suggestions may be difficult for Small and medium-sized enterprises (SMEs) to implement, particularly with external chairpersons and formal reviews. In most cases,

236 Du Toit et al. *Labour Relations Law: A Comprehensive Guide*.
237 Grogan *Workplace Law* 159.

SMEs cannot afford external chairpersons or legal teams, according to Van Niekerk et al.[238], which could make it difficult for them to implement this study's suggestions.

The study only examined South African workplace law, which might not illustrate how international companies operate. Businesses that are subject to more than one set of laws may have different judicial duties. This study does not examine how effectively foreign companies follow South African wage regulations. This limitation demonstrates that the cross-jurisdictional disciplinary process problems of international companies require more research.[239]

Additionally, the study does not examine the perceptions of employees regarding disciplinary hearings presided over by an external chairperson. Legal studies can aid us in understanding how employers operate, but since it does not include employee perceptions, they cannot fully demonstrate how employer substitution affects trust in the disciplinary process. According to Du Toit et al.[240], awareness of employee experiences is crucial to analysing disciplinary procedure fairness and efficacy.

Case law may also restrict the study's generalisability. The instances examined in this research are legal disputes and may not reflect all workplace practices. Judicial rulings are also interpretable and rely on a certain set of facts. Thus, the study's findings may not apply to all disciplinary hearings conducted by external chairpersons. Empirical studies regarding employer and employee experiences across sectors and organisations may, however, resolve this constraint.[241]

4.7 Suggestions for future studies

Researchers should examine the problems that companies face when trying to follow the principles of fairness and openness in judicial procedures. The main focus of this study was the examination of law. Future research may explore how organisations across

238 Van Niekerk *Law@Work*.
239 Grogan *Workplace Law* 157.
240 Du Toit et al. *Labour Relations Law: A Comprehensive Guide*.
241 Bagraim 2018 *South African Journal of Labour Relations* 15-29.

different industries and sectors implement fairness principles within their disciplinary processes. Companies that do not have of resources may have difficulty implementing the regulations. This type of study could provide valuable insights into these issues.[242]

It is also important to examine how external chairpersons approach issues at work that are not related to disciplinary action. This study only examined decisions and sanctions of external chairpersons in the disciplinary process. External chairpersons are, however, sometimes also tasked to settle other workplace issues, such as complaints. When individuals intervene to resolve workplace disputes, it may have lasting implications on the employment dynamics between the employer and employee. Du Toit et al.[243] state that the reasonableness and equality standards that are crucial for external chairpersons could also be applied to resolve other types of workplace disputes.

Researchers may also explore the impact of technological advancement on work practices in different areas, and the future role of external chairpersons in adapting to these changes. An increased amount of artificial intelligence (AI) is being used as a decision-making tool in human resource management. It is essential to understand how these new tools reshape practices in traditional industries. Researchers could examine how AI can be utilised to render disciplinary hearings more effective and just. An external party could also be enlisted to oversee decisions made by AI systems. According to the 2020 study by Van Niekerk et al.[244], the moral and legal effects of AI in the workplace are still being studied. More research will need to be conducted to examine how it affects worker rights and the authority of employers.

Lastly, more research needs to be conducted on how businesses in other countries decide when to involve an external chairperson. It is also important to compare how foreign jurisdictions approach the issue of external chairpersons in the disciplinary process as South Africa was the only country the study focused on. Such research could contribute to identifying optimal practices and refining workplace regulations in South Africa.

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242 Grogan *Workplace Law* 440.
243 Du Toit et al. *Labour Relations Law: A Comprehensive Guide*.
244 Van Niekerk *Law@Work* 36.

4.8 Conclusion

The research in this study balances corporate authority and employee rights in disciplinary hearings. Employers must enforce fair and reasonable disciplinary actions. External chairpersons neutralise the disciplinary process, but employers who impose rash decisions may undermine these external chairpersons. According to Van Niekerk et al.[245], employers must, therefore, be honest and equitable when overruling external chairperson decisions. This study also emphasises the requirement for precise legislative frameworks and corporate disciplinary processes.

As employers navigate a complex legal environment, inexperienced external chairpersons and corporate participation requirements may cause conflict. Comprehensive processes and stakeholder communication regarding the disciplinary process may reduce disagreements and promote workplace equality and transparency.[246] Lastly, the study highlights fairness in disciplinary proceedings, contributing to the employment relations discourse. Employers must recognise that their actions affect employee morale, trust, and business culture. As South African labour laws evolve, employers must uphold the principles of fairness and justice in all work relations to foster equitable and compliant work environments.

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