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# DISCIPLINARY COMMITTEE, AN ADJUDICATIVE MEASURE OR A PROCEDURE TO LEGALISE DISMISSAL?

Arvin Luchmun LLB, LLM, PG Cert, FHEA |Barrister-at-Law

## Abstract

The legislation governing employment rights have been repealed and re-enacted several times to adapt to the needs of the workplace and more importantly to harmonise relationship between employees and employers. A legitimate but controversial aspect in the harmonisation of the relationship is the procedural law to be followed before an employee could be dismissed, is the Disciplinary Committee. Worldwide statistics demonstrate an increase in employee-employer litigation issues, while within the Mauritian jurisdiction procedural fairness and impartiality of the decision maker chairing the disciplinary committee seems to be recurring adjudicative issues. This paper aims to enlighten rationale behind the appointment of the members of the disciplinary committee and how fairness can be enhanced in the whole process.

## Introduction

The first from of labour started with slavery and migrant workers in Mauritius during the colonisation period of late seventeen century where the country was under French rule and later under British colonisation. This explains why procedural rule in Mauritius are predominantly French law and post British colonisation, took the form of ordinances which were contained in statutes. The amalgam of these two different systems generated a difficult and complex legal system, where much had to be adapted to co-exist as one. The labour laws have been one of the key areas of law witnessing considerable changes through these 2 rules of law. The aim of the legislations started from regulating slave trade and evolved through several stages to its current form of promoting working relationship through a balance framework where both the worker's rights are preserved and the employer's integrity are protected. Facts and figures of cases proceeding to trial on the ground of procedural unfairness seems to indicate that several practices are not in line with current standard or there is an abuse of the loopholes of the system. One of the procedural rules widely criticised for being pro-employer is the Disciplinary Committee, which in the views of many has been reduced to a mere formality to legalise the employee dismissal. Many aspects and practices around the committee remain as at date, obscure and has no plausible explanation to continue to exist. This paper will focus on the available avenues for the employee to challenge both the appointment of the disciplinary committee and the findings of the committee and the

origin of the existing procedure and its "raison d'etre". The paper will further critically analyse the current procedure, the lacuna and will consider the alternative to the critics raised in an attempt to propose a reform based on fairness.

**The question**

The courts have been solicited on numerous occasions to interpret the different parts of the Employment Rights Act (ERA) 2008 and to give meaning to the procedural law where many practices are not as a matter of law but as customary practice and bear little relevance to the real-life scenario. Such that it is frequently argued, with reasons, that current procedure to be followed prior to dismissal is more employer focus and holds minimal prospective of employee vanquishing the process. This call into question the fundamental rights of the employee which will be assessed through the following questions.

1. Is the decision of the disciplinary committee chair impartial?
2. What are the avenues available to an employee and the procedural hindrance faced to address a procedural matter?
3. How fair is the process?
4. What steps could be taken to rationalise the disciplinary committee proceeding and to promote neutrality of the decision maker?

**The Concept of Disciplinary Committee**

The laws relating to employment rights in Mauritius is a blend of both French Law and English Law and is contained mostly in statutes whereas the procedural law, established during the French colonisation is coded. Nevertheless, some statutory provisions pertaining to employees' rights could find their corresponding parts in the French Code du Travail leading to the normal conclusion that the rights are inspired from French Law. Prior to 2008 the law dealing with employee's right was contained in the Labour Act 1975 which was repealed with the enactment of Employment Right Act (ERA) 2008. As at date the core of employment rights is contained in the ERA with some sectorial exceptions contained in other enactments. This is expected to change once the Workers Right Act (WRA) 2019 comes into force. The concept of disciplinary committee exists both in French and English Law but with time both have evolved quite differently.

**Origin of the law**

The procedure to address a work-related issue can range from disciplinary hearing to a formal letter with the allegation and requesting for written explanation depending upon the likely sanction. The more severe the employee shortcoming or the more severe the sanction the

higher probability the employer will opt to proceed through a disciplinary hearing. Save and except from the principle that the employee should be given a fair chance to put his case and the different time frames for each step, the ERA does not cater for the procedure to be followed for the committee. This is where reference is sought to the civil code which is itself an adapted version of the French Code Civil. The Mauritian legal system allows guidance from French procedural law and through Common Law in absence of domestic provisions. The current accepted practice in disciplinary proceedings appear to be a fusion of the Common Law, French law and some part adapted to suit the Mauritian jurisdiction. The origin of each steps in the process will differ.

**Procedure to follow**

The legislation enumerates steps that need to be respected once the employer becomes aware of the alleged misconduct or 'faute grave' of the employee. The employer has a period of 10 days as from the moment he becomes aware of the alleged act of misconduct, to suspend the employee normally with pay. Following which a letter will enlist the reasons for the suspension and may invite the employee to attend a disciplinary hearing or another communication about the disciplinary hearing would be sent in due course. ERA provides for a minimal seven-day period before a disciplinary committee could be scheduled to allow the worker to answer the charge. Noteworthy the whole process is employer controlled including date, venue and selection of the panel to chair the disciplinary hearing. The only right retained by the employee is to be legally represented during the hearing. Following the hearing the employer would have a period of 7 days to inform the employee of the sanction and this period needs be strictly adhered to, where the misconduct is sanctioned by dismissal. Irrespective of the sanction taken the employee retain his right to take the matter further but remedy available might be limited.

**The Law**

The legislation clearly sets out that before considering a disciplinary hearing the employer has to consider all possible alternatives in view of safeguarding the employee's job. This can range from warning, informal meeting or any other means of reiterating the proper work conduct. In practice this is hardly the case. As per section 38(2) ERA dismissal will be deemed unfair where the employee has not been given an opportunity to be heard and/ or where the employer has not respected the specific time frames as provided by the act. The employee's right to answer any charge before being dismissed is enshrined in Section 38(2) ERA which is very similar to the Section 32 of the Labour Act (now repealed). The wordings of the section are very broad and the act is silent upon the procedure to be adopted. Practice has developed its own procedure. The aim of section 38(2) is to give the employee an opportunity of dissuading the employer from dismissing him in circumstances where he

might otherwise be dismissed and of keeping his job[1]. A less formal approach could be envisaged where the employer does not wish to sanction the employee by dismissal. Nevertheless, in most matters proceeding to a disciplinary hearing the probability of the employee safeguarding his job is very minimal because in most cases the employer would have already made up his mind to dismiss the employee. This leaves the impression that the disciplinary hearing is a mere formality that has to be complied otherwise dismissal become de-facto unfair.

**The process in United Kingdom**

The ACAS code of Disciplinary and Grievances Procedure[2] sets out the procedure to be followed within the UK which involves consideration of several measures before the employer can consider the draconian step of disciplinary hearing which may lead to dismissal. The code is reviewed from time to time to adapt to the current situation. The ACAS code does not have legal force but most employers would follow as procedural guidelines, to avoid breaching the fairness requirement imposed by the legislation and as a matter of convenience. The code extensively provides for informal procedures to address work related issues, in an attempt to dissuade matters proceeding to disciplinary action. The code does not provide for the formal qualifications of the chairperson of the disciplinary hearing but sets outs an eligibility criterion. One of the key principles of the code is to promote fairness also a legal requirement of the ERA[3] and transparency.[4] This entail appointment of a neutral person to chair the disciplinary hearing.[5] The definition of neutral seems to be the literal definition. Where it appears that the conclusion reached would have been tainted by the board (chair) unfairly construed, this can be a ground of appeal.[6] This leaves us clear that the Committee could be chaired by a Human Resource Manager or anyone who has not in any way participated in the inquiry or has no vested interest. This is achievable in large companies but can be challenging in a small company to find such an independent person. Further if the word fairness is taken in its broad sense, a chair appointed who is under control of the employer might not necessary fit the definition. The court has not interpreted the terms in the broader sense, but held that where the employee has any reasons to believe that the Chair should not sit for any of the reasons, the employee should challenge the chair. Failure to do so may waive the right of appeal[7] on this ground.

**The French approach**

[1] P Bissonauth V Sugar Insurance Fund Bond Privy Council Appeal no 68 2005.
[2] http://www.acas.org.uk/media/pdf/p/f/11287_CoP1_Disciplinary_Procedures_v1__Accessible.pdf
[3] S 98 Employment Rights Act 1996
[4] Art 2 ACAS Code fn, 2
[5] Taylor v OCS Group Ltd [2006] EWCA Civ 702, [2006] I.C.R. 1602, [2006] 5 WLUK 781
[6] D'Silva v Manchester Metropolitan University [2017] 6 WLUK 86
[7] McCarthy v Bar Standards Board[2017] EWHC 969 (Admin); [2017] 5 WLUK 25

The procedure to establish the disciplinary committee largely resembles the UK approach but is more regulated and structured such that hearings are chaired by 'conseil Prud'hommes.' French Law has defined criteria for appointment, powers, jurisdiction and other matters relating to its operational framework. Unlike English Law and Mauritian Law, the 'conseiller prud'hommes' is appointed by selection from an established register of workers of and employees[8] in a quasi-similar way to the appointment of Jury in Mauritius. Their remuneration comes from public funds[9] and they are made to undergo training[10] and take oath[11] before they could discharge their functions. There appointment is supervised upon by the Court of Appeal. The number of appointments among employee and employer's representative is proportionate to ensure proper balance and fair representation on both side and as far as possible the Conseil chair committees in equal numbers. There are several other requirements in the Code du Travail to make sure that fairness prevail throughout the whole process and the trial. In an attempt to dissuade appeals the employee also has the possibility[12] to challenge individual member of the 'conseil prud'hommes' for parity, personal interest among other grounds[13] within the trial itself. Further a dissatisfy employee or employer may apply against a judgement delivered by a 'conseil prud'hommes' as per provision of the Code de procedure civile.[14] Statistics seems to indicate only 25% of decisions of 'conseil prud'hommmes' are appealed.[15] A 'conseillier prud'homme' is answerable to a disciplinary hearing where his conduct amount to misconduct, further as to February 2017 he is also answerable to the 'Cour de Cassation' under the jurisdiction he operates, this ensure more accountability.[16]

**Under Mauritian Law**

As discussed above, under Mauritian legal system there seems to be no established criteria to select a chair in a disciplinary committee while the Section 38 remains the ultimate guiding factor. The wordings are quite clear on the time limit at each step. The employer has a 10 days period to take appropriate steps should he wish to proceed with a disciplinary hearing, otherwise it will be deemed that the employer has treated the misconduct as a shortcoming without sanction and cannot proceed with a hearing. Where the employee is informed of the misconduct a minimal of 7 days must be given before any disciplinary hearing is scheduled. Failure to respect these time scale will render the dismissal unfair. Prior to the implementation of the ERA, Section 32(2) (a) of Labour Law Act 1975 would regulate the requirement for a fair hearing. In practice, most disciplinary hearing will follow the civil procedure rule though there is no mandatory requirement to follow same. In the case of

[8] Article 1422 of French Code du Travail
[9] Article 1442, 1443 of the French code du Travail
[10] Article 1442-1 of the French Code du Travail
[11] Article 1442-11 of the French Code du Travail
[12] Article 342 of the French Code de procedure Civile
[13] Article 1457-1 of the French Code du Travail
[14] Article 527 French Code de Procedure Civile
[15] Cabinet Bredin-Prat et Cyril Gaillard Repertoire Travail de Dalloz Mai 2017
[16] Ibid

*Robert Tranquille V P.R Limited*[17] the court held that the committee held under section 32(2)(a) cannot be equated to a judicial hearing and it was not a mandatory requirement for the employer to inform the employee of the possibility to be legally represented in the hearing. It is clear the defunct Labour Act and the now valid Employment Rights Act do not cater for the procedural law, leaving to a spectrum of interpretation and practices.

**Setting up the Committee**

The appointment of the chair is made upon an ad-hoc basis by the employer and it operate somehow as a substitute of the 'conseil prud'hommes' discussed above. It might sound cynic that selecting the chair is left to the employer and there is a real perception that the chair is unlikely to decide against his appointer. Further there is nothing preventing the employer from appointing himself as the chair. The aspect of fairness of the process and fairness of the chairperson has been in issue in many cases but astonishingly the court have been very reluctant to pronounce on the impartiality of the chairperson. In the case of *Mamraj V The MCCB Ltd*[18] the court did not pronounce on the fairness behind employer's legal representative and the chairperson being members of the same chamber, on the ground that this was not canvassed in the lower court and at the committee hearing. One of the rare cases with a pronouncement on this matter is *Harrel Freres V Jeebodhun*[19] where the court opined that a person who may appear to be bias should not sit on the disciplinary committee. The court therefore leaves it under the individual member or the panel to assess the issue of bias. In *Murray V Anderson*[20] the court opined that the test for bias is reasonable suspicion of a real likelihood of bias. It is not clear whether this is subjective or objective. Unfortunately, the court have not as at yet embark upon explaining what it exactly means. It is hard to believe that under the current circumstances relating to its appointment that the chair could be fully impartial. Simply because he is appointed by the employer and for the other reasons highlighted above, already leaves the perception of unfairness. Unfortunately, since this is a civil matter and the one who asserts bear the burden of proof. It is highly possible that this defence will fall at the hearing and to succeed at trial is a matter based on facts, where the employee will have to establish the perception' based on facts to the civil standard.

**Appointment related issues**

In small companies the difficulty of appointing a neutral person to chair a hearing is more of concern. The employer would be aware of the agitation of the employee and in many cases has already taken minor sanctions against the employee. The fact the employer has asked the employee to put his complaint into writing does not make him part of the inquiry.[21],[22] What is established is where four panel members of the chair who have had previous issues with the

[17] 1996 SCJ 366
[18] 1998 SCJ 144
[19] 1981 MR 189
[20] 1980 MR 99
[21] J B Barbe V Shell Mauritius Ltd [2013] SCJ 2002
[22] Cooraban M A V Mauritius Institute of Education [1995] SCJ 271

employee answering the charged, sitting as chair is a breach of the requirement of fair trial[23] and the employer representative who discovered the alleged misconduct cannot thereafter sit in the hearing to determine the misconduct.[24] Interestingly the court did not pronounced upon the issue whether the employer could not have found a more independent person to chair the hearing but embarked onto defining whether the actual role of the employer and the difficulties this may cause to the employer. This leave the perception of bias.

As discussed above the chair is appointed by the employer and such communicates its findings to the employer. There is nothing in the existing legislation that compel the chair to communicate the findings with the employee. On a point of good practice, it would have reduced the hurdle if the chair would communicate a copy of the findings to the employee but this is not provided by the law[25] though the court have considered this to be unfair and allowed an appeal based on non-communication of committee proceedings[26] to allow the employee to proceed with an appeal. This certainly causes a delay to the employee to take the matter further and is used as tactics to dissuade appeal.

**Methods of dispute resolution**

It is clear that adjudicative approached adopted by the current practice does not take into account other available methods. This has been identified and highlighted in many cases as not being not in line with the ERA provisions and dismissal is not used as a last resort. As a result, most case reaches trial and the court has no power to reinstate the employee. Both the French and English approach have made effective use of mediation as a method of resolving disputes as at an early stage. In the Mauritius jurisdiction the method of appointing the chair and the legislation share the responsibility for not being able promote non-rivalry methods of resolution. It is suggested the use of without prejudice proactive mediation could play an important part in dispute resolution.

**Addressing a point of law**

The legislation does not cater for the qualification and experience of the chair nor does it mention any minimal knowledge of the law. This causes procedural difficultly for the employee who wishes to address a point of law or to discuss admissibility of the evidence which has a high bearing upon the fairness requirement under procedural law. The UK court approach would demand addressing the issue of fairness as it arose, whereas the Mauritian jurisprudence is divided. In *Marino Karuthasami V Equlibre Ltd*[27] the court refused to admit that the employee who was legally represented at the disciplinary hearing who did not challenge chair composition, later appeal on the grounds of fairness. Other cases viewed that

[23] United Bus Service V Roheman
[24] D Beehary V NTC Employees Cooperative Credit Union 2007 IND 30
[25] Smegh Ile Maurice Ltee V Dharmendra Persad 2012 UKPC 23
[26] CI Brunette V Commissioner of Police 2018 SCJ 40.
[27] 2013 SCJ 338

the disciplinary committee is not a court of law and employee has other forum to raise the issue of fairness and impartiality of the chair[28] and the court went further refusing an injunction in *Bhoolah V ICTA*[29] on the ground that an aggrieved employee whose right was not respected in a disciplinary hearing had other avenues under ERA to pursue his claim. The fact that all procedural and point of law have to be taken via an appeal certainly fall short of the requirement of fairness such that the employee is not given a fair chance to defend his case. This is not in line with the principles of natural justice and certainly give way to all cases to proceed to appeal.

**Procedural compliance**

As discussed above, there is no establish process except that the in most cases the chair will try to abide by the civil procedure law to any procedural matter but should the chair refuse to do so the aggrieved employee has no alternative to enforce same. The case of *Jughroo Vijay V Supintex Ltd*[30] re-affirms the position of *Tranquille*[31] where the Industrial Court held under the defunct Labour Act, not being inform of right to be legally represented was not a bar to fair trial. Following the enactment of the ERA 2008 this seems to be altered by section 38 now caters for the right to be legally represented.

The admissibility of evidence presented to the disciplinary hearing is another area that demands clarification. An analysis of Article 1315[32] provide that the party relying on the evidence has to discharge the legal burden to the civil standard. It appears that there is no need for strict adherence to procedural and evidential rule such that the hearing operates as a tribunal and rule could be relaxed.[33],[34]

**Type of Evidence allowed**

The question of whether the disciplinary committee may use the findings of a criminal court where the employee has already been found guilty of a serious offence constituting misconduct, the Court stated it is hard to believe that aim of section 32 (2) would be met.[35] The Supreme court in the case of *Huneewoth v. S. Goorteum*[36] without referring to section 32(2) found that it would amount to a breach of Article 10 of the constitution for the magistrate to rely upon evidence(which was presented in a disciplinary hearing) not heard by her. Nevertheless, the court have in several cases allowed the chair of the disciplinary hearing

[28] Ibid, fn 1
[29] 2016 SCJ 414
[30] 2007 IND 43
[31] Ibid, fn 1
[32] The civil Code Act
[33] Mamode V De Speville 1984 SCJ 1721
[34] Tirvengadum V Bata Shoes Mauritius Ltd 1979 MR 133.
[35] Ibid, fn 1
[36] 1989 SCJ 141

to give evidence at trial.[37] Should this be limited to production of documents on which the hearing findings were reached? The court seems obiter to answer this question negatively[38] and in many cases the Chair has been allowed to give evidence as to the content of the disciplinary proceeding at court hearing.[39] The impartiality of the chair is once more challenged. The Supreme Court took a different approach and in the *Calou E L v Sregh Ile Maurice Ltee*[40] where it held that if the Magistrate relied upon the finding of the disciplinary hearing chair and the witnesses heard by the chair, which was hearsay, this was clearly wrong. Is the position different where the employee pleaded guilty to a criminal offence in a court of law and the same is used as basis of dismissing the employee from his employment? Certainly, this could be adduced as hearsay evidence in the disciplinary hearing and as far as the employee is given ample opportunity to respond to the charges may not fall short of the requirement of fair trial.

**Joining of counts**

The ACAS code provide that an act of misconduct of more than 3 years cannot be taken at a hearing even if it was subjected to a sanction. French law provides 'l'agissement fautif' dated more than 2 months does not give rise to misconduct, except where it contains a series of related act constituting misconduct of same category. While the act is clear that the employer has a period of 10 days to act from the moment he become aware of the misconduct of the employee to call upon a hearing. There is no provision in the law to regulate the number of charges of misconduct and the time limit. In the case of *Sewtohul V La Tropicale Mauricienne Ltee*[41] a warning given 3 years before the new alleged act of misconduct was considered but since was not of same nature it was rejected. In the *Rose Hill Transport Ltd v L N Lamarquette*[42] the court found the misconduct upon a series of acts where the last one in time did not amount to gross misconduct but all together added to the charges which did not meet the 10 days period under S 38(i)(2)(a)(iii). Consequently, it appears that all the employer has to do is find a recent cause likely to constitute misconduct as trivial as it may be not warranting dismissal. This will allow him to bring about all acts of misconduct and all together this would warrant dismissal. This certainly defeats the purpose of Section 38(2).

**Other issues**

Another thought-provoking aspect is the power conferred to the disciplinary committee to make recommendation. The employer not being bound by the findings of the disciplinary committee. Even where the charge against the employee has been dismissed or the charge

[37] Rheza Moortoojakhan V Tropic Knits Ltd 2013 IND 28
[38] Ibid
[39] Abdurrahman v Total Mauritius Ltd 2010 IND 27
[40] 2017 SCJ 312
[41] 2015 IND 34
[42] 1994 SCJ 396

does not amount to a 'faute grave' the employer may still opt to dismiss the employee irrespective of the disciplinary committee findings. In the same vein the Supreme Court viewed that there was no obligation on the employer to adduce evidence to rebut the version of the employee especially where the employee has been guilty of gross misconduct.[43] The above two issues once more cast a doubt upon the powers of the disciplinary committee and its findings and reduce the process to a mere formality to legalise the dismissal and calls for amendment of the law such that employers are force to accept the decision of disciplinary committee.

**Gross Misconduct a cause of dismissal**

The ERA[44] caters for several measures to be considered before the option of Disciplinary hearing is opted, but in practice this is not the real case. This section has not generated many cases law as it is fairly new. In the case of *St Aubin Limitee V Doger De Speville*[45] it was held that termination will only be unjustified where the employer has no valid reasons at all to discontinue employing the worker. This is clear from the position taken by the Privy Council in the case of United Docks Ltd V De Speville[46] where the court highlighted the "a valid reason to dismiss and could not in good faith take any other action" were two distinct things. Further the position under the defunct Labour Act as expressed by Fok Kan[47] has changed and the employer now has to comply with S 38(2) and other sections before the option of dismissal could be considered.

**Defining Misconduct**

Previously under the Labour Act it was necessary to determine what amounted 'faute serieuse' and 'faute grave' for the purpose of severance allowance calculation.[48] The ERA does not define what amount to gross misconduct that would warrant the dismissal of an employee.

The notion of faute is very common in French law and has been used in several context in the Civil Code. As per Dalloz[49] in the work context fault could be of two categories 'faute contractuel' and 'faute disciplinaire'. The former relates to the wrong performance of an assign task that can cause severe prejudice to the employer, whereas 'faute disciplinaire' relate to the non-subordination or the non-adherence to a principle that may not directly cause prejudice to the employer. A contractual 'faute' may amount to a 'faute disciplinaire' where it disrupts the good functioning of the employer's business. French case law does not seem to

[43] De Maroussem G Planteau V Societe Dupou 2009 SCJ 287
[44] Section 38(2) (a) Employment Rights Act 2008
[45] 2011 UKPC 42
[46] Privy Council Appeal No 0048 of 2018, [2019] UKPC 28
[47] Introduction au droit du travail , 1995 Edition
[48] Shyam Parmessur 2015 SCJ 449
[49] Note 41-48 Jean Mouly et Jean Savatier Droit Disciplinaire, Repertoire de Dalloz March 2017

embark upon establishing which one is more serious and likely to warrant a dismissal[50] but concludes that one a contractual 'faute' may result in a disciplinary 'faute' and what left is some case law which highlight the different severity of 'faute'[51] and as per note 440 Dalloz considered in *Pillay Curpen V ABC Coach Work Ltd*[52] to trigger dismissal on the basis of gross misconduct the employee must been dishonest and have intended to cause harm or disrupt the employment environment. French Jurisprudence denote 'faute' is not established where the worker refuses to perform a task outside his work ambit or refuses to accept a letter convening him to a meeting.[53]

Certainly, French law explain the different types of 'faute' but does not provides a fine line distinction between 'faute grave' and other 'faute'. Turning to Mauritius jurisprudence the case of *Georgette Chan Man Sing V Win Tai Chong Co Ltd*[54] is worth considering where it was held what will amount to gross misconduct is a matter of facts, and a shop assistant uttered filthy words toward a client would amount 'faute serieuse' and would lead to dismissal. This does not clarify the situation but brings a new terms of 'faute serieuse' which appears be more than 'faute legere' but less than 'faute grave' which was still was sufficient to warrant a dismissal. The case *of Grewals V Koo Seen*[55] clarifies the difference and explain that a 'faute legere' should be sanctioned otherwise than dismissal and 'faute serieuse' whilst may lead to dismissal not triggering S 34[56] (for the purpose of severance allowance at punitive rate) and lastly 'faute grave' which is the most severe. It is clear that not all misconduct will warrant dismissal.[57] In the case of *United Docks Ltd V De Speville*[58] both cases of *Union St Aubin V de Speville*[59] and *Harrel Freres V Veerasamy*[60] were considered and the Privy council correctly identified that the Labour Act (position is same under ERA ) does not define the severity of misconduct but does only qualify for purpose of calculation of severance allowance. Misconduct should be construed upon facts and will only warrant dismissal where the employer proves misconduct on the balance of probabilities and further establish that to continue employing the employee would damage employer's interest. In reaching this conclusion several aspects need to be considered, the unblemished years of service that would mitigate the misconduct and whether there was a different sanction other than dismissal.[61]

**Outcome of Disciplinary Committee**

[50] Raman Ismael V United Bus Service 1986 SCJ 303
[51] Ibid fn 48
[52] Goparlen Pillay Curpen v ABC Coach Works Ltd 2016 IND 18
[53] Rawateea V Avipro Co Ltd 2013 IND 32
[54] 2012 SCJ 82
[55] Grewals Ltd V Koo Seen Ling G A 2012 SCJ 300
[56] Labour Act 1975
[57] J-Ricardo Ricardo bon-a tout v Therlite Ltd 2016 IND 33
[58] Privy Council Appeal No 0048 of 2018, [2019] UKPC 28
[59] Ibid, fn 45
[60] 1968 MR 218
[61] General Construction Co Ltd V Payaniady [2008] SCJ 220

Statistics for Mauritius as far as how many disciplinary hearings proceed on appeal is not available. There is no requirement for either employee or employer to report the beach to the labour office. This call for more accountability which requires a proper reform. The adoption of similar concept of a French 'conseil prud'hommes' with a list of approved councillors or mediators and lawyers may help to control the situation. This will also render it possible to have statistics of the number of DC cases and their outcome.

In the light that a disciplinary hearing in most cases leads to a dismissal and which will no doubt have severe consequences on the employee especially where the employee has a long working history with the employer or there is a restrictive clause in the employee contract, it is suggested that, adopting a sticker rule of evidence to section 38 to the criminal standard will ensure more protection towards the right of the employee.

As observed this area of law shows sign of weakness and call for reform. The courts have in a number of cases held that the finding of the disciplinary committee was unjustified or the process was not fair and the outcome has been that court granted severance allowance at punitive rate. The case of *Matadeen V The Pamplemousses and Riviere du Rempart District Council*[62] correctly identifies that the Court has no remedy to re-instate the employee even where it is established that the dismissal has been unfair, this leaves the employee aggrieved with no fair solution. It is clear from the comparative analysis that the law in UK and France has evolved and several procedural measures have been reviewed to ensure more fairness. The analysis demonstrate that the disciplinary committee has served purpose through time further the current structure no-more answers the need of the sector and in many cases fail to establish fairness. Whilst the court have recognised in several cases that the disciplinary committee is not a court of law and applying same procedural law as a court of law is not possible but the decision of the committee has drastic and irreversible consequence on the employee. In a nutshell it can be summarised that the disciplinary committee to decide upon whether the employee should be dismissed or not and to a limited extent that procedural rules are followed. The Court can be called upon to determine whether dismissal under the circumstances was fair.

**Recommendations**

In the light of the research which clearly denotes that the procedure in place dealing with dismissal has several lacunas and calls for reforms. The followings recommendations are proposed

1. to require all cases to consider without prejudice mediation and arbitration mandatorily as a means to resolve the dispute before referring to disciplinary committee.
2. to adopt a quasi-French like conseil of prud'hommes with accredited qualified persons to chair disciplinary proceedings.
3. to establish an employment rights tribunal with powers and a pre-requirement of conducting mediation before adjudication.

[62] 2013 SCJ 496

4. to amend the law and make it a legal requirement that hearing decisions are communicated to employer and employee at the same time.
5. in the event any party address a point of law the committee should have legally qualified person among its chairs to hear this matter or if not matter to be referred to a legal qualified person for a ruling.
6. to have the possibility to refer a ruling to court of law for clarification rather than waiting for full decision to be reached.
7. to require allegations in disciplinary committee to be satisfied to the criminal standard[63]

**The Workers Right Act 2019**

The Workers Right Act (WRA) 2019 received presidential assent on the 23rd August 2019. While the WRA bring consequent changes the employees' rights, the changes with regard to disciplinary committee proceedings is minimal. Most changes are pro employee but some changes could potentially be pro-employer.

Under (to be defunct) Section 38(2) ERA the employer has a period of 10 days to initiate an action as from the moment he is made aware of the alleged misconduct or becomes aware of the criminal conviction. The new Section 64 WRA provides that where the employer initiates an internal inquiry into the alleged offence or the criminal proceedings the period of 10 days is prolonged and starts after the completion of the inquiry. While the implementation of this stage could potentially deter dismissal proceeding where there is not enough prima facie evidence against the employee amounting to misconduct. This could be a double edge sword, where the employer can subject act of misconduct outside the 10 days period to disciplinary sanctions on the grounds that an inquiry was on going. Further it is not clear what kind of inquiry could the employer conduct in case the employee has been sanction in a criminal case. Does this entitle the employer to inquire into a criminal matter that has no relation with the employee work? This seems to potentially allow the employer a way to sanction an employee for a criminal offence much after the commission of the offence on the ground of an inquiry was on going or the employee did not reveal his conviction at time of taking employment. This certainly is not in favourable to the employee. It will be interesting to follow how court interpret this section in future.

**Equal arms in Disciplinary Hearing**

A common ground of appeal against Disciplinary Committees' decision has been around the access to materials to allow the employee to have a fair trial. Section 65 WRA provides for the employee to have a notification of charge, notice to answer charge, should the employer fail to comply in the prescribed manner with Section 65 as enacted, dismissal will be deemed

[63] http://www.barristermagazine.com/the-standard-of-proof-in-disciplinary-proceedings-the-balance-of-probabilities-v-reasonable-doubt/

unfair. In the same vein and as discussed in the case of *Smegh*[64] and *Brunette*[65] the WRA has taken into consideration the court observations and made it mandatory under section 64 (10) WRA that the disciplinary hearing proceeding is communicated to the employee within a time frame, where a request is made for the same.

## Conclusion

The study clearly identifies a need for reform and the recommendations call for more transparency and accountability as a means of safeguarding employees' rights. It is clear that the current method of disciplinary practice has served its purpose and it is no longer efficient. Therefore, there is a need to review the structure and to adopt new principles. The enactment of the WRA has attempted to address some of the concern raised by the study and is definitely a progress towards employees' rights protection. Nevertheless, there is still an imbalance into equality of arms in the process. Noteworthy all the proposed recommendations cannot be applied all together as some operate alternatively to the other identified proposals. Further due to the fact that some of the proposals are very complex would require an in-depth study to measure compatibility with our current legal system.

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