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RESEARCH ARTICLE

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Should employees be entitled to legal representation during disciplinary hearings in South Africa?

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ABSTRACT

This article demonstrates that employees in South Africa are denied the right to appoint external legal representation of their own choice during disciplinary inquiries. It argues that this violates their fundamental rights such as dignity, fair labour practice, and practicing their chosen occupation freely. Although Item 4(1) of Schedule 8 of the Code of Good Practice: Dismissal allows accused employees the opportunity to be represented by a trade union representative or a fellow employee, this Code is silent on whether an accused employee can obtain external legal representation of their choice during disciplinary inquiries. It further illustrates that accused employees who are brought before disciplinary hearings are placed in a position where they are forced to rely on their fellow employees or trade union officials who may not possess the skills and competency to adequately present their defences. Further, if they wish to seek external legal representation, they need to request permission from chairpersons of disciplinary hearings who usually refuse to grant such permission. This article advances an argument that it is constitutionally impermissible to adopt a paternalistic approach where dismissal is a likely sanction to subject accused employees to the discretion of chairpersons of disciplinary inquiries to decide whether to allow external legal representation. It argues further that accused employees should have a right to decide for themselves whether to obtain external legal representation of their own choice during disciplinary hearings.

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1. Introduction

In South Africa, employment-related disciplinary hearings are required to be substantively and procedurally fair. Substantively, charges brought against employees are required to be based on a fair reason. Procedurally, proceedings that employees are subjected to must comply with the rules of natural justice where employees are allowed to defend themselves against charges preferred against them by their

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employers.¹ Disciplinary hearings are required to not only be fairly conducted but to also be seen as fair.² The parameters of fairness relating to the procedures to which employees should be subjected have not been adequately debated by both the courts and academics alike concerning disciplinary hearings in the workplace. In particular, the ‘right’ of the employees who are brought before disciplinary hearings to appoint their own external legal representatives as a corollary of the fairness of employment-based disciplinary hearings is yet to be adequately discussed in South Africa. Neither the Constitution of the Republic of South Africa, 1996 nor any of the legislation promulgated in South Africa expressly provides employees who are brought before disciplinary hearings an automatic right to procure external legal representation of their own choice. In *Masstores (Pty) Ltd v Commission for Conciliation Mediation and Arbitration*, it was held that ‘[a] disciplinary hearing is not a criminal trial’.³ However, in *Scheepers v Transnet Bargaining Council*, it was held that ‘[e]ven though the disciplinary inquiry is not a criminal trial, it has certain features akin to such a trial’.⁴

In criminal proceedings, accused persons have an automatic right to a fair trial, which includes legal representation at their own costs or state expense if they do not have the means to hire their own private legal representatives. However, this right does not extend to employees who are facing disciplinary hearings. In terms of s 35(3)(f) of the Constitution, ‘[e]very accused person has a right to a fair trial, which includes the right to choose, and be represented by a legal practitioner, and to be informed of this right promptly’. In *S v Lusu*, it was held that ‘[t]he right to legal representation is a right that is central to the fairness of criminal trials’.⁵ Judicial officers in criminal proceedings are required to inform accused persons of their right to legal representation and bring to their attention the fact that such representation can also be acquired at the state’s expense.⁶ While criminal proceedings are clearly different from workplace-related disciplinary hearings, the impact of the latter proceedings can be equally, if not more, devastating by making it difficult for the dismissed employee to care for themselves and their loved ones. A criminal record can make it difficult to find employment while dismissal can lead to unemployment. This

¹ *Pillay v Commissioner for Conciliation Mediation and Arbitration* [2014] ZALCD 55 para 74.

² *Dumbu v Commissioner of prisons* [1992] 3 All SA 561 (E) para 565.

³ *Masstores (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* [2023] ZALCJHB 254 para 51.

⁴ *Monare v SA Tourism* (2016) 37 ILJ 394 (LAC) para 72–73; the Labour Appeal Court further held that ‘[i]n a disciplinary hearing, for example, there is a charge of misconduct to which an employee may either plead guilty or not guilty, which is similar to a plea to a criminal charge. Fairness and logic dictate that the same safeguards that apply in a criminal trial with regard to a plea of guilty should also apply in disciplinary hearings where the employee faces dismissal’. See also *Scheepers v Transnet Bargaining Council* [2023] ZALCJHB 156 para 30.

⁵ *S v Lusu* 2005 (2) SACR 538 (EC) para 11. See also NC Steytler *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa, 1996* (1998) 302, where it is argued that ‘[t]he right to a lawyer is an essential feature of the right to a fair trial as lawyers play a critical role in ensuring that the accusatorial system, the foundation of a fair trial in the common law tradition, produces a just result. In an adversary system a court’s decision rests primarily on the evidence and arguments advanced by the parties and the system is predicated on the assumption that parties will protect their own interests through their vigorous participation in the proceedings. A fair adversary system is thus dependent on the prosecutor and the accused participating fully and effectively in order to produce a just decision. Because effective participation requires legal knowledge and court room skills, accused need the assistance of lawyers who have such knowledge and skills. With the constitutionalisation of criminal procedure, the need for legal assistance is even greater; not only is a fair trial likely to emerge through skilled participation, but other constitutional rights, such as privacy, can also be vindicated through the criminal process’. See *Moloi v S* [2019] JOL 45242 (GP) para 13 where this statement was quoted with approval.

⁶ *Lusu* (ibid) para 15.

necessitates an academic discussion regarding the need for external legal representation to ensure fairness in employment-related disciplinary hearings.

In this article, we examine whether employees should, as a matter of right, be allowed external legal representation of their own choice in disciplinary hearings they are subjected to by their employers in their workplaces. Given the possibility of dismissal in these hearings, this article aims to evaluate whether the current approach of employees being assisted by their fellow employees or trade union representatives as well as disciplinary hearings chairpersons' being granted the power to decide whether to allow external legal representation is constitutionally justified. Employers usually employ legally trained persons as chairpersons of disciplinary hearings to preside over either unrepresented accused employees or those represented by equally lay colleagues or, in some instances, trade union representatives.⁷ This raises an important question of whether it should be taken for granted that fairness in these proceedings will be ensured given the expertise of the appointed chairpersons. While it could be argued that experienced chairpersons would be better equipped to chair disciplinary hearings because of their mastery and understanding of the procedures to be followed, it does not follow that all experienced chairpersons will always act fairly. Some experienced chairpersons have been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for following unfair procedures.⁸

Chairpersons are appointed and remunerated by employers. Even though they would ordinarily receive some form of briefing from employers, which does not necessarily make them biased, their conduct can create an impression in the minds of the employees subjected to the disciplinary hearings that they are biased. Concerning the subjective mind of an employee faced with a disciplinary hearing, it is worth asking whether the fact that an appointed chairperson has the necessary expertise justifies denying the employee brought before such a chairperson the autonomy to decide what would be fair in such an inquiry. We seek to answer this question by reflecting on whether the discretionary approach to external legal representation in workplace disciplinary hearings is constitutionally 'reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom'.⁹ Based on the right to a fair hearing,¹⁰ fair labour practices,¹¹ and dignity,¹² we argue that the South African constitutional framework demands that employees should decide to be represented by their own desired legal representatives in disciplinary hearings. We argue that this can be achieved by explicitly indicating in the Constitution that employees have a right to appoint their own legal representation in disciplinary hearings to which they are subjected.

⁷Item 4(1) of Schedule 8 of the Labour Relations Act 66 of 1995 (LRA): Code of Good Practice: Dismissal (hereafter Code) among others, provides that in workplace disciplinary hearings '[t]he employee should be entitled [...] to the assistance of a trade union representative or fellow employee'.

⁸See generally *Industrial Court Pretoria; Madondo/SA Breweries* [2001] 8 BALR 875 (CCMA); *FAWU obo Sotyato vs JH group Retail Trust* (2001) 8 BALR 864; and *SACCAWU obo Mosiane vs City Lodge Hotels Ltd* (2004) 2 BALR 255. See also *National Union of Metalworkers of South Africa obo Alungile/Bhisho Motors* [2023] 12 BALR 1349 (MIBC) para 17, where the disciplinary hearing was found to be procedurally unfair because the chairperson was biased.

⁹Section 36 of the Constitution.

¹⁰Section 34 of the Constitution.

¹¹Section 23(1) of the Constitution.

¹²Section 10 of the Constitution.

The discussion will be structured as follows: [Section 2](#) demonstrates that legal representation in disciplinary hearings by external legal representative of employees' own choice is a constitutional right that should automatically be afforded to all employees who are brought before disciplinary hearings. [Section 3](#) discusses the approach that the South African courts adopted regarding legal representation in disciplinary hearings. [Section 4](#) discusses some of the guidelines that have been provided by the courts. [Section 5](#) concludes the discussion. In this article, we are not arguing for representation or assistance to be allowed in workplace disciplinary hearings because this is already taking place. We advance the argument that all employees subjected to workplace disciplinary hearings should be afforded the right to appoint their own preferred external legal representatives without seeking permission to do so from employers or chairpersons of these hearings.

2. Constitutional entitlement to legal representation

2.1. Overview

The Appellate Division (as it then was) in *Dabner v SA Railways and Harbours*,¹³ found no common law authority to support a view that persons generally have a right to legal representation before tribunals other than the courts. Even though the Appellate Division was not called to resolve an employment dispute within the workplace in this matter, its reasoning has been extended to disciplinary hearings post the apartheid era.¹⁴ While the view that persons are not entitled to legal representation in proceedings other than court proceedings may have been justifiable based on what the common law may or may not have provided,¹⁵ such a view cannot be justified in the era where human rights are at the centre of the resolution of disputes, particularly in the employment context. It is not much about what the common law permitted but more about what is constitutionally required. Legal representation in disciplinary hearings is not necessarily prohibited by the common law. In fact, while some employers in their policies do not allow external legal representation in employment related disciplinary hearings, they permit internal assistance in these proceedings.¹⁶

It has been held that chairpersons of employment-related disciplinary hearings have the discretion to allow legal representation in these proceedings in exceptional cases.¹⁷ In certain instances, those appointed as chairpersons are entrusted with the power to decide whether issues with which they are confronted are complex enough to warrant external legal representation.¹⁸ The fact that these chairpersons have the

¹³*Dabner v SA Railway and Harbours* 1920 AD 583 at 598.

¹⁴See *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* [2005] 2 All SA 479 (SCA) para 11.

¹⁵*South African Post Office v Commission for Conciliation, Mediation and Arbitration* [2021] ZALCJHB para 22.

¹⁶See *Marhule v Minister of Home Affairs* [2021] ZALCJHB 63 para 1; *Volschenk v Morero* [2011] 3 BLLR 313 (LC) para 3 and 4 as well as *Dywili v Brick & Clay* [1995] 7 BLLR 42 (LC) 44.

¹⁷*Ming v MMI Group Ltd* [2016] ZALCJHB para 10.

¹⁸See *Majola v MEC, Department of Public Works: Northern Province* [2003] JOL 12211 (LC) para 1, where it was held that '[w]hether legal representation is indispensable to ensuring a procedurally fair hearing is a discretion conferred on the chairperson of an enquiry. The chairperson must exercise that discretion judiciously having regard to all the circumstances of the particular case. In certain circumstances, the denial of legal representation could effectively be a denial of access to a court or tribunal'.

discretion to subjectively determine the complexity of the matter and the existence of exceptional circumstances to warrant external legal representation means employees are not part of this decision, notwithstanding its impact on their livelihoods. This raises a fundamental question of whether, from a fairness perspective, chairpersons are suitable to dictate whether external legal representation should be allowed. It is not clear how any disciplinary hearing that potentially can lead to the dismissal of an employee can be referred to as either not complex or lacking in exceptional circumstances, at least from the affected employee's point of view.

There is nothing ordinary with the potential of being rendered unemployed through dismissal that is likely to arise from a disciplinary hearing due to poor presentation of the defence. The stakes are not as high for those appointed as chairpersons as they are for employees facing the possibility of dismissal. The fact that employers unilaterally procure services of legally trained persons to chair disciplinary hearings does not automatically guarantee the fairness of these proceedings. The possibility of chairpersons being biased against employees does not justify granting them the authority to determine whether the external legal representation of the employees' own choice should be allowed.¹⁹ The issue is not whether the expertise of the appointed chairperson objectively provides comfort of fairness, but whether the employee subjectively believes that fairness can be ensured if he or she is legally represented by his or her own external legal representative. As is the case in criminal proceedings, the need for legal representation should be assumed in favour of the employee who can waive the right to be represented if he or she so wishes. Failure to do so infringes on some of the fundamental rights that are entrenched in the Constitution as demonstrated below.

As will be demonstrated below, there are instances in the workplace where employees subjected to disciplinary hearings can be represented by their colleagues who possess the necessary knowledge or expertise to effectively assist them.²⁰ For instance, in the higher education sector, university employees may require their colleagues who are admitted as legal practitioners and practiced in the field of labour law to assist them. This is not the luxury enjoyed by employees in all sectors of the economy. The latter employees may be persuaded to attain their own external legal representation when requested to appear in disciplinary hearings. However, these employees are currently faced with serious legislative and judicial reluctance to accept that external legal representation of their own choice is a necessary and essential administrative mechanism to ensure procedural fairness of any adversarial dispute resolution mechanism such as disciplinary proceedings where skilled and

¹⁹See *South African Transport and Allied Workers Union obo Mphahlele/Prasa t/a Metrorail – Gauteng North* [2015] 4 BALR 461 (CCMA) para 116, where it was found that '[t]he chairperson of the disciplinary inquiry was overtly biased. His job grading was on the same level as that of the chairperson. The correct disciplinary code and procedure was not utilised'. See also *SACCAWU obo Mosiane/City Lodge Hotels Ltd* [2004] 2 BALR 255 (CCMA) 261, where the commissioner in accepting that the chairpersons were biased and reinstating the employee held that '[t]he accumulative effect of all the "blunders" made by both the Chairpersons so completely vitiated the proceedings that when one assesses both hearings together, one is left in a grey foggy cloud where it is difficult to ascertain if the true facts of the case emerged'.

²⁰As university employees, we are both admitted as attorneys with practical experience in labour law. We can competently represent any university employee in a disciplinary hearing brought against them by the university for free, a luxury that a retail employee who is subjected to a disciplinary hearing may not enjoy.

experienced prosecutors are assigned to prosecute the employers' claims against accused employees.²¹

This is even though it has been shown that there are procedural defects such as chairpersons who get involved in the prior investigations against employees and participate in the formulation of the allegations preferred against such employees.²² Such conduct is contrary to the concept of fairness and what disciplinary hearings are intended to achieve. It has been held that '[a] disciplinary enquiry is designed to permit the accused employee an opportunity to defend himself against his accusers before an impartial chairperson who has an open mind and no pre-conceived ideas about whether or not the employee is guilty of the offence.'²³ Procedural defects that may render disciplinary hearings unfair are more likely to be identified by external legal representatives who specialise in labour disputes as opposed to lay colleagues who do not possess the relevant technical skills.

2.2. Implicated rights

2.2.1. The right to dignity

The attainment of fairness in the workplace requires a delicate balance between the employers' and employees' interests to not only ensure the achievement of the employers' goals but also respect for human dignity.²⁴ In *S v Makwanyane*, it was held that '[r]ecognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.'²⁵ In terms of s 10 of the Constitution,²⁶ '[e]veryone has inherent dignity and the right to have their dignity respected and protected'. Deryck Beylveled and Roger Brownsword argue that dignity can itself appear as a source of human rights, a species of a human right, defining the subjects of human rights and the objects to be protected, a reinforcer or limiter of rights of individual autonomy and self-determination.²⁷ Despite its inherent complexity, dignity is invoked in the constitutional context, among others, not only as the basis for an individual's entitlement to fundamental rights but also to curtail interference with the enjoyment of such rights.²⁸

²¹ *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA) para 11 and *Highveld District Council v CCMA* [2002] 12 BLLR 1158 (LAC) para 11. It is important to note that while the disciplinary hearing in *Hamata* was not based on workplace misconduct, the main principles relating to disciplinary hearings from that case have been applied in workplace-related disciplinary hearings disputes in South Africa. See among others *Commission for Conciliation, Mediation and Arbitration v Law Society of the Northern Provinces (Incorporated as the Law Society of Transvaal)* [2013] 11 BLLR 1057 (SCA) para 19; *South African Post Office v Commission for Conciliation Mediation and Arbitration* [2021] JOL 49802 (LC) para 22; and *National Education, Health and Allied Workers' Union/Department of Health – Eastern Cape* [2013] 1 BALR 15 (PSCBC) para 22.

²² *NUM obo Nongwane/Sheltam (Rail) Mine Services CC* [2004] 6 BALR 738 (CCMA) 743.

²³ *Ibid.*

²⁴ S Vettori 'The role of human dignity in the assessment of fair compensation for unfair dismissals' (2012) 15 *Potchefstroom Electronic Law Journal* 102, 102.

²⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) paras 328 and 329.

²⁶ *Ibid.*

²⁷ See D Beylveled & R Brownsword 'Human dignity, human rights, and human genetics' (1998) *Modern Law Review* 661–80.

²⁸ AC Steinmann 'The core meaning of human dignity' (2016) 19 *Potchefstroom Electronic Law Journal* 1, 5.

Dignity is one of the fundamental rights that provides a shield against unwarranted limitation of fundamental rights in the Constitution. The Constitutional Court in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*,²⁹ reminded us that the right to dignity 'occupies a special place in the architectural design of our Constitution, and for good reason'.³⁰ This right aims to 'repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past'.³¹ There is a power imbalance between employees and employers that calls for employees' dignity not to be infringed in the workplace by those who provide employment.

There are employees whose dignity is impaired in the workplace through conduct such as discriminatory practices, bullying, and harassment, unfair labour practices, mismanagement, being forced to work long hours without adequate pay, and exploitation.³² Some employees may feel that their right to dignity is interfered with because they are subjected to flawed and grossly unfair disciplinary hearings.³³ These employees may desire to be subjected to disciplinary proceedings where they stand a chance of demonstrating that allegations against them are baseless. This requires adequate and competent legal assistance. The employee's subjective belief or perception of the fairness of the proceedings should be a guiding factor in determining whether external legal representation of their own choice is warranted under the circumstances. When disciplinary hearings threaten livelihoods, it is justified for those brought to such hearings to prefer to be represented by their own external legal representatives that they believe would competently prosecute their defences.

We are of the view that being denied external legal representation of one's choice when subjected to a disciplinary hearing impairs on the employee's right to dignity in the workplace. This is because first, the employee's autonomy to assess the complexity of their own case and decide for themselves whether the external legal representative is warranted is taken away from them. Secondly, employment generally provides a sense of value and dignity. Where dismissal is a possible sanction, an employee may suffer the indignity of poor representation and presentation of her defence by a lay colleague and the ultimate indignity of unemployment that may result from a lack of adequate legal representation. These employees do have the option to approach the CCMA or applicable bargaining council to obtain justice with respect to the unfair dismissal. However, this is a risky option that may impact their income pending the finalisation of the labour dispute. Having an option of reviewing the decision does not justify being restricted from appointing legal representation of one's own choice at the inquiry level.

²⁹*Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2019 (11) BCLR 1321 (CC).

³⁰*Ibid* para 45.

³¹E Cameron 'Dignity and disgrace: Moral citizenship and constitutional protection' in C McCrudden (ed) *Understanding Human Dignity* (2012) 476.

³²See *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council* (2022) 43 ILJ 825 (LAC) para 2, *Samka v Shoprite Checkers (Pty) Ltd* (2020) 41 (ILJ) 1945 (LAC) para 1. See also A Tiwari & R Sharma 'Dignity at the workplace: Evolution of the construct and development of workplace dignity scale' (2009) 10 *Frontiers in Psychology* 1, 2.

³³See *SA Footplate Staff Association obo Raaths/Spoornet* [1999] 7 BALR 862 (IMSSA) 864; *Braun v August Laepple (Pty) Ltd* [1996] 6 BLLR 724 (IC) 275 and *Abeldas v Woolworths (Pty) Ltd* [1995] 12 BLLR 20 (IC) 37.

Item 1.3 of the Code of Good Practice on the Prevention and Elimination of Harassment,³⁴ encourages and promotes:

the development and implementation of policies, procedures and practices that will lead to the creation of workplaces that are free of harassment, and in which employers and employees respect one another's integrity and dignity, privacy, and their right to equity in the workplace.

This code is aimed at preventing, eliminating, and managing all forms of harassment in the workplace. Item 8.2 of this Code provides that to maintain a working environment in which an employee's dignity is respected, employers must have a zero-tolerance attitude towards harassment complaints.³⁵ Most importantly, the Code explicitly provides that all employees in the workplace have a right to be treated with dignity.³⁶ Unfortunately, courts and academics alike have not adequately evaluated the potential violation of employees' right to dignity when subjected to disciplinary hearings, some of which may be substantively and procedurally unfair. It cannot be doubted that the Labour Relations Act 66 of 1995 (LRA) provides remedies that can be utilised when disciplinary hearings are found to be unfair. However, the issue is not what can be done once the hearing is found to be unfair but whether employees believe they will receive a fair hearing if they are represented by external legal representatives of their choice at the hearing.

Similarly, accused persons in criminal proceedings are not informed that they should go through their trials in the hope that they can utilise appeal and review proceedings should the presiding officers wrongly decide their cases or be subjected to processes that warrant the intervention of the higher court. They are provided the right to choose at the start of the proceedings whether they will conduct their defence or procure the services of legal representatives of their choice if they can afford to. They are allowed the peace of mind that the process they are subjected to is a fair process. There is no reason why employees who are subjected to disciplinary proceedings are not afforded the same opportunity as a matter of right. According to Daniel McLaren, the right to work has been embraced across the globe, and in many cases; it has been linked to the right to dignity, as well as to a livelihood and to participate in economic development.³⁷

In terms of s 22 of the Constitution, '[e]very citizen has the right to choose their trade, occupation or profession freely'. Once an employee has chosen his or her occupation, he or she deserves to be treated with dignity in the workplace. In the context of employment disciplinary hearings, employees should be afforded the dignity of deciding who should assist them in conducting their defence. There is no need for employers through their policies or chairpersons whose services they procured to dictate that employees should not be legally represented by their own external legal representatives. Employees should have the autonomy to decide for themselves because it is their livelihoods that are at stake.

³⁴The Code came into effect on 18 March 2022.

³⁵The Code of Good Practice on the Prevention and Elimination of Harassment (2022).

³⁶*Ibid.*

³⁷D McLaren 'Realising the right to decent work in South Africa' (2017) Studies in Poverty and Inequality Institute Working Paper 15, 18.

There are at least two ways in which the right to dignity of employees who are denied legal representation of their choice in disciplinary hearings can be impaired. First, failure to conduct their defence properly because of being forced to either represent themselves, be represented by fellow employees or even union officials despite the serious threat to their livelihoods due to the potential dismissal sanction that can be passed against them. Maharaj convincingly argues that '[a] person's dignity is dependent on job security. Having job security means that there is food, clothing, shelter, and other requirements for a good quality of life. Once a person is unable to sustain this, it will lead to his or her dignity becoming impaired'.³⁸ The Constitutional Court has also authoritatively held that '[t]he ability of people to earn money and support themselves and their families is an important component of the right to human dignity'.³⁹ The potential for the earning capacity being compromised warrants those who will be prejudiced to decide for themselves whether to use external legal representatives of their own choice in disciplinary hearings.

Being prevented from appointing their own legal representatives, which they believe will assist them to preserve their rights, inhibits them from using the resources available to them to protect their livelihoods, which directly informs their right to dignity. Seen in this context, it cannot be denied that legal representation of one's own choosing in disciplinary hearings is an important component of employees' right to dignity, which must be protected. Employees should be entitled to be represented by external legal representatives of their choice, which right they could waive if they so wish. The denial of this right prevents them from exercising their right to ensure that their disputes with their employers are resolved fairly within their workplaces before disciplinary hearings where they can competently structure their defences.⁴⁰ The fact that there are remedies that can be utilised once the disciplinary proceedings are finalised is beside the point. The issue is whether the disciplinary hearing to which the employee is subjected is viewed as fair by the employee. If the employee's assessment of fairness includes acquiring relevant external legal assistance, then such an employee should be allowed to do so.

Fairness from the employee's perspective appears to be a concept with which courts seem not to be particularly concerned. There is evidence of an employer who insisted on being legally represented against an employee who was represented by a fellow employee in a disciplinary hearing. Despite the clear power imbalance, the court found that courts should not 'dictate to employers how they should conduct their own internal processes'.⁴¹ The court further held that the 'prerogative to discipline remains that of the employer, and any such undue interference invariably intrudes into the employer's powers and rights to take disciplinary action'.⁴² This was an urgent application and the court did not entertain the merits of the case. This meant that the employer was ultimately allowed to have legal representation in the disciplinary

³⁸N Maharaj 'A critical analysis of the appropriateness of dismissal as an automatic sanction for dishonesty in the workplace' (2021) unpublished LLM mini dissertation University of KwaZulu-Natal 6.

³⁹*South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* 2014 (4) SA 371 (CC) para 31.

⁴⁰See s 34 of the Constitution.

⁴¹*Marhule* (note 16 above) para 6.6.

⁴²*Ibid* para 9.

hearing that was instituted against the employee. Surprisingly, the employer was effectively allowed to exercise a right that is casually denied to employees. We do not take issue with the employer being allowed to appoint its own legal representative in this case; we frown upon employees being denied the same right when they wish to appoint their own legal representatives.

Secondly, employees' right to dignity is infringed when their autonomy to decide whether it is appropriate to have legal representation of their own choice during disciplinary hearings is taken away from them by vesting chairpersons of these proceedings with discretion to decide whether legal representation is necessary. Unfair outcomes are likely to occur when employees are confronted with false allegations preferred against them and biased chairpersons of disciplinary hearings. On several occasions, different South African labour forums found some disciplinary hearings' chairpersons to be biased against employees, particularly those that have previously rendered legal services for employers.⁴³

During disciplinary proceedings, employees' own external legal representatives can reasonably and objectively assess, on the correct facts, whether their clients' apprehension that chairpersons have not or will not bring impartial minds to bear on the determination of issues before them and that they are not open-minded to persuasion by the evidence and submissions on behalf of such employees.⁴⁴ In *BTR Industries SA (Pty) Ltd v Metal and Allied Workers Union*, it was held that '[i]f suspicion is reasonably apprehended, then that is an end to the matter'.⁴⁵ When proceedings are believed to be biased, employees when adequately represented, can raise technical points such as applications for the recusal of chairpersons, which they are unlikely to do when they are unrepresented or assisted by lay colleagues.⁴⁶ It is unjustified in a constitutional democracy to deny employees the right to appoint their desired legal representative in disciplinary hearings. We submit that this amounts to the infringement of their right to dignity.

2.2.2. The right to fair labour practices

Ironically, there are instances where judges were faced with allegations of misconduct that could potentially lead to their impeachment. For good reason, they consulted their lawyers to protect their rights even before they were subjected to disciplinary hearings.⁴⁷ None of these judges allowed chairpersons of these hearings to assess

⁴³See, among others, *Surgical Innovations (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2014] ZALCD para 44; *Feinberg v African Bank Ltd* [2005] JOL 12228 (T) 9; and *Abeldas v Woolworths (Pty) Ltd* [1995] 12 BLLR 20 (IC) 36; *NUM obo Ncongwane/Sheltam (Rail) Mine Services CC* [2004] 6 BALR 738 (CCMA) 743. See also *SACCAWU v Citi Kem* [1998] 2 BALR 160 (CCMA) 167, where it was held that '[t]he chairperson of the disciplinary enquiry is obliged to be independent, impartial and unbiased at all times. From the testimony of Jones, it was very clear that the chairperson of the disciplinary enquiry was not seen to be independent. On the contrary, I got the distinct impression that the chairperson of the disciplinary enquiry at times fulfilled the functions of the investigating officer and vice versa and such conduct by the chairman clearly shows bias'.

⁴⁴See *President of the Republic of South Africa v South African Rugby Football Union* (2) SA 14 (CC) para 48, where the Constitutional Court stated the test for apprehension of bias. In instances where an employee cannot afford their own legal representative, they have the option to request institutions that offer free legal services to obtain *pro bono* assistance. Otherwise, they can be assisted by fellow employees or union representatives.

⁴⁵*BTR Industries SA (Pty) Ltd v Metal and Allied Workers Union* (6) 1992 (13) ILJ 803 (A) 821J-822D.

⁴⁶See generally *Ndlovu v Chaane* (J119/21) [2021] ZALCJHB 20 (1 March 2021).

⁴⁷See among others 'Moata lawyer cries racism' (24 April 2009) *News24*; N Tolsi 'Hlophe: "Hired gun" evens the legal odds' (27 Sep 2013) *Mail&Guardian*.

whether allegations against them were serious enough to warrant legal representation of their own choice. These judges acquired their own preferred legal representation, despite their proven knowledge of the law generally, because they understood the consequences of the processes against them, and most importantly that they may end up not having jobs. In particular, they realised that seeking legal representation of their own choice would allow them to better safeguard their right to fair labour practices. When judges with all their legal knowledge are facing allegations of misconduct are not denied the right to legal representation of their own choice, why should employees who do not have any legal background be denied this right?

It is not clear why judges who are yet to be accused of misconduct when presiding over cases where lay employees request permission to be allowed to appoint their own legal representatives in disciplinary hearings are quick to remind society that there was no right to legal representation at common law, without any reference to the employees' right to fair labour practices.⁴⁸ The Judicial Conduct Tribunal considering the allegations of misconduct against Judge Makhubela allowed her to seek legal representation of her own choice that is paid for by the state.⁴⁹ No one suggested that she should request one of her fellow judges to represent her, some of whom are more than capable of doing so, or seek permission from the chairperson of the tribunal to procure an external legal representative of her own choice. It was taken for granted that she has the right to defend herself against the allegations preferred against her as she sees fit. Why are ordinary employees not afforded the same opportunity as a matter of right?

Section 23(1) of the Constitution clearly provides that '[e]veryone has the right to fair labour practices'. This provision is given effect by the LRA,⁵⁰ which provides the legal framework for employees to be fairly dismissed.⁵¹ There are several practices in the workplace that employees may need to protect themselves against, such as allegations made against them that potentially can attract the sanction of dismissal through a disciplinary hearing. When such allegations are made and employers endeavour to test them through disciplinary hearings, most employers exercise their discretion by appointing experienced labour practitioners to chair such proceedings. Employees are forced to face these professionals on their own, without experienced legal representatives of their choice.

It cannot be doubted that there is value to be derived in employers procuring the services of experienced chairpersons to conduct disciplinary hearings. Such chairpersons are likely to ensure that the correct procedures are followed and hopefully act fairly and impartially to all parties involved in the disciplinary proceedings. However, there is evidence of chairpersons making up their minds on the guilt of employees or being biased against them in disciplinary hearings.⁵² Employees cannot be expected to rely on the expertise of chairpersons for the fairness of their disciplinary hearings

⁴⁸See *South African Post Office* (note 15 above) para 5 and *Mahumani* (note 14 above) para 11.

⁴⁹T Broughton 'Judge Makhubele racks up legal fees in excess of R3-million' (14 November 2023) *GroundUp*.

⁵⁰Section 1(a) of the LRA reads, 'the purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act, which are – to give effect to and regulate the fundamental rights conferred by s 23 of the Constitution'.

⁵¹Section 185(1) of the LRA.

⁵²See *Aranes/Budget Rent A Car* [1999] 6 BALR 657 (CCMA) 670 and *SACCAWU v Citi Kem* [1998] 2 BALR 160 (CCMA) 168.

in the same way those accused of crimes are not forced to rely on the fairness of magistrates and judges who are presiding over their cases. The fact that chairpersons are employed, appointed, and remunerated by employers justifies employees deciding on their own accord whether they should utilise their own external legal representatives. In the context of legal representation at arbitration hearings, it was correctly held in *Law Society of the Northern Provinces v Minister of Labour*, that the dismissal of an employee is a serious matter for that particular employee.⁵³ No court in South Africa adequately justified why the employee's autonomy to evaluate the seriousness of their case should be deferred to chairpersons of disciplinary hearings.

In *Law Society*, it was held that the rule that restricted employees' right to appoint their legal representatives in employment arbitration proceedings was unconstitutional.⁵⁴ This decision was overturned by the Supreme Court of Appeal in *Commission for Conciliation, Mediation and Arbitration v Law Society of the Northern Provinces*,⁵⁵ where the court placed more emphasis on the discretion of the commissioner who is presiding over arbitration proceedings to decide whether legal representation is warranted.⁵⁶ Unfortunately, this case was centred on the rights of lawyers to practice their trade. It was not an employment-related case. In *CCMA*, the Supreme Court of Appeal noted that 'there is not the slightest suggestion in its papers that the restriction on the right to legal representation causes hardship to or has operated to the prejudice of those affected by it'.⁵⁷

This *dictum* should be understood in line with the circumstances of this case and the litigants involved. This case did not deal with employees and their right to legal representation of their own choice in the context of disciplinary hearings. In the context of employment disciplinary hearings where neither employees subjected to these proceedings nor their colleagues who are appointed to assist them are legally trained, lack of adequate legal representation may be catastrophic if employees' dismissals result from poor representation and prosecution of their defences. To date, there has not been a case that has been brought on behalf of an employee that adequately engages the employees' constitutional rights, including the right to fair labour practices in the context of restriction to legal representation during disciplinary hearings. While employers have the prerogative to dismiss their employees when dismissal is warranted following disciplinary hearings, they should always keep in mind that the Constitution affords employees the right to fair labour practice.⁵⁸

It is important that courts, just like in the case of some of the judges who exercised their autonomy and sought out their own legal representatives when in trouble at their workplace, to carefully reflect on the constitutional dictates and the realities

⁵³ *Law Society of the Northern Provinces v Minister of Labour* [2013] 1 All SA 688 (GNP) para 30.

⁵⁴ *Ibid* 45(1). See also T Broodryk 'Legal representation at the CCMA *Law Society of the Northern Provinces v Minister of Labour* 2013 (1) BLLR 105 (GNP) and *CCMA v Law Society, Northern Provinces* 2013 (11) BLLR 1057 (SCA)' (2014) 35 *Obiter* 393. See further KJ Selala 'Constitutionalising the right legal representation at CCMA arbitration proceedings: *Law Society of the Northern Provinces v Minister of Labour* 2013 1 SA 468 (GNP)' (2013) 16 *Potchefstroom Electronic Law Journal* 398. The discussion of this issue is beyond the scope of this article and will be addressed in a separate article.

⁵⁵ *Commission for Conciliation, Mediation and Arbitration v Law Society of the Northern Provinces* 2014 (2) SA 321 (SCA) para 24.

⁵⁶ *Ibid* para 30.

⁵⁷ *Ibid* para 3.

⁵⁸ Section 23(1) of the Constitution.

of employees in the workplace, given the power imbalances between them and their employers. In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau*, it was held that it is difficult for employees to confront their employers with allegations of unfair labour practices because this may trigger proceedings that may lead to their dismissal.⁵⁹ The Labour Appeal Court correctly held that ‘an employee would feel much comfortable if this could be done through the assistance of a lawyer who would be better placed to take the necessary precautions to protect the interest of the client.’⁶⁰ Although the case dealt with whether there is an absolute right to be represented at the CCMA, where an employee has been dismissed for misconduct or incapacity, it is submitted that its reasoning applies to employees facing disciplinary hearings.

The restriction of external legal representation of own choice in disciplinary hearings is a violation of employees’ right to fair labour practices, as it remains silent on the issue of external legal representation at disciplinary hearings.⁶¹ We are of the view that the plight of employees should be addressed by amending s 23 of the Constitution by explicitly making it clear in this section that employees subjected to workplace disciplinary hearings have a right to appoint legal representation of their own choice. In our view, this is a constitutional right. As such, it would not be enough to merely make provision in the relevant code for the explicit recognition of legal representation of the employee’s own choice in disciplinary hearings. The Constitution must be amended and the LRA should give the necessary effect to it.

2.2.3. *The right to choose one’s occupation freely*

In terms of s 22 of the Constitution, every citizen has the right to choose their occupation or profession freely. This is not a constitutional provision that is usually invoked when the rights of employees are discussed. However, the dynamics of the workplace such as false accusations and events that can lead to dismissals, including constructive dismissals necessitate a discussion relating to the likely interference of such events with one’s ability to continue in his or her chosen occupation. For instance, in *Solidarity obo Oosthuizen v South African Police Service*, junior colleagues falsely accused their superior of racism against them.⁶² The superior was brought to a disciplinary hearing where it emerged that her subordinates were heard plotting to falsely accuse her of racism.⁶³ The court noted that ‘there is an emerging trend of false claims of racial or sexual harassment by subordinates against their superiors in order to circumvent being disciplined.’⁶⁴ Had the plot not been proven, the superior would have been dismissed based on false accusations. While fairness may be an issue that can be discussed when false allegations that inevitably lead to dismissal are made, a broader issue under these circumstances relates to the interference with the

⁵⁹ *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* [2009] 4 BLLR 299 (LAC) para 43.

⁶⁰ *Ibid.*

⁶¹ Item 4(1) of the Code of Good Practice.

⁶² *Solidarity obo Oosthuizen v South African Police Service* (2023) 44 ILJ 882 (LC) para 35.

⁶³ *Ibid.*

⁶⁴ *Ibid* para 33. See also *Public Service Association of South Africa v Department of Mineral Resources* [2022] ZALC-JHB para 32.

employee's chosen occupation. It is in this context that an inquiry in terms of s 22 of the Constitution becomes relevant.

This does not mean that an employee is entitled to a particular job with a particular employer. However, once a particular job with a particular employer has been acquired, no one has the right to arbitrarily interfere with that occupational choice by bringing false accusations against the employee that would lead to the employee being subjected to a disciplinary hearing that can result in his or her dismissal. That is a direct violation of the employee's freely chosen occupation that he or she will be forced to leave based on false accusations. Such a violation was clearly demonstrated in *Weitz v Goodyear SA (Pty) Ltd*.⁶⁵

In *Weitz*, the employee instituted a case against the employer claiming damages for loss of earning capacity. The employee alleged that he was subjected to malicious disciplinary proceedings without reasonable or probable cause. The employee argued that this experience caused him major depression and post-traumatic stress disorder that rendered him unemployable with the consequent loss of earning capacity.⁶⁶ It was argued that the employer failed to investigate before proceeding with the disciplinary inquiry to satisfy itself that the allegations were malicious and without merit.⁶⁷ Further, this was sufficient to establish an intentional act on the part of the employer aimed at causing harm to the employee.⁶⁸ It was argued on behalf of the employer that its 'conduct was anything but unlawful and that there is no obligation upon an employer to conduct an investigation prior to a disciplinary inquiry as the disciplinary proceedings are themselves an inquiry'.⁶⁹ In dismissing the employer's exception that the employee's particulars of claim did not disclose the cause of action, the court held that the employer's failure to conduct an investigation before the disciplinary proceedings being initiated in line with the Code of Good Practice: Dismissal, constituted a breach of a legal duty.⁷⁰

While this case does not deal with legal representation in disciplinary hearings, it clearly demonstrates the devastating consequences for employees when they are not adequately legally represented. Had the employee been allowed to appoint competent legal representation of his own choice, such representative would have pointed out that the allegations of racism preferred against the employee had not been investigated by the employer.⁷¹ In terms of Item 4(1) of the Code of Good Practice: Dismissal '[n]ormally, the employer should conduct an investigation to determine whether there are grounds for dismissal'. The fact that the chairperson of the disciplinary inquiry did not probe whether an investigation had been conducted or at the very least provide reasons that may justify why the employer did not institute such an investigation

⁶⁵*Weitz v Goodyear SA (Pty) Ltd* (2014) 35 ILJ 441 (ECP).

⁶⁶*Ibid* para 1.

⁶⁷*Ibid* para 4.7.

⁶⁸*Ibid* para 23.

⁶⁹*Ibid* para 15.

⁷⁰*Ibid* para 19.

⁷¹See PAK le Roux 'Disciplinary proceedings based on false allegations: Can innocence give rise to a claim for damages?' (2014) 23 *Contemporary Labour Law* 72, 73 where it is argued that '[i]f this decision is a correct reflection of our law an employer cannot simply rely on allegations made by a co-employee or other persons when taking a decision to institute a disciplinary enquiry. At least some form of assessment must be made as to the veracity of the allegations and the "automatic" bringing of disciplinary charges in the hope that an independent third party will decide as to the guilt or otherwise of the employee will not be sufficient'.

provides further justification for employees, as a matter of right, to appoint their own external legal representatives with the necessary expertise. The malicious allegation made against the employee forced the employee out of his freely chosen occupation contrary to s 22 of the Constitution.

In *Baxter v Minister of Justice and Correctional Services*,⁷² the employee was dismissed for disclosing irregularities in the employer's recruitment processes. The employer argued that by disclosing such information, the employee violated the Protected Disclosure Act.⁷³ Apart from making disclosures, the employee was also charged with trying to influence the employer's learnership intake in favour of his daughter.⁷⁴ He was subjected to a disciplinary inquiry and found guilty of all the charges.⁷⁵ Concerning the disciplinary inquiry, the court held that the charges against the employee 'were thus implausible, if not trivial. They appear somewhat trumped up and support a conclusion that the real reason for [the employer] taking disciplinary action against the [employee] was [for] questioning the propriety of the various appointments'.⁷⁶

Most importantly, and in line with the employer's interference with the employee's free engagement in his chosen occupation, the LAC observed that there was 'a threat of dismissal that bore no relation to any of the charges ultimately brought against the [employee]'.⁷⁷ The LAC further held that '[m]ost of the charges were a fig leaf covering the true reason for dismissal: the protected disclosures'.⁷⁸ Under these circumstances, it is unreasonable to expect employees subjected to such treatment not to adequately defend themselves during disciplinary hearings through their own external legal representation. This will allow them to competently raise technical points that can assist chairpersons of these hearings in arriving at fair outcomes.

It has been argued that unfair disciplinary proceedings may result from among others: illegally entrapping unwanted employees to substantiate misconduct charges; falsification or fabrication of documents; influencing of witnesses; coercing admissions and confessions; tampering with taped evidence; or instructing chairpersons to make false findings.⁷⁹ Without adequate and competent legal representation of their own choice, employees subjected to these proceedings may not be able to raise technical points that can prevent expensive post-disciplinary hearing proceedings if adequately addressed at the hearing level.

By procuring legal representation of their own choice, employees would be better placed to adequately prepare for their disciplinary hearings and evaluate the fairness of all the processes that may lead to their potential dismissal. According to Cameron, pre-dismissal procedures mandate that employees must be accorded a hearing, which

⁷²*Baxter v Minister of Justice and Correctional Services* [2020] 10 BLLR 968 (LAC).

⁷³The Protected Disclosure Act 26 of 2000 as amended.

⁷⁴*Ibid* para 52.

⁷⁵*Ibid* para 53.

⁷⁶*Ibid* para 92.

⁷⁷*Ibid* para 92.

⁷⁸*Ibid* para 94.

⁷⁹ Israelstam 'Dishonest disciplinary tactics can backfire' *Labour Guide* <<https://labourguide.co.za/misconduct/dishonest-disciplinary-tactics-can-backfire>> Israelstam is an experienced labour law practitioner who was a commissioner at the CCMA for more than 30 years. His views, which are based on his practical experience, provide the much need practical outlook to our argument and demonstrates that we are dealing with a topic that has a practical significance.

can be in the form of an inquiry.⁸⁰ He cautions that employees subjected to such hearings should not be fobbed off with sham hearings.⁸¹ In a constitutional democracy, one of the most effective methods of ensuring that employees are genuinely heard during disciplinary proceedings is to guarantee their 'entitlement' to legal representation of their choice that can effectively assist them to prepare their defences and prosecute their cases. Failure to do so would also amount to an interference with their freely chosen occupation or profession.

2.2.4. *Limitation of the right to legal representation*

Legal representation during disciplinary hearings is not *per se* prohibited. Employees can be represented by their fellow employees or union officials if they are trade union members. The SCA in *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee*⁸² provided a blueprint of how the issue of legal representation in disciplinary hearings generally should be approached. Even though this case was not concerned with an employment-related disciplinary hearing, it has been used as authority in labour-related disciplinary proceedings.⁸³ The starting point is that there is no absolute right to legal representation in disciplinary hearings.⁸⁴ The entitlement to choose and consult with a legal representative for the purpose of representation only arises in the context of those accused of committing crimes to ensure their right to a fair trial.⁸⁵ The SCA held that such a right is not accorded concerning civil matters and if the legislature intended to provide for such a right it would have expressly done so.⁸⁶

According to the SCA, there has always been a reluctance by the legislature and the courts to make legal representation a condition of procedurally fair administrative proceedings.⁸⁷ It noted, however, that 'it is equally true that with the passage of the years there has been growing acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding'.⁸⁸ The SCA opined further that 'there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to attain procedural fairness'.⁸⁹ Most significantly, the SCA observed that disallowing outside legal representation is motivated by the desire to exclude outsiders from the institution's disciplinary proceedings.⁹⁰ Relying on *Hamata*, the Labour Court in *Ngongo v University of South Africa*, held that:

⁸⁰E Cameron 'The right to a hearing before dismissal—Part 1' (1986) 7 *Industrial Law Journal* 183, 193.

⁸¹*Ibid.*

⁸²*Hamata* (note 21 above).

⁸³See for instance *Majola v MEC, Department of Public Works: Northern Province* [2003] JOL 12211 (LC) para 7 and *Ngongo v University of South Africa* [2012] JOL 28981 (LC) 8.

⁸⁴*Hamata* (note 21 above) para 5.

⁸⁵*Ibid* para 8.

⁸⁶*Ibid* para 8.

⁸⁷*Ibid* para 9.

⁸⁸*Ibid* para 11. The court clarified that it used 'words "administrative proceeding" in the most general sense [...] to include, inter alia, quasi-judicial proceedings'.

⁸⁹*Hamata* (*ibid*) para 11.

⁹⁰*Ibid* para 17.

a person does not have an absolute right to be legally represented before tribunals other than courts of law [...] However, it does require disciplinary proceedings to be fair and if in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion.⁹¹

It is clear from the above authorities that the conversation is more about the employers' policies that allow assistance by either fellow colleagues or the discretion of presiding chairpersons to allow external legal representation in disciplinary hearings. The chairpersons' discretion to permit external legal representation is generally exercised having regard to the complexity of the matter.⁹² This effectively renders the employee subjected to the disciplinary inquiry to be at the mercy of either the employer in terms of the policy on assistance or the chairperson in terms of his or her discretion. The employee is not entrusted with the decision that has the impact of rendering him or her unemployed.

Notwithstanding, the fact that the Constitution does not expressly provide for the right to legal representation in civil proceedings, including proceedings before administrative or quasi-judicial tribunals or committees such as disciplinary hearings, there is no justification for employees not to appoint their preferred external legal representatives as a matter of right. Limiting employees to the mere assistance from fellow colleagues and trade union representatives, as well as the potential of their request for legal representation being refused,⁹³ employees are effectively denied the right to adequate legal representation⁹⁴ when subjected to disciplinary hearings. It is not enough to get assistance from colleagues and trade union representatives because they can hardly be referred to as legal representatives.

Restricting legal representation in disciplinary hearings may be motivated by the general desire to not overly formalise disciplinary hearings and to ensure that these proceedings are speedily resolved without employees raising technical points that may delay the proceedings. As demonstrated above, there are instances where there is a need for technical points to be raised and argued to provide the necessary guidance to the presiding chairpersons. It is unlikely that fellow colleagues would raise such points. A better approach that would ensure fairness of disciplinary hearings is for employees' right to legal representation of their own choice to be recognised, which they can waive if they so desire.

Disciplinary hearings are forums that do not apply the technical rules of evidence observed in a court of law while following procedures that would allow them to produce their evidence and correct or contradict any prejudicial statement or allegation made against them.⁹⁵ It is generally believed that inquiries are designed in such a manner to provide employees reasonable opportunity to present their cases.⁹⁶ It is submitted that this understanding leads to serious prejudice and denies employees the

⁹¹ *Ngcongco v University of South Africa* [2012] JOL 28981 (LC) 8.

⁹² See *Smith v Beleggende Outoriteit Van Kommandement NoordTransvaal van die SA Weermag* 1980 (3) 1 ALL SA 52 (T) 58 and *Morali v President of the Industrial Court* [1987] 3 All SA 603 (C) 605-606.

⁹³ See *Majola v MEC, Department of Public Works, Northern Province* [2004] 1 BLLR 54 (LC) para 15.

⁹⁴ Section 23(1) of the Constitution.

⁹⁵ See *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) 646; s 34 of the Constitution.

⁹⁶ *Marlin v Durban Turf Club* 1942 AD 122, 125-126.

right to effectively meet the allegations against them in disciplinary hearings, which they would adequately do with their own preferred external legal representatives.

This unjustifiably limits the right to adequate legal representation and fails to adequately evaluate whether employees, despite the alleged informality of disciplinary hearings, can adequately present their defences. It has also been argued that these proceedings simply amount to hearings where employees are informed in advance of the case to meet and given proper opportunity to prepare and present their response.⁹⁷ Therefore the question is, if these proceedings are as informal as alleged, why are employers continuously procuring services of experienced legal practitioners, and not appointing any of their other employees who are not legally trained, to chair these proceedings?

None of the judges who determine cases where employees were subjected to disciplinary hearings and denied their right to appoint their own external legal representatives as a matter of right provided the rationale for this limitation.⁹⁸ As demonstrated above, the starting point of all the cases dealing with legal representation in the workplace is that the express provision for this right could not be found in common law. What about the Constitution? None of these cases adequately engaged whether the Constitution, as the supreme law of the country, should recognise the right to appoint external legal representation during disciplinary hearings.

Section 34 of the Constitution provides employees the right to have their dispute decided fairly in a court, impartial tribunal, or forum.⁹⁹ Adequate access to a disciplinary inquiry as a forum entails employees' ability to effectively participate in these proceedings. It is submitted that part of adequate participation relates to the kind of legal representation to which the employee has access.

Arguments that are generally put forward against the legal representation of own choice in disciplinary hearings have nothing to do with employees and their right to a fair hearing. The focus appears to be on employers and their internal systems, notwithstanding the fact that it is employees who stand to lose their livelihoods.¹⁰⁰ It is submitted that the default position should be that all employees subjected to disciplinary proceedings have a right to legal representation of their own choice particularly where dismissal is likely to be imposed.

3. Judicial approaches to legal representation

3.1. Overview

Dismissals and disciplinary hearings should be grounded on the principle of fairness. A dismissal must be substantive and procedurally fair. Section 188(2) of the LRA provides that when determining whether a dismissal is fair, one must look for guidance in the Code of Good Practice: Dismissal. However, this Code is silent on the use of external legal representation of one's own choice during disciplinary hearings.

⁹⁷M Brassey 'The common law right to a hearing before dismissal' (1993) 9 *South African Journal on Human Rights* 177.

⁹⁸See generally *Ngcongco v University of South Africa* [2012] JOL 28981 (LC) and *Majola v MEC, Department of Public Works, Northern Province* [2004] 1 BLLR 54 (LC).

⁹⁹The CCMA and labour courts.

¹⁰⁰See *Hamata* (note 21 above) para 17.

This led some employees to approach courts to seek authorisation to appoint their own external legal representation in disciplinary hearings against them. This often occurs when the chairperson rules that the matter is not complex enough to warrant the assistance of a legal representative.

However, courts have continuously used the common law as a shield to avoid answering the crucial question of the necessity of legal representation of an employee's own choice at workplace disciplinary hearings as a constitutional imperative. In 1992, the court in *Lace v Diack*¹⁰¹ had to determine whether the denial of legal representation at an internal inquiry constituted a reviewable offence. The court merely ruled that the common law did not allow for an absolute right to be represented during workplace disciplinary inquiry.¹⁰² Nonetheless, the court opined that the employer should consider allowing legal representation for serious charges such as a dismissal.¹⁰³ Most significantly, the court opined that:

Our law has not, however, developed to the point where the right to [legal] representation should be regarded as a fundamental right required by the demands of natural justice and equity. It may well be that, in time to come, public policy may demand the recognition of such a right. In my view, however, that time has not yet arrived.¹⁰⁴

It may well be that in 1992, the political circumstances did not permit legal representation of choice to be advocated for because there were no constitutional ideals that were accepted by all as fundamental in the workplace. However, since 1994, the workplace has been fundamentally transformed based on commonly accepted constitutional rights of fair labour practice, equality, privacy, and dignity. We are of the view that the time has arrived to reflect on legal representation in workplace disciplinary hearings through the constitutional lens. While this case pre-dates the LRA and the Constitution, the principles found therein are still relied on to justify the restriction of external legal representation at disciplinary hearings.¹⁰⁵ Instead of developing the common law to allow legal representation of own choice at disciplinary hearings, courts merely provide that chairpersons need to consider applications for legal representation at disciplinary hearings. In a sense, one could argue that this demonstrates the judicial realisation of the challenges that may occur where employees are unrepresented, particularly for serious allegations that may result in dismissal. The principles established in cases such as *Dabner* and *Lace* concerning the common law continue to be followed in South Africa, to the detriment of employees who believe that their cases can better be presented by external legal representatives of their choice.¹⁰⁶

¹⁰¹ *Lace v Diack* (1992) 13 ILJ 860 (W).

¹⁰² *Ibid* 865G.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*

¹⁰⁵ See for instance *POPCRU v Minister of Correctional Services* [1999] JOL 5080 (LC) para 26 and *Police And Prisoners Civil Rights Union v Minister of Correctional Service* [1999] ZALC para 25.

¹⁰⁶ See for instance *Lamprecht v McNellie* 1994 (3) SA (AD); *Chamane v Member of the Executive Council for Transport, Kwazulu-Natal* 2000 JOL 6302 (LC); and *Majola v MEC, Department of Public Works: Northern Province* 2003 JOL 12211 (LC).

3.2. Representation by fellow employees or trade union officials

Item 3(1) of the Code of Good Practice: Dismissal encourages employers to establish rules that will govern discipline in the workplace and to ensure fairness when disciplinary hearings are instituted against employees. This code is intended to provide employers and employees with useful guidelines on how to deal with dismissals in their workplaces for reasons related to conduct, capacity, or operational requirements.¹⁰⁷ Although item 4(1) of this Code is silent on whether an accused employee is permitted to be represented by an external legal representative, it allows for an employee to be represented by either a fellow employee or a trade union representative. A trade union representative has the right to represent its members during disciplinary hearings.¹⁰⁸ It has been held that for procedural fairness to be established during disciplinary hearings, an accused employee should be allowed the assistance of a fellow employee or a trade union representative.¹⁰⁹ The fact that such an employee can utilise the services of a fellow employee is not a viable option that can lead to competent representation in disciplinary proceedings. We submit that employees who do not have legal training cannot be expected to have the necessary skills and sophistication that can be used to effectively represent their fellow employees who are facing the possibility of dismissal.¹¹⁰

This creates room for the blind to lead the blind to unemployment. It is important to note that colleagues have the discretion to elect whether to represent accused employees at disciplinary hearings. They are generally not obliged to assist in these proceedings. In *Malope v Commissioner Mbha*,¹¹¹ a colleague withdrew his representation the day before the inquiry without any explanation. Employees are generally not skilled to represent their colleagues and may struggle to articulate themselves, which will impact the arguments they will advance on behalf of the employees they are representing.

Furthermore, the right of a trade union to represent an employee is also codified under s 200 of the LRA. This section provides that a registered trade union may act on behalf of and in the interest of its members. Trade unions do not organise in every workplace and not every employee is a member of a trade union. Even where the employee is a trade union member, there is no guarantee that the chosen trade union representative is suitably competent to adequately represent the employee as would be the case with an external legal representative that the employee has satisfied himself or herself that has the necessary skills and expertise in the resolution of labour disputes.

Section 18 of the LRA allows for a majority trade union to conclude a collective agreement in respect of the threshold of representativity in the workplace. This in itself restricts the rights of minority trade unions from exercising certain organisational rights, such as access to the workplace,¹¹² deducting subscription fees,¹¹³ and taking

¹⁰⁷ *Department of Public Works, Roads and Transport, Mpumalanga Provincial Government v Sambo* (JR1890/16) [2021] ZALCJHB 334 (4 October 2021) para 14.

¹⁰⁸ Section 14(4)(a) of the LRA.

¹⁰⁹ *Molope v Mbha* [2005] JOL 13636 (LC) 14.

¹¹⁰ *Ibid* 22.

¹¹¹ See generally *Malope v Commissioner Mbha* (2005) 26 ILJ 283 (LC).

¹¹² Section 12 of the LRA.

¹¹³ Section 13 of the LRA.

leave for trade union activities.¹¹⁴ The main purpose of this section is to promote a system of workplace majoritarianism, which allows the employer to deal with only the majority trade union.¹¹⁵ This restriction implies that where an employee who is a member of a minority trade union is faced with a disciplinary inquiry, and there is a collective agreement that provides for a threshold of representativity, the said employee may find him/herself without representation at the disciplinary hearing.¹¹⁶ In other instances, the employer and the majority trade union set absurd thresholds that are impossible for minority trade unions to reach.¹¹⁷ This prevents minority trade unions from obtaining certain organisational rights.¹¹⁸ However, where a minority trade union does meet the threshold provided in s 18 of the LRA, it may acquire these rights either by bargaining with the employer or referring the dispute for arbitration.¹¹⁹

Where there are two conflicting collective agreements in place, the collective agreement of the majority will take precedence over that of the minority.¹²⁰ Furthermore, where there is a s 18 collective agreement in place, employees who are part of minority trade unions may not be able to fully exercise entitlements associated with the right to freedom of association.¹²¹ For instance, it can be difficult for a representative from a minority union that does not have organisational rights to access the employer's premises for the purposes of disciplinary hearings.¹²² Nonetheless, even if such a representative can attend the disciplinary hearing, an accused employee may not have confidence in their ability to adequately represent them and may desire to obtain an external legal representative of their own choice.¹²³

3.3. The role of chairpersons

Item 4(1) of the Code of Good Practice: Dismissal is silent on whether an accused employee may be represented by a legal practitioner of their own choice. The decision to allow such legal representation lies in the discretion of the chairperson who can refuse to grant such permission.¹²⁴ The chairperson can consider an application for external legal representation even if the employer's policy prohibits such

¹¹⁴Section 15 of the LRA.

¹¹⁵M Brassey *Employment and Labour Law: Commentary on the Labour Relations Act* (2006) A3–21.

¹¹⁶TG Esitang & S van Eck 'Minority trade unions and the amendments to the LRA: Reflections on thresholds, democracy and the ILO Convention' (2016) 37 *Industrial Law Journal* 768.

¹¹⁷See *South African Post Office Ltd v Nowosenetz* (2013) 34 ILJ 1604.

¹¹⁸J Kruger & CI Tshoose 'The impact of the Labour Relations Act on minority trade unions: A South African perspective' (2013) 16 *Potchefstroom Electronic Law Journal* 294.

¹¹⁹Section 21(8C) of the LRA.

¹²⁰*POPCRU v Ledwaba* (2014) 35 ILJ 1037 (LC) 60.

¹²¹Section 23(2) of Constitution provides that '[e]very worker has the right - (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union'.

¹²²See *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union* 2019 (1) SA 73 (CC) para 108 where it is held that '[t]he right to represent employees at grievance and disciplinary proceedings is explicitly conferred on a majority union by section 14(4) of the LRA'. The Court also cautioned that 'Any statutory provision that prevents a trade union from bargaining on behalf of its members or forbidding it from representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights' (para 90).

¹²³See *Volschenk* (note 16 above) para 4.

¹²⁴See *Majola v MEC, Department of Public Works, Northern Province* [2004] 1 BLLR 54 (LC) para 15, where it was observed that '[e]he overwhelming weight of authority in the Labour Court has been against granting legal representation at disciplinary hearings'.

representation. In 1995, the court in *Dladla v Administrator, Natal*¹²⁵ recognised the need for the chairperson to exercise the necessary discretion in determining whether to allow legal representation. The court found that a failure to do so would invalidate the outcome of the administrator. The possibility of the chairperson considering and allowing external legal representation does not justify placing the right that should be exercised by an employee on the person whose livelihood is not at stake, particularly where dismissal is a likely sanction.

The unfairness that can result when employees are denied the right to obtain their own external legal representation during disciplinary proceedings is clearly demonstrated in *Volschenk v Morero*.¹²⁶ In this case, the employer was represented by a legal representative in a disciplinary hearing.¹²⁷ Based on this, the employees applied to the chairperson to also be permitted to appoint their own external legal representative. The chairperson refused their application. The employees applied on an urgent basis to the Labour Court to be allowed to have external legal representation. The employees were charged with involvement in financial irregularities. The court noted that the chairperson had an obligation to consider the employees' request for legal representation of their own choice notwithstanding, the fact that the employer's disciplinary code did not make provision for such legal representation.¹²⁸ The court noted that the chairperson was required to exercise his discretion guided by whether fairness necessitated external legal representation being allowed.¹²⁹

The court pointed out that the employer's disciplinary code allowed employees to be represented by union representatives.¹³⁰ The employees made it clear that they had no confidence in the union representatives. The court was of the view that the employees failed to justify their subjective belief in the competency of the union representative with objective factors.¹³¹ The employees justified their desire to use their own external legal practitioner on the fact that the chairperson allowed the employer to use its own legal practitioner against them and they required 'parity of arms'. They also believed that the matter was complex.¹³²

Quite shockingly, the court in assessing whether the employees should be allowed external legal representation, assessed the nature of their work and held that they would be able to answer questions on the billing system based on their working knowledge thereon and may request legal representation later should there be a need for expert witnesses to provide evidence in the disciplinary hearing.¹³³ The court opined that '[o]n the question of whether legal expertise is required to deal with questions of fraud and the like, such charges against employees are commonplace and in my view is also not an issue necessitating legal expertise to address it'.¹³⁴ The basis upon which the court concluded that the charge of fraud is commonplace is not

¹²⁵*Dladla v Administrator, Natal* 1995 (3) SA 769 (N).

¹²⁶*Volschenk* (note 16 above) para 3.

¹²⁷*Ibid* para 4.

¹²⁸*Ibid* para 3.

¹²⁹*Ibid*.

¹³⁰*Ibid* para 4.

¹³¹*Ibid* para 4.

¹³²*Ibid* para 5.

¹³³*Ibid* para 7.

¹³⁴*Ibid* para 10.

clear. We cannot imagine in criminal cases a judge or magistrate saying to the accused person that fraud charges are commonplace and there is no need for them to seek legal assistance. Surely, there are all sorts of misconduct allegations that employers can prefer against their employees. However, this does not mean that employees faced with such allegations should not have the autonomy to decide whether they need to obtain external legal services to properly defend themselves. It is even worse than the court observed that '[t]he most serious prejudice the applicants face in consequence of the outcome of the inquiry is dismissal, not a civil judgment debt'.¹³⁵ How is it that the possibility of unemployment cannot be regarded as serious enough to warrant external legal representation in an economy that is generally not creating jobs? It is interesting that judges can make such sweeping statements but when accused of career threatening wrongdoing, as demonstrated above, they will be the first to seek legal representation.

Most astonishingly, without any evidence on the appointed union representation as well as their skills, abilities, and expertise being led, the court concluded that the right to be represented by a union representative provided employees with more extensive rights than those provided in the LRA.¹³⁶ This is because '[t]here is no restriction on the expertise that such a union official may possess'.¹³⁷ The court did not hear evidence on the particular union representative in this case to assess their suitability to represent the employees. The court viewed the union representative generally as part of the services provided by trade unions to their members. By so doing, the court did not seriously consider the employees' lack of confidence in the appointed legal representative. There was no need for employees to provide objective factors as to why the appointed union representative was not suitable for their case. It was not much about the union representative but more about the kind of legal representation that employees who are faced with the possibility of dismissal desired and felt would match the employer's appointed legal representative.

The court also failed to engage the fact that the employer, over and above the appointed chairperson of the inquiry, procured the services of an external legal representation and how that placed the employer at an advantage. Incorrectly relying on *Hamata*, the court held that '[t]he main authorities on the question of legal representation in internal hearings do not dictate that there must be parity between the ability and expertise of representatives, but only that the procedure should be fair'.¹³⁸ The court did not deal with the fact that in those authorities including *Hamata*, the institution or the employer was not legally represented. As such, there was no need to deal with the issue of parity of arms in those contexts. It is not clear from the judgment what motivated the employer to obtain external legal representation.

In refusing the employees' permission to obtain external legal representation of their own choice, the court merely made a sweeping statement that the employees would not 'be deprived of a fair hearing if they were only able to use a union official as their representative'.¹³⁹ This is even though the employees made it clear that they

¹³⁵Ibid para 9.

¹³⁶Ibid para 12.

¹³⁷Ibid.

¹³⁸Ibid para 12.

¹³⁹Ibid.

had no confidence in the union representative.¹⁴⁰ It is submitted that this case provides a textbook example of why the discretion of chairpersons, and by extension courts, is problematic as the basis to determine whether employees subjected to disciplinary hearings should be permitted to obtain external legal representation of their own choice. There is a possibility of chairpersons exercising their discretion based on what they are exposed to and what they subjectively deem as complex or simple and not on how the employees' views are on their cases. This paternalistic approach is unwarranted in a constitutional democracy because it unreasonably takes away the autonomy of these employees notwithstanding, the devastating impact of the likely dismissal sanction.

In *Morali v President of the Industrial Court*,¹⁴¹ the court was faced with the question of whether the Industrial Court had the discretion to allow legal representation in instances where one party to the dispute had objected to legal representation, notwithstanding s 45(9)(c) of the LRA at the time that only allowed for legal representation where parties to the dispute have consented. The court found that although the common law provided for the *audi alteram partem* rule, which is the cornerstone of a fair hearing, there was no right to be represented at an administrative tribunal. However, an administrative tribunal has the discretion to allow legal representation taking into consideration whether the merits of the case raise complex legal issues and/or the matter itself is complex. On the facts, the court looked at the fact that the applicant was not highly educated and struggled to articulate himself in any of the official languages. The court set aside the Industrial Court's order refusing to allow legal representation.

The challenge that arises is the lack of clear guidelines for chairpersons when exercising their discretion regarding legal representation in disciplinary hearings. Neither the LRA nor the Code provides guidelines that clarify the issue of legal representation at internal disciplinary hearings. To avoid inconsistent exercise of discretion by chairpersons during disciplinary hearings there might be a need for useful guidelines, pending the amendment of s 23 of the Constitution that we are proposing in this article. Different treatment of employees, even during disciplinary proceedings, without justification can constitute discrimination.¹⁴² Due to a lack of clear guidelines for chairpersons when exercising their discretion regarding legal representation in disciplinary hearings, the chairpersons' discretion appears to be based on their subjective view regarding the complexity of disputes before them.

3.4. Inadequacy of judicial guidelines

Legal representation during disciplinary hearings may not always be allowed. Matters that the Chairperson deems not to be complex and of a simple nature will result in the application for legal representation being denied. It is important to reiterate that legal representation in workplace disciplinary hearings is not banned in South Africa. There are instances, where courts allowed employees to obtain legal representatives of

¹⁴⁰Ibid para 4.

¹⁴¹*Morali v President of the Industrial Court* [1987] 3 All SA 603 (C) 605-606.

¹⁴²Section 6 of the Employment Equity Act 55 of 1998 as amended.

their own choice. The problem is that this is not treated as a right but something that should be applied for. Absent clear legislative guidelines, courts tried to provide some guidelines as to when it may be justifiable for employees to be allowed such legal representation.

In *Hamata*, a decision that has been followed by labour forums, it was held that external legal representation in disciplinary hearings can be considered when the university's policy allows; the matter is complex; the consequences of an adverse finding against the student are serious; availability of legally qualified persons in the institution; and any relevant factor.¹⁴³ This judicial guidance places the authority to permit the usage of external legal representation in disciplinary hearings on chairpersons. This case was decided in the context of a university disciplinary hearing. Most public universities have law schools or faculties, most of which have law clinics that employed labour law practitioners. In these universities, there may also be readily available lecturers and attorneys who may assist students and colleagues who are subjected to disciplinary hearings. In the labour context, this is not a luxury that all employees employed in different sectors enjoy. Some of these employees may desire to have their own trusted external legal representation. These guidelines appear not to be adequate for all employees in different sectors that are not structured the same as public universities.

3.5. Prerogative to discipline

In any workplace, the employer has a right to discipline employees in accordance with the principles of fairness. Section 188 of the LRA provides that a dismissal will be fair if it is substantively and procedurally fair. Where employers believe that employees have contravened a provision of their policies or any Act governing the employer-employee relationship, they have the discretion to hold disciplinary hearings against such employees.¹⁴⁴ It has been held that 'the institution of disciplinary action is within the sole prerogative of an employer, as is it the employer's right to maintain discipline in the workplace'.¹⁴⁵

In *Marhule*,¹⁴⁶ the court undertook to explain why courts have been reluctant to intervene with workplace disciplinary proceedings. Tlhotlhamajane J stated that if courts were constantly interfering with the employer's internal processes it would infringe the principle that the prerogative to discipline remains with the employer.¹⁴⁷ Further, courts would only interfere in events where the failure to do so would lead to a grave injustice.¹⁴⁸ This implies that employees should have faith in their employers by giving them a reasonable opportunity to ensure that disciplinary proceedings are conducted fairly and *expeditiously* without prejudice the interests of their employees. In other words, employees should first be subjected to their employers'

¹⁴³*Hamata* (note 21 above) para 21.

¹⁴⁴See Items 3 and 4 of the Code of Good Practice: Dismissal.

¹⁴⁵See *Tshenolo Waste (Pty) Ltd v Sekgoro* (2021) 42 ILJ 2693 (LC) 32, relying on *Atlantis Diesel Engines (Pty) Ltd v Roux* (1988) 9 ILJ 45 (C).

¹⁴⁶*Marhule* (note 16 above) 9.

¹⁴⁷*Ibid.*

¹⁴⁸*Ibid* 8.

disciplinary processes before formulating their opinions on the fairness of such processes. We do not agree with this approach. We submit that a better approach is for the employees at the time they are informed of disciplinary hearings against them to have an option, as a matter of right, to decide whether they want their own legal representation.

In *Randfontein Estates Gold Mining Co (Witwatersrand) Ltd*,¹⁴⁹ the court held that the prerogative to discipline rests with the employer. Even though the employer has a prerogative to dismiss an employee, it is still important for courts to consider whether the disciplinary hearing was conducted fairly.¹⁵⁰ The dismissal of an employee must be substantively and procedurally fair.¹⁵¹ Where an unfair process has been followed in disciplinary proceedings, courts must come to the employees' assistance.¹⁵² Where the employer falls short of their substantive and procedural requirements, either the CCMA, the relevant Bargaining Council, or the court must step in to ensure the fairness of such proceedings. It is submitted that fairness requires any employee brought before the disciplinary hearing to exercise his or her autonomy and decide for themselves whether they wish to use external legal representation. This is a right that cannot be exercised only when allowed to do so by either the employer or chairperson of the inquiry.

4. Conclusion

Section 23 of the Constitution provides for the right to fair labour practices for all employees. This right is given effect by s 185 of the LRA, which prohibits the unfair treatment of employees in the workplace. This fundamental right protects employees among others, from being subjected to dismissals without disciplinary hearings. It was shown in this article that the extent to which employees' right to fair labour practice can be violated when subjected to disciplinary hearings has not received adequate academic and judicial attention in South Africa. In this article, we sought to open an academic debate on whether legal representation should be allowed as a matter of entitlement in disciplinary hearings. We did so by proposing the amendment of s 23 of the Constitution to explicitly grant employees the right to appoint their desired legal representatives during disciplinary hearings.

We sought to demonstrate that employees' several fundamental rights are infringed when subjected to disciplinary hearings when their autonomy to choose their own external legal representatives is taken away from them. We demonstrated that these employees are largely at the mercy of the chairperson of disciplinary hearings when they wish to procure their own external legal representation. We argued that this paternalistic approach is constitutionally unwarranted and violates employees' right to dignity and fair labour practices. We argued that in a democratic country founded on the values of equality, freedom, and dignity, employees should be entitled to obtain their own external legal representatives when they are requested to appear

¹⁴⁹*National Union of Mineworkers v Randfontein Estates Gold Mining Co (Witwatersrand) Ltd* 1988 9 ILJ 859 (IC).

¹⁵⁰See *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC).

¹⁵¹Section 185 of the LRA.

¹⁵²Section 167(3)(a) of the LRA.

before workplace disciplinary hearings. We are of the view that employees facing disciplinary hearings should be granted the automatic right to choose their own legal representative to even the plan field during these hearings. Should our proposal for the amendment of s 23 of the Constitution be implemented, this will automatically relieve the chairpersons of disciplinary proceedings the burden of deciding whether legal representation is warranted in disciplinary hearings.

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