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Natural justice in labour relations: The legal aspects of human resource management in Botswana

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Abstract

This paper explores the pivotal role of natural justice in labour relations within the context of Botswana with a focus on Human Resources Management, (HRM), the paper examines the significance of upholding principles of fairness, equity, and procedural integrity in employment disputes. Employing a secondary methodology, it synthesizes existing literature to explore the concept of natural justice, its evolution in the context of labour relations, and its potential to reshape HRM practices in Botswana. The analysis underscores the necessity for fair and equitable treatment of employees, the role of procedural fairness in conflict resolution, and the alignment of HRM policies with principles of natural justice. The paper concludes by offering recommendations for HRM practices that promote a culture of fairness and transparency in the workplace, thereby fostering harmonious labour relations and sustainable organizational success.

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Introduction

In Botswana, as in many other countries, Labour relations are governed by legal frameworks aimed at safeguarding the rights and interests of both employers and employees. Central to these frameworks is the principle of natural justice, which mandates fair treatment, unbiased decision-making, and adherence to procedural fairness in employment matters. However, despite the legal mandate, the practical application of natural justice in labour relations remains a challenge, often leading to discord, grievances, and litigation. This paper seeks to explore the significance of natural justice in labour relations and its transformative potential for HR practices in Botswana.

Literature Review

Since the landmark decision in *Ridge v Baldwin* ^[1] the notion of procedural fairness in administrative decision-making has received considerable attention in England, and similar developments have taken place in the United States ^[2] and other countries.

Existing literature on natural justice in labour relations highlights its essential role in fostering trust, ensuring equity, and maintaining procedural integrity within organizations. By upholding the principles of natural justice, organizations can create a fair and transparent environment that promotes employee confidence and satisfaction. This, in turn, leads to more effective conflict resolution and a harmonious workplace, ultimately contributing to the overall success and sustainability of the organization.

¹ [1964] AC 40.

² Cf S H Bailey, C A Cross and J F Garner Cases and Materials in Administrative Law (1977) 347 and W McCormack 'The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review?' (1974) 53 Texas LR 1257.

The primary procedural safeguards in Botswana administrative law are based on the matching principles of natural justice: *audi alteram partem* and *nemo iudex in causa sua*: that is, that one should hear the other side, and that no one should be a judge in his cause (or, in other words, that the decision-maker should be free of bias) ^[3] Scholars have consistently emphasized the critical importance of implementing fair and transparent processes in resolving workplace disputes. Such practices are essential not only for maintaining employee morale but also for enhancing overall productivity. By ensuring that dispute resolution mechanisms are equitable and transparent, organizations can foster a sense of trust and fairness among employees. This, in turn, leads to a more harmonious work environment, where employees feel valued and respected. Consequently, fair, and transparent processes contribute significantly to the long-term success and sustainability of an organization.

As a general rule, the principles of natural justice apply whenever an administrative act is quasi-judicial. An administrative act is considered quasi-judicial if it affects the rights, liberties, or potentially the privileges of an individual. This means that whenever an administrative decision impacts an individual's fundamental rights or freedoms, the principles of natural justice must be upheld to ensure fairness and procedural integrity.

^[4] Furthermore, the introduction of the concept of legitimate expectation under public law extended the range of protection given, so that prospective, as well as existing, rights, interests, privileges, and benefits could come within the domain of natural justice ^[5]. Although it is not clear what the boundaries of legitimate expectation are, it must be based on either an express undertaking or arise from past conduct on the part of the public authority in order for it to be recognized as legitimate or reasonable as stated in *Attorney General for Hong Kong v Ng Yuen Shiu* ^[6] that,

“When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty”.

Botswana courts, like their counterparts in South Africa, usually follow the English law by classifying the functions of the administration into four broad categories: the legislative; the judicial; the quasi-judicial; and the purely administrative (including ministerial) ^[7]. Whilst even a 'purely administrative' function cannot be exercised *ultra vires*, ^[8] it has generally been held that only judicial and quasi-judicial proceedings need follow the principles of natural justice. In the case of *Kekgosi v Clover Botswana* ^[9] observed that the term 'equity' is defined as 'justice administered according to fairness as contrasted with the strictly formulated rules of common law.' Section 15 (1) of the Trade Disputes Act (Cap 48:02) describes the Industrial Court as 'a court of law and equity.'

Methodology

This paper was researched using secondary methodology. Secondary research involves the collection and analysis of data and information that already exists, rather than gathering new data through primary research methods. This form of research leverages existing resources such as books, articles, reports, databases, and other sources to address research questions, validate findings, or provide context to primary research. The objects of secondary research are Information Gathering, Validation of Findings, and Contextualization and methods involved in secondary research are literature review, document analysis, database searching, content analysis, and meta-Analysis.

Legal Framework

Botswana's legal framework governing labour relations is anchored in various statutes, including the Employment Act, the Trade Disputes Act, Public Service Act, and the Industrial Court Act. These laws provide the legal foundation for addressing employment disputes and ensuring compliance with natural justice principles. Additionally, Botswana is a signatory to international conventions and treaties that uphold principles of fairness and non-discrimination in the workplace, further emphasizing the country's commitment to promoting equitable Labour practices.

Case Studies

An analysis of recent case studies in Botswana reveals numerous instances where the application of natural justice principles has significantly influenced the outcomes of labor disputes. In situations where employers have failed to adhere to fair and transparent processes, the courts have intervened to uphold the rights of employees and sanction organizations for procedural irregularities. These judicial interventions underscore the importance of maintaining procedural fairness and transparency in employment practices. Consequently, these cases serve as critical precedents for HR practitioners, highlighting the substantial legal and reputational risks associated with disregarding natural justice principles in employment matters. By learning from these precedents, HR professionals can better navigate the complexities of labor relations and foster a more equitable workplace.

General principles of law and of equity

Article 4 of ILO Convention No. 158 establishes the equitable requirement that an employee can only be dismissed if the employer has a valid reason for doing so. This principle ensures that dismissals are justified and not arbitrary. Furthermore, the Court has emphasized that the basic requirement for a procedurally fair dismissal is outlined in Article 7 of ILO Convention No. 158. This article mandates that employees must be given an opportunity to defend themselves against any allegations before their employment is terminated, ensuring procedural fairness, and protecting employees' rights.

Industrial Court of the Republic of Botswana, *Sebako and*

³ Marinus Wiechers 'Administrative Law' in *The Law of South Africa* 1 (1976) ed W Ajobert (hereinafter referred to as *LAWSA* I) 50ff (para 82).

⁴ See, for example, *Publications Control Board v Central News Agency Ltd* 1970 (3) SA 479 (A) at 488f; *Adjunk-Minister van Landbou v Heatherdale Farms (Pty) Ltd* 1970 (4) SA 184 (T) at 186. For a very recent example of this method of approach, see *Meyer v Prokureursorde van Transvaal* 1979 (1) SA 849 (I).

⁵ Breen (n85).

⁶ [1983] 2 AC 629

⁷ LA WSA 135ff.

⁸ See, for example, *G M Cockram Administrative Law* (1976) 59

⁹ 2010 (3) BLR 714 (IC).

Another v. Shona Gas, undated, 2006 (1) BLR 86 (IC) ^[10], established a jurisprudential principle based on international law. The first claimant worked as a driver who delivered gas cylinders to customers for Shona Gas and the second claimant was the first claimant's assistant. The claimants alleged that they had been unfairly dismissed because their manager suspected they had stolen a gas cylinder during a delivery run, although the manager had not investigated, or proven, that it was the claimants who had committed the theft.

In determining the unfair dismissal claims, the Court stated that the Employment Act did not set out a process that an employer must follow when dismissing an employee for misconduct. Accordingly, the Court set out "general principles of law and of equity relevant to a fair dismissal on a charge of theft," with reference to both domestic case law and international law.

The Court noted that, to be a fair dismissal, the termination needed to be substantively and procedurally fair, by stating that:

"These rules of natural justice, or rules of equity as they are sometimes called, are derived from con the case of FAWU Obo Kapesi & Others v Premier Food Ltd t/a Blue Ribbon Salt River⁶ the Court emphasized that a disciplinary hearing was simply an opportunity afforded to an employee to state a case in response to the charges levelled against him or her by the employer. Ultimately, when the matter reaches the Industrial Court, the court has to assess the circumstances of the dismissal and assess whether the requirements of procedural and substantive fairness were satisfied inventions and recommendations of the International Labour Organization (ILO), which this court, also being a court of equity, applies when determining trade disputes" ^[11].

On the other hand, the Industrial Court emphasized that in the case of Tladi v DHL International ^[12], the burden of proof rested on the employer. The court highlighted that the employer must demonstrate, on a balance of probabilities, the valid reasons for terminating the employee's contract. This requirement underscores the necessity for employers to provide substantial and credible evidence to justify their decision to dismiss an employee. By doing so, the court ensures that the principles of fairness and natural justice are upheld, protecting employees from arbitrary or unjustified termination.

Introduction of new evidence

In the case of Phirinyane v Spie Batignolles ^[13], it was observed that when an employee denies the alleged misconduct, the employer must place sufficient facts before the chairman of the disciplinary enquiry to establish that the alleged misconduct has been committed. In the absence of such sufficient evidence the dismissal is unfair, and this cannot and should not be curable by ultimately bringing new

evidence before the Industrial Court to try justifying an unfair dismissal ^[14].

Standards for a fair hearing

On the standards for a fair hearing, The Court in Phirinyane v Spie Batignolles ^[15] set out the following cardinal requirements for a fair disciplinary hearing as follows; (a) The employee who faces discipline must be given reasonable notice of the time and place the employer intends holding a disciplinary enquiry. (b) At the same time the employee must be informed of the nature of the charge or charges against him. (c) The employee must be given the option of being assisted or represented at the enquiry by a co-employee of his choice. (d) The employer should place sufficient evidence before the enquiry to prove that the alleged misconduct has been committed and that it has been committed by the employee so charged. (e) The employee should be entitled to question any witness who testifies against him. (t) The employee must be entitled to give evidence himself and to call his own (g) In the event of being found guilty of the alleged misconduct, the employee must be given a further opportunity of putting forward facts in mitigation a sanction is decided on. (h) If found guilty and after a sanction has been imposed, the employee should be informed of his right to appeal against such finding and/ or sanction. (i) The enquiry should be conducted in good faith.

In Stanley Moyo v Kgolagano College 1995 ^[16] The Court ruled that there are certain requirements according to the principles of equity that must be complied with. These are (a) there must be a valid reason for the change; and (b) The change must be affected through a fair procedure.

Keeping records of the disciplinary hearing

On the issue of keeping records of the disciplinary hearing, the court had a divergent opinion. In the case of Khei v Botswana Meat Commission ^[17], the Court noted that a presiding officer at the disciplinary hearing must keep a record of the proceedings. However, in the case of Ngakaemang v Choppies Topshape Holdings (Pty) Ltd ^[18] the Court indicated that it was not a requirement for the employer to keep a record of the proceedings from the disciplinary hearings ^[19]. Nevertheless, the Court cautioned that it is strongly recommended that such a record be kept obviating possible future disputes as to what transpired at the disciplinary hearing.

Regard for the record of proceedings

In Palluci Home Depot (Pty) Ltd v Herskowitz ^[20] the Court held that the Commissioner had committed a grave error by finding an employee guilty in relation to a charge that was not related to the initial reasons for guilty dismissing the employee. The importance of the case is that it is critical for the Commissioner to have regard to the record of proceedings of the internal hearing in determining whether the dismissal was fair or not.

¹⁰ <https://compendium.itcilo.org/en/compendium-decisions/industrial-court-of-the-republic-of-botswana-sebako-and-another-v-shona-gas-undated-2006-1-blr-86-ic>

¹¹ https://www.researchgate.net/publication/361952008_Equity_and_Evidence_before_the_Industrial_Court_in_Botswana_The_De_Novo_Conundrum

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¹³ 1995 (1) BLR 1 (HC)

¹⁴ Namibia Law Journal Vol 12-2020-21.indd 72

¹⁵ Ibid

¹⁶ Stanley Moyo v Kgolagano College; Ic 33/95

¹⁷ 2010 (3) BLR 649 (IC). See also Phirinyane v Spie Batignolles 1995 BLR 1 (IC).

¹⁸ 2011 (2) BLR 1064 (IC)

¹⁹ Namibia Law Journal Vol 12-2020-21.indd 76

²⁰ (2015) 5 BLLR 484 (LAC).

Preliminary investigation of the allegations

In the case of *Gabathuse v Quarries of Botswana* ^[21] the Court advised that, before an employer commences disciplinary proceedings, it must conduct a reasonably fair investigation into the allegations ^[22]. This should be geared towards gathering facts and evidence which will enable the employer to objectively assess whether to embark on the disciplinary process and as well reduce the risk of spurious charges.

Retrenchment must be fair

The case of *George Mokaya Vs Morteo Condotte (Pty) Ltd*, ^[23] established that 'even when a retrenchment is substantively done, if the correct procedure is not followed, such retrenchment will be procedurally unfair, and it can result in the employer being ordered to pay compensation to such employee'. To avoid penalties, the employer must be guided by section 25 of the Employment Act.

Implications for HRM Practices

The evolving landscape of Labour relations in Botswana underscores the need for HR practitioners to prioritize natural justice in their policies and practices. By fostering a culture of fairness, transparency, and accountability, HR can mitigate the risk of disputes, improve employee relations, and enhance organizational reputation. *Diwanga J* in the case of *Andrew Disepo v Mupane Gold Mine (Pty) Ltd* ^[24], reiterated that the Industrial Court hears the evidence *de novo* to decide whether the employer had valid reasons to dismiss the employee and whether a fair procedure was followed. The inquiry of the Industrial Court, however, does not occur in a place of complete isolation; the court is entitled and required to refer to the disciplinary hearing and determine whether the hearing was conducted fairly, and as well assess whether sufficient evidence had been led, at the stage of the disciplinary hearing, to substantiate the reasons for the dismissal. Even though the Human Resources personnel are tasked with recruitment and dismissals, they are expected to be judicious, when conducting disciplinary hearings. Any inability to comply with the rules of natural justice can cost the organisation dearly. Key strategies include implementing robust grievance mechanisms, providing training on procedural fairness, and promoting diversity and inclusion in decision-making processes.

Conclusion

In conclusion, natural justice is a cornerstone of effective labor relations and HR management in Botswana. When determining unfair dismissal claims, the Employment Act does not specify a process that employers must follow when dismissing an employee for misconduct. As organizations navigate the complexities of the modern workplace, adherence to principles of fairness, equity, and procedural integrity becomes increasingly paramount.

"There is, therefore, no vacuum such as the one created by the silence in the Employment Act. There are rules of natural justice, or rules of equity as they are sometimes called, which are derived from conventions and recommendations of the International Labour Organization (ILO), which the courts of equity apply when determining trade disputes. Furthermore, case law has refined the process by setting out standards of fairness in workplace dispute handling.

By embracing natural justice principles, HR practitioners can contribute to the creation of a workplace environment characterized by trust, respect, and mutual understanding. This approach not only ensures compliance with legal standards but also promotes a culture of fairness and transparency. Consequently, such practices foster harmonious labor relations and sustainable organizational success in Botswana.

Recommendations

Capacity building and awareness: Many organizations prefer not to conduct training due to cost implications. When they do, they often allocate insufficient funds to hire an HRM specialist or a lawyer to interpret the law and conduct the training. This leads to a misconception that HR work is merely about hiring and firing. In many cases, employers take the issue of being summoned by the district labor office for granted, which results in significant mistakes in handling disputes. They often prefer to ignore the meeting or send an incompetent representative, further exacerbating the issue.

To address these challenges, it is crucial to invest in comprehensive capacity-building initiatives. This includes providing thorough induction training to help employees understand the organization's policies and procedures better. Such training can prevent obvious mistakes that may lead to disputes. Additionally, ongoing training and development programs should be implemented to ensure that both management and staff are well-versed in labor laws and best practices in HR management. By prioritizing capacity building and awareness, organizations can foster a more knowledgeable and compliant workforce, ultimately reducing the risk of disputes and enhancing overall productivity.

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²¹ 2012 (2) BLR 644 (IC)

²² Namibia Law Journal Vol 12-2020-21.indd 81

²³ George Mokqya 1) Morten Condotte (Pry) Ltd., Ic 6/94

²⁴ Case No. ICF 365/14 (Unreported)