Reflecting on the Doctrine of Double Jeopardy in Zimbabwe's Labour Law

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Abstract

The doctrine of double jeopardy, which protects individuals from being tried for the same offence after an acquittal or conviction, plays a significant role in Zimbabwean labour law. This paper explores the relevance of the doctrine of double jeopardy in safeguarding employees' rights and ensuring fair legal processes within the labour context. It examines case law and statutory provisions that illustrate how the principle of double jeopardy is applied in labour disputes, particularly in relation to unfair dismissal and disciplinary actions in Zimbabwe. The paper also highlights potential challenges in balancing employers' rights and employees' protections, emphasising the need for a robust legal framework to prevent abuse and ensure justice in employment matters. Overall, the doctrine serves as a critical mechanism for promoting legal certainty and protection against arbitrary state or employer actions in Zimbabwe's labour landscape.

Keywords: Double Jeopardy, Labour Law, fair Labour Practices, Bill of rights.

1. Introduction

Simply put, the *ne is in idem*, or double jeopardy, principle states that an individual cannot be tried twice for the same offence.[1] Both the civil and criminal law have long embraced this idea. The majority of labour law experts have maintained that double jeopardy is equally applicable in labour law since courts have used and interpreted the principle in their rulings.[2] Section 65 of the Constitution affirms that everyone has the right to fair labour practices.[3] It is noteworthy that

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1 John Grogan, Workplace Law (10th edition, Juta 2009) 237.

2 *Ibid*.

3 Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (Constitution).

recognising the right to fair labour practices in a Bill of Rights strengthens the social and economic fabric of society while protecting the dignity and rights of employees. From this provision, the rights entrenched in the Labour Act[4] flows, which include but not limited to the right not to be unfairly dismissed,[5] and the prohibition against unfair labour practices.[6] Generally, the codes of conduct of many organisations in Zimbabwe do not allow an employee to be tried twice on the same offence by the same employer following a determination or ruling. The principle of double jeopardy, traditionally rooted in criminal law, poses significant challenges when applied to disciplinary hearings in various professional settings. This principle raises questions about fairness and due process in the context of repeated disciplinary actions against an individual for the same alleged misconduct. Thus, the article seeks to answer the following questions, among others: What are the justifications of the double jeopardy rule? What are its exceptions? Do these exceptions result in fairness in disciplinary proceedings?

1.1 The Scope and Meaning of *Res Judicata*

The *res judicata* principle has been developed and utilised consistently by Zimbabwean courts. Accordingly, a party cannot receive any relief based on the same set of facts of a case previously finalised. In *O' Shea v Chiunda,*[7] Sandura, JA explained *res judicata* as follows:

> *Res judicata* applies where the two actions are between the same parties, or their successors in title concerning the same subject matter and founded on the same cause of action…….. Instead of instituting court proceedings, the employee should have appealed to the regional hearing officer against the labour relations officer's decision.

Further, in the case of *Kamupariro v Musendo and another,*[8] the court expressed the principle in the following terms:

> The principle of *res judicata* is simply a term used for a matter already judged, a case in which there has been final judgment and is not a subject of appeal. Generally, the legal doctrine is meant to preclude continued litigation of a case on same issues between the same parties. The matter especially is barred from being heard against

4 [Chapter 28:01] (Labour Act).

5 *Ibid* section 12B.

6 *Ibid* section 8.

7 1999 ZLR 333 (S).

8 HH 196/17.

> either in the same court or in a different court. A court will use the principle of *res judicata* to refuse to rehear and reconsider the matter. The principle prevents litigants from multiplying judgments and subsequently causing confusion.
>
> In order to succeed, a party claiming *res judicata* must show that the earlier judgment is identical to the present in the following:
>
> (1) Same parties
>
> (2) Same cause of action
>
> (3) Same relief sought.

In the context of employment, the doctrine of double jeopardy provides that an employer cannot discipline an employee again after a final decision has been made during previous disciplinary processes. Additionally, the rule forbids imposing more than one penalty for the same offence. More often than not, if the employer initiates a disciplinary hearing, it is anticipated that the employee will be dismissed[9] and if the employee is somehow not dismissed, the employer would want to influence the outcome or subject the employee to a second hearing. It is unjust for an employer to subject an employee through another disciplinary proceedings for the same alleged wrongdoing, with the hope of a more "acceptable" outcome before a different chairperson than in the first enquiry. Similar to this, a higher level of management cannot replace a sanction given by a disciplinary committee or authority with a more severe sanction following a properly constituted disciplinary enquiry. Employers may not be able to use their right to reprimand employees without restrictions. This right is limited by the fairness criterion which includes the right to a fair and procedural hearing as outlined in the Labour Act.[10] It is noteworthy that the right to discipline an employee is impacted by the double jeopardy principle since the employer only has one chance to use this right equitably.

2. The Origin of the Doctrine of Double Jeopardy

The English common law principle "*nemo bis punitur pro eodem delicto*" which means that "no one should be punished twice for the same offence" is the source of the term double jeopardy.[11] The Constitution codifies the fundamental

9 De Rebus, 'Double Jeopardy in the Workplace' < https://www.derebus.org.za/double-jeopardy-workplace/>accessed on 13 April 2025.

10 Lovemore Madhuku, *Labour Law in Zimbabwe* (Weaver Press 2015) 104.

11 Ipleaders, 'The Doctrine of Double Jeopardy' <https://blog.ipleaders.in/the-doctrine-of-double-jeopardy/>accessed on 10 April 2025.

principle of *res judicata,* which has its roots in the common law.[12] Section 70(1)(m) of the Constitution expressly prohibits any accused individual from being tried for an offence related to an act or omission for which they have already been found not guilty or acquitted. This right offers protection from being "twice put in jeopardy" and is a component of the overall right to a fair trial. Cachalia *et al* reiterate that this principle is commonly referred to as the doctrine of double jeopardy.[13] The defence known as *exceptio rei iudicatae* is the civil equivalent of the principle of double jeopardy.[14] According to Harms, the unchallengeable assumption that a final judgment from a competent court regarding a claim is accurate serves as a basis of this plea. Due to this presumption, incessant litigation and bad faith that permits repeated demands over the same things are avoided.[15]

3. Application of the Doctrine of Double Jeopardy in Labour Law

Grogan posits that double jeopardy is:[16]

> Where employees have been acquitted at a disciplinary hearing, or the presiding officer has imposed a penalty/sanction less severe than dismissal, they cannot generally be subjected to a second enquiry on the same offence. Nor may management ignore the decision of a properly constituted disciplinary enquiry and substitute its own decision. A dismissal in such circumstances would invariably be unfair.

The principle coming out of the definition above is that, in the employment law context, the employee cannot be invited to a second hearing for the same offence if the disciplinary committee or disciplinary authority has acquitted the employee or has given him or her a lesser penalty than a dismissal. The fundamental starting point is that it would violate the principle of double jeopardy to subject an employee to several disciplinary proceedings stemming from the same allegations and pertaining to the same events.[17] Management

12 Section 70 of the Constitution.

13 Azhar Cachalia, Halton Cheadle, Dennis Davis and Nicholas Haysom, *Fundamental Rights in the New Constitution* (Juta & Co. Ltd, 1994) 88.

14 Sienta Bekker,'The Doctrine of Double Jeopardy in The South African Labour Laws'< https://repository.up.ac.za/bitstream/handle/2263/27214/dissertation.pdf?sequence=1&isAllowed=y>accessed on 10 April 2025.

15 Cachalia (n13) 88.

16 Grogan (n 1) 200.

17 Etienne Du Toit, *Commentary on the Criminal Procedure Act* (Juta, 1987)16.

cannot simply disregard the chairperson's decision of a duly constituted disciplinary hearing and replace, vary or amend such decision with its own.[18]

There are three types of specific situations in which the principle of double jeopardy applies in the employment context. First, the rule prohibits instituting the same misconduct charges to an employee for the same disciplinary offence following a verdict of not guilty, put simply, acquittal. Secondly, after an employee has been convicted or found guilty, he or she may not be recharged on the same grounds, and thirdly, the rule forbids the employer to give numerous sanctions for the same offence.[19] The principle of double jeopardy requires that the allegations made against an employee in the second hearing be essentially identical or similar as the ones made in the first hearing.[20] The standard test for double jeopardy according to Grogan is whether the allegation is related to the same alleged misconduct.[21]

The following is how Van Jaarsveld, Fourie and Olivier explain the applicability of double jeopardy doctrine in labour law:

> It is unfair for an employer (management) to set aside a first disciplinary hearing and then to subject the employee to a rehearing when no justification exists for doing so.[22]

The Labour Act is relevant to the doctrine of double jeopardy as it provides that:

> Where any proceedings in respect of any matter have been instituted, completed or determined in terms of this Act, no person who is aware thereof shall institute or cause to be instituted, or shall continue any other proceedings, in respect of the same or any related matter, without first advising the authority, court or tribunal which is responsible for or concerned with the second mentioned proceedings of the fact of the earlier proceedings.[23]

What, then, are the implications of holding such a hearing without notifying the court or tribunal dealing with the initial proceedings? Are the provisions of

18 Grogan (n 1) 200.

19 Cachalia (n13) 88.

20 Sienta Bekker,'The Doctrine of Double Jeopardy in The South African Labour Laws'< https://repository.up.ac.za/bitstream/handle/2263/27214/dissertation.pdf?sequence=1&isAllowed=y>accessed on 10 April 2025.

21 Grogan (n1) 248.

22 SR Van Jaarsveld, JD Fourie and MP Olivier, Principles and Practice of Labour Law (LexisNexis, 2012) 14-23.

23 Section 124 of the Labour Act.

section 124 of the Labour Act peremptory or merely directory? In the case of *Liverpool Bank* v *Turner,*[24] Lord Campbell had this to say:

> No universal rule can be laid down as to whether a mandatory enactment shall be considered as directory only or obligatory with an implied nullification for disobedience. It is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

It is apparent that section 124 of the Labour Act prohibits the institution of fresh proceedings between the same parties on the same or related issues without informing the trier of fact in the earlier proceedings. The first requirement is that the person must be aware that there are such proceedings. The heading of the section 124 of the Labour Act clearly reads "protection against multiple proceedings" and it captures the intention of the legislature. Whilst it is trite that headings do not form part of the statute, it has now been accepted that they assist in determining what the legislature intended. The legislature's intention was to stop litigants from ploughing the same field twice or to forum shop. The further intention of the legislature must have been to prevent different conflicting decisions being delivered on the same issue. The proper construction of section 124 of the Labour Act leads to the intention of the lawgiver. The section clearly refers to "the same or any related matter" depicting the fundamental issue that litigants who are party to same proceedings should not institute any other proceedings without informing the presiding person.

The principle coming out of the above provision is primarily based on the public interest that litigation must come to conclusion. If the matter is finally adjudicated on, it cannot be raised again. Once a case has been decided to its finality, the court is prohibited from re-opening the same.[25] Nonetheless, there are requirements which must be met which are that the two actions must be based on the same cause of action; involve the same parties; and must be related to the same subject-matter; and there has to be a final judgment or determination of the matter in the first action.[26]

The surrounding facts in the case of *Bonda v ZETDC & Ndlovu*[27] demonstrate the extent to which double jeopardy is applicable in labour law. The employee (second respondent) was charged with a misconduct where he was alleged to

24 (1861) 30 LJ Ch 379.

25 *Anjin Investments (Pvt) Ltd v The Minister of Mines and Mining Development & Ors* CCZ-6-18.

26 *Tongogara Rural District Council v Ndiripo* SC 19/23.

27 LC/MT/81/18.

have stolen from the employer. He was charged in terms of the code of conduct and due process was followed. The disciplinary committee found him guilty of the misconduct. It meted out a penalty of demotion and employee served the penalty. The court noted that the disciplinary committee had acquitted him on the charge of absenteeism, and upon returning to work the employer relying on the legal opinion written by its legal officers, terminated him on notice. It was the court's decision that termination on notice was done for the wrong reasons, and it was tantamount to a dismissal without due process not having been followed. The court concluded that the employee was convicted of criminal conduct and served a penalty of demotion and was therefore entitled to *res judicata*. This was because all the mistrust that could have arisen was allayed by the penalty of demotion and giving the employee a second chance to continue under the contract of employment. Thus, to revisit it and give it as a reason for the termination on notice was held to be improper and unlawful.

In the matter between *Manda v Damic Security (Pvt) Ltd*,[28] the respondent raised a point *in limine* to the effect that the application for rescission which the applicant sought to file, should condonation be granted, was already dealt with and dismissed. The applicant was seeking condonation so as to file the very same application. The respondent raised the plea of *res judicata*, arguing that the court had already dealt with a similar application and dismissed it. The court stated that it therefore made no sense to hear an application for condonation wherein the applicant sought condonation to file an application which was already dealt with and whose judgment was extant. It was noted that it was an exercise in futility which could be avoided by raising a *point in limine* as was done by counsel for the respondent. The court upheld the *point in limine* of *res judicata*.

In *Verukai N.O v Reserve Bank of Zimbabwe & Moyo & 52 others,*[29] the second respondents (Moyo & 52 others) were employed by the first respondent (Reserve Bank of Zimbabwe) and were retrenched. They had agreed on the retrenchment package at Works Council level and were paid their package. The second respondents approached the labour officer for conciliation, which failed. The respondents were paid their outstanding balances together with 5% interest. The Deed of Settlement which was drawn between the parties was subsequently taken to the Labour Court where it was made an order, thereby putting the matter into finality. It was the court's determination that the retrenchment package was negotiated by all the parties freely and voluntarily

28 LC/MT/63/18.

29 LC/MT/50/17.

up to the end. The Labour Court ruled that the order in the case LC/H/ORD/151/11 put the matter to rest, and it was *res judicata*. This was because the Deed of Settlement that was made an order by the Labour Court brought the matter to finality. The Labour Court made a ruling to the effect that the labour officer had no basis to entertain it as it had been finalised.

It is a well-known fact that a *res judicata* plea will be successful if a party can demonstrate that a decision was arrived at in the matter regarding the same facts and involving the same parties. Despite being imported from the civil and criminal practices, the doctrine of double jeopardy is evidently applicable in labour law if regard is had to the case law that has been discussed above. In labour law, significant attention is given to ensuring fairness for both the employer and the employee.

4. Exceptions to the Doctrine of Double Jeopardy

There are exceptions with regards to the principle of double jeopardy. Given the application of double jeopardy rule in labour law, the pertinent question is, what would happen if the chairperson of the disciplinary hearing was under undue influence or was biased against the employer? Are the disciplinary findings acceptable to the employer? The employee can be subjected to a second hearing if additional evidence is found after the first hearing has completed.[30] In the South African case of *Branford v Metrorail Services (Durban) & others,*[31] (which is applicable to Zimbabwe) it was suggested that the court will be sympathetic with the employer if any one or more of the following grounds are present:

(a) During the initial hearing, the presiding officer in the first hearing acted *mala fide* or without applying his or her mind to the facts;

(b) The presiding officer just issued a recommendation and lacked the powers to make a final decision;

(c) Whether and under what conditions fresh, pertinent evidence surfaced after the initial hearing;

(d) The employer's decision to convene the second hearing was made in good faith;

(e) The time period between the first hearing and the second hearing.

A single disciplinary enquiry conducted in accordance with the employer's registered code of conduct is the standard for determining the fairness

30 *Mapxashike v Zimbabwe Platinum Mines* LC/H/342/15.

31 (2003) 24 ILJ 2269 (LAC).

of a disciplinary offence. There are exceptional circumstances where the requirement of a single enquiry may be deviated from. There is no hard and fast rule on what qualifies as exceptional circumstances; instead it will depend on the circumstances of each case. One could argue that the departure from the doctrine is only warranted in exceptional circumstances. A disciplinary decision brought about by corruption, bias, malice or gross unreasonableness or irrationality is an example of exceptional circumstance that justifies departing from the doctrine.

5. Non-Compliance with the Disciplinary Code of Conduct

If the employer's disciplinary code was not followed during the initial hearing and the material facts were not adequately examined, then a second enquiry would be valid in the circumstances. In criminal law as well, if a major irregularity tainted the initial hearing, the double jeopardy rule will not prevent a re-hearing.

5.1 New Evidence

When new information or evidence becomes available to the employer after the first enquiry, fairness allows the employer to re-open disciplinary enquiry against the employee. Le Roux has developed the legal position regarding the fairness of a second enquiry based on new evidence as follows:

> Where new and material information comes to light which was not in the employer's possession at the time of the first enquiry and which, if true, would materially have altered the outcome of the disciplinary enquiry.[32]

Thus, the new evidence must be material in the sense that it has the potential to alter the outcome of the disciplinary proceedings.

32 Pieter Le Roux, 'Reconvening Disciplinary Inquiries: When Can a Second Inquiry Impose a Heavier Penalty?' (2001) *Contemporary Labour Law* 19.

Inconsistency

The decision to change the sanction can be appropriate or acceptable if the disciplinary committee or disciplinary authority failed to take the consistency principle into account and arrived at an inconsistent or unreasonable decision. Hutchinson contends that a disciplinary decision that is tainted with inconsistency may be cured by carrying out a second disciplinary enquiry, in the interest of justice and fairness.[33] In these circumstances, the employer intervention must always adhere to the principles of natural justice. Procedural unfairness occurs when an employee is not given a second hearing before the chairperson changes the inconsistent sanction.[34]

5.2 Unreasonable Decision

A serious irregularity that might warrant for a second hearing is an incorrect disciplinary ruling by the tribunal. Grogan asserts that elements that can compromise the fairness of employer intervention and that could substantiate interfering with the disciplinary consequences include a decision that is fatally flawed or a penalty that induces a sense of shock.[35] The disciplinary authority may have made a lenient decision as a result of *mala fides,* failure to apply the disciplinary code, or failure by the disciplinary authority to apply his mind to the task at hand. If a disciplinary authority has failed to carry out the task assigned to it or fail to fulfil its responsibilities effectively, the employee shall not be permitted to take the erroneous decision that was delivered on his behalf.

6. The Role of the Disciplinary Committee/Disciplinary Authority

It is noteworthy that an employer has the right to enforce discipline among its employees, provided that it is done in a just, lawful and fair manner. In actual fact, it is the duty and responsibility of the employer to discipline the employees, and an employer remains the *dominus litis* in determining whether to charge an employee with misconduct, and if so, what specific charges would be. In that regard, the employer would choose the suitable charge in the code of conduct which corresponds with the facts of the matter. It is the duty of the employer

33 William Hutchinson, 'Remedying Inconsistency by Conducting a Second Disciplinary Hearing' (2006) *Industrial Law Journal* 2036.

34 *Ibid*.

35 John Grogan, 'Double Jeopardy: Fairness is the Test' (2004) *Employment Law* 4.

to set up the disciplinary committee or disciplinary authority, which will hear and determine the matter.

There are no formal provisions in the Labour Act pertaining the role of the disciplinary committee or disciplinary authority. The appointment and selection of the disciplinary committee or disciplinary authority is governed by the code of conduct. If the code of conduct is silent on the appointment, it is the obligation of the employer to appoint. A disciplinary committee is defined as "a committee set up at the workplace/establishment composed of employer and employees representatives, to preside over and decide disciplinary cases and/or worker grievances".[36] The disciplinary committee is constituted of the chairperson and committee members. An employee in a managerial position usually has the responsibility to preside over a disciplinary enquiry. The informal procedural requirements outlined in the Labour Act acknowledge that managerial employees are laypersons and not experienced judicial officers since they do not have legal training, therefore, they do not follow the strict rules observed by the courts of law.[37]

A disciplinary authority is defined as "a person or authority or such disciplinary committee dealing with disciplinary matters in an establishment or at a workplace."[38] The code of conduct does not specify the number of individuals that should make up the disciplinary authority or how they should be composed. The designation of persons in the disciplinary authority is not stipulated and all is left to the employer's discretion.[39] It is clear from the definition of disciplinary authority that it can consist of one person. The disciplinary committee or disciplinary authority responsible for making the decision should be impartial and ought to approach the proceedings with an open mind. The principle of natural justice demands both the chairperson and the disciplinary committee members or the disciplinary authority to act impartially and with the requisite *bona fides*.

Grogan asserts that the right or authority to appoint disciplinary committee members resides with the employer.[40] It is the employer, as well, who determines the size and specific people who sit on the disciplinary committee.[41] When the

36 Section 2 of the Labour (National Employment Code of Conduct) Regulations, 2006 (S.I. 15 of 2006).

37 *Tel One (Pvt) Ltd v Mutodzaniswa* LC/H/165/15.

38 See again note 36 above.

39 *National Engineering Workers Union v Dube* SC 01/16.

40 Grogan (n1) 243.

41 See generally S.I. 15 of 2006.

company relinquishes to the disciplinary committee certain functions in terms of the code of conduct, it has no right to merely take back such powers.

It is common cause that the disciplinary committee or disciplinary authority plays a crucial part in disciplinary proceedings. The aim for determining the finality of the decision of an appointed disciplinary committee is to assess whether the employer violates the double jeopardy rule by interfering with that decision. The finality of the decision of the disciplinary committee is one of the determining factors when the courts consider the fairness of interference with that decision. When an appointed disciplinary committee has made a final decision, it may be deemed unfair for a higher level of management to interfere with that decision.[42] It is trite that "findings of fact made in the court *a quo* must be so outrageous in their defiance of logic that no sensible person applying their mind to the issues decided would have arrived at such findings,"[43] in order to warrant interference by an appellate court. Garwe, JA went on to state the reason why this is so in *Samson v Windmill (Private) Limited*[44] when he held that:

> The reason for this approach is obvious. Faced with the same facts, reasonable people might reach different conclusions without any of them being properly labelled as unreasonable.

The disciplinary committee must be properly constituted for the hearing to be conducted. In the case of a non-managerial employee, most codes of conduct stipulate that there must be a chairperson and equal representatives of managerial employees and members of the workers' committee. If the chosen representatives refuse to attend the hearing, it will proceed in their absence. In the case of *Pacprint (Pvt) Ltd v P. Kumbula & 10 others*,[45] members of the workers' committee who form part of the disciplinary committee under the applicable code of conduct declined to attend the hearings. All the respondents were found guilty *in absentia* and subsequently dismissed from the appellant's employ. The court held that the respondents could not claim that the proceedings were invalid on the grounds that the workers' committee was not included in the disciplinary committees that convened to hear and determine the matter, because the hearing was done due to their deliberately uncooperative conduct.

42 Van Jaarsveld (n22)14-23.

43 See *Hama v NRZ* 1996 (1) ZLR 664 (S); *Mpumela v Berger Paints (Pvt) Ltd* 1999 (2) ZLR 146 (S); *Malimanji v CABS* SC 47/07; *Barros & another v Chimphonda* 1999 (1) ZLR 58 (S)).

44 SC 7/15.

45 SC 67/17.

The disciplinary committee or disciplinary authority exists not to promote the employer's interests in disciplinary proceedings. They serve as unbiased arbiters who hear arguments from both parties (employer and the employee) before rendering their judgment. Thus, it is important for the disciplinary committee members to know that their role demands fairness and justice from them prior to engaging in the disciplinary process. The disciplinary committee should be briefed on or be cognisant of the relevant legal tests and workplace policies, regulations, practices, procedures and rules which should be considered as part of the disciplinary procedures.

There is, of course, institutional bias but the bias must not be gross. In the matter between *Zindoga v CMED,*[46] it was held that:

> Owing to the nature of disciplinary proceedings in an organization setting, 'institutional bias' cannot be totally ruled out. What is important, however, is that the disciplinary authority should not only act in a way which ensures that the accused gets a fair trial but also be seen to be doing so.

The issue of institutional bias was also ably articulated in *Musarira v Anglo American Corporation*[47] where it was stated that:

> I would point out here that as long as a charge of misconduct is preferred by an employer against an employee there is always a certain element of institutional bias, as the employer is the offended party. However, this happens to be the situation in all misconduct cases. What is important is that misconduct matters are dealt with in a manner that is fair and impartial and that the rules of natural justice are followed. The rules of natural justice in such a case are that the party concerned – (a) must be given adequate notice; (b) must be heard or be able to present his/her side of the story; and (c) should be allowed to call witnesses if he/she so wishes. See *Dabner v SA Railways and Harbours* 1920 AD 588 at 598.

Hence, the proceedings should pass the test of fairness despite the presence of institutional bias.

6.1 The Functions of a Disciplinary Committee/Disciplinary Authority in a Disciplinary Enquiry

It is a core responsibility of a disciplinary committee or disciplinary authority to make factual findings, determine whether the employee is guilty or not and to impose, in the circumstances, an appropriate penalty, if they found the employee

46 LC/H/77/14.

47 SC 53/05.

guilty. The responsibilities of a disciplinary committee or disciplinary authority include effectively applying the disciplinary code of conduct and procedure to the best of their ability, upholding the employer's code of conduct and carefully and diligently considering the facts and issues presented before them.

According to Grogan a presiding officer has an obligation to analyse all available information, evaluate the relevant information in favour of and against the employee, in order to make a thoughtful and well sounded judgment and act impartially while carrying out these responsibilities.[48] The evidence is weighed on a balance of probabilities, that is, could it have happened and it did not happen.[49]

6.2 Can an Employer Charge an Employee Twice for the Same Misconduct?

Employees who have been exonerated during a disciplinary investigation or who have received a punishment less severe than termination from the disciplinary committee or authority are often exempt from being subjected to a second investigation over the same infraction.[50] A dismissal under such conditions would be considered unjust. It is noteworthy that a disciplinary hearing is different from a criminal hearing. A disciplinary hearing, at any level, provides an opportunity for the employee to present his or her case in response to the charges levelled by the employer. Fairness is the only yardstick in labour law. Protecting employees from capricious intervention with discipline in a just system of labour relations is the goal of the established law prohibiting employers from meddling in the results of disciplinary investigations in which the chair has the ultimate say. This principle deserves to be preserved. The notion of double jeopardy is based on fairness, and it basically provides that an employee cannot be charged with the same offence for which he or she has already been found guilty or not guilty.

The case of *Mapxashike v Zimbabwe Platinum Mines*[51] offers some crucial guidelines on the double jeopardy principle. In that case, the appellant was employed by the respondent as a painter. Following allegations of theft of gloss magnolia paint, he was subsequently charged. On 20 July 2010, the appellant was found not liable following a disciplinary hearing. On 6 August 2010, the

48 Grogan (n1) 242.

49 *ZESA v Dera* 1998 (1) ZLR 500.

50 Grogan (n1) 200.

51 LC/H/324/15.

respondent addressed a memorandum to the appellant indicating that it had reconsidered the case, and the appellant had failed to answer certain questions. In its opinion, the appellant had a case to answer and consequently was arraigned before another disciplinary committee. The matter was heard by a person junior to the initial hearing officer and the appellant was found liable and dismissed. An internal appeal was dismissed. The Labour Court made a finding that it was incompetent for the respondent to charge the appellant with an offence that he had been acquitted of.

The respondent appealed to the Supreme Court, which allowed the appeal and remitted back the matter to the Labour Court to decide on the fairness of the second hearing. The Labour Court stated that where an employer conducts a second hearing it must be demonstrated that it was fair to do so. The second hearing was independent of the first and the appellant was advised of the charges. An oral hearing was conducted, which is a necessary component of a disciplinary hearing.[52] The Labour Court made a decision that there was both procedural and substantive fairness in the conduct of the second hearing.

In the case of *Marima & 2 others v Minister of Primary & Secondary Education & another*[53] the three appellant teachers who were in the respondent's employ teaching different grades had an occasion in February 2012 to enrol school children into their classes without the involvement of the head of the school and for some consideration from the parents of the children in question. When the infraction came to light, they were all called separately by the head and warned in writing to desist from such conduct. Such warnings were endorsed by the respondent's head office. Some nineteen months later in August 2013, the appellants were charged with misconduct for the infraction already described above. In October 2013, hearings were conducted in their matters. The outcomes of the hearings were guilty verdicts and penalties of $200-00 each as well as transfers to different schools and warnings against similar future conduct. The court held that the matter was investigated and the members were invited to meetings where their guilt was concluded. Emanating from the guilt conclusions the head went on to warn the members and subsequently sought endorsement of the same by the provincial officers. Even though a formal hearing was not held and formal charge letters served on the appellants, the warnings that the appellants got emanated from the infractions that they had allegedly committed. The court was therefore persuaded that the *res judicata* argument was merited besides the fact that the warning was premised on

52 See *Brake and Clutch (Pvt) Ltd* v *Nyama* SC 42/01.

53 LC/H/370/15.

inchoate disciplinary proceedings. The court held that it was not the appellants' fault that the respondent put the cart before the horse by warning them first, yet it entertained at a later stage a view to formally charge them for the same. Moreover, the court held that it took a whole nineteen months to prefer charges against the appellants that went contrary to the appellants' right to have the matter dealt with within a reasonable time. If an employer decides to charge an employee, such decision to charge an employee should be done promptly or within a reasonable period of time.

In the case of *Samuriwo v City of Harare,*[54] Hove, J opined that:

> The employer by its conduct waived its right to discipline the appellant. Once an act of misconduct has been committed, the employer should bring the charges within a reasonable time. There is no reason, in this case, to re-engage the appellant and then wait from June to January of the following year to bring charges…. They have failed to take any disciplinary action after reinstating the appellant for a period of about eight months. The delay in bringing the charges was long and unexplained. By its conduct of delaying to bring the disciplinary allegations, the employer waived its right to discipline the appellant. Any reasonable person would have formed the opinion that the employer did not intend to pursue the charges and had thus waived its right to discipline. *In casu*, the employer's decision to wait for about eight months is unreasonable and cannot be sanctioned by this court.

What comes out of the above decision is that where an employer has been aware of certain acts of misconduct for a long time and has done nothing about it, it may not have a 'good cause', if the circumstances are such that it may be taken to have waived its right to suspend or dismiss, in other words, the employer is taken to have condoned the misconduct.[55]

6.3 Can an Employer Appeal Against the Sanction Imposed by the Disciplinary Committee or Disciplinary Authority?

It is common cause that the employer may occasionally be displeased with the penalty imposed by the disciplinary committee or authority. The question therefore is, can the employer appeal against the sanction of the disciplinary committee or authority? Generally, it can be argued that it is unfair for the employer to appeal the decision of the disciplinary committee or authority considering that the chairperson of the disciplinary committee and ostensibly management representatives are the agents of the employer by virtue of their

54 LC/H/65/2016.

55 Lovemore Madhuku (n10) 123.

appointment. The chairperson and the management representatives would be performing duties on behalf of the employer. In the case of *ZESA Holdings (Pvt) Ltd v Matunja*,[56] the court held a different view and stated that section 92 D of the Labour Act as read with S.I. 15 of 2006,[57] gives an employer the right of appeal to the Labour Court against a decision of the disciplinary authority. It was the Supreme Court's view that the requirement that the right of appeal is given to a party or person who is aggrieved by such decision or determination is in clear and unambiguous language as to admit no doubt whatsoever. Further, the court made a ruling to the effect that the clear language employed in section 92 D of the Labour Act is to the effect that both the employer and the employee involved in disciplinary proceedings before a disciplinary committee or disciplinary authority have a right to appeal to the Labour Court if aggrieved. However, in the case of *Pioneer Transport v Mafikeni,*[58] it was decided that an employer cannot appeal against the decision of the disciplinary committee or disciplinary authority. It is submitted that an employer should not ordinarily appeal against a decision of the disciplinary committee that it has constituted and which acts as its own agent.

6.4 Can an Employer Change or Deviate from the Sanction Imposed by the Disciplinary Committee or Disciplinary Authority?

The major purpose of maintaining discipline in the workplace is to ensure that each employee makes a valuable and efficient contribution to the company's operations and advances the employer's commercial objectives. In the workplace, one of the most jealously guarded territories of managers is the authority to establish rules and take disciplinary actions against violations of the same.[59] The goal and aim of disciplinary sanctions is seen as remedial and corrective than punitive in the contemporary employment law,[60] and this is in line with S.I. 15 of 2006 which provides that disciplinary action should, in the first instance, be educational and then corrective.[61]

56 SC 73/22.

57 Section 8 of SI 15/2006.

58 SC 45/17.

59 Grogan (n1) 230.

60 Annali Basson, *Essential Labour Law* (3rd edn, Labour Publications 2002) 75.

61 Section 7 of S.I 15 of 2006.

All disciplinary codes of conduct provide for the right to appeal. Thus, unless the employee has relinquished or waived the right to appeal, he or she should be afforded an opportunity to do so in accordance with the code of conduct. Waiver may occur by reluctance to pursue an appeal or by failing to timeously lodge an appeal.[62] The basic rule, with few exceptions, is that the employer cannot change the disciplinary committee's sanction.[63] It is an unwritten rule that management must exercise their judgment when selecting a chairperson to preside over the disciplinary hearing and suitable persons as employer representatives. The following situations may cause the employer to deviate from the disciplinary committee's sanction; for the sake of consistency, if fairness so requires, if the disciplinary committee did not exercise their mind to the available facts to an extent that no reasonable disciplinary committee applying its mind to the facts would have arrived at the same decision, if the misconduct goes to the root of employment relationship.

The pertinent question which arises from the above is that, is it lawful for the employer to give a sanction not consistent with the registered code of conduct? The common law position is that any act that goes to the root of employment justifies an employer dismissing the employee.[64] A common law principle or concept cannot be changed or abolished by a code of conduct. The fact that the code of conduct is the result of an agreement is irrelevant and immaterial.[65] If the offence committed betrays the trust bestowed on the employee, it is lawful to dismiss an employee even if the penalty is not consistent with the charge in the code of conduct. In *DHL International (Pvt) Ltd v Kelvin Tinofireyi,*[66] the court held that:

> The respondent *in casu* has not denied the seriousness of the misconduct for which he was dismissed. He did not and indeed could not show that the offence was "so trivial, so inadvertent or otherwise so excusable" as not to warrant the remedy of summary dismissal. I find in the result that the appellant properly and in its discretion imposed the penalty of dismissal on the respondent, even though the conduct in question was not dismissible in terms of its code of conduct.

The principle coming out of the above cases is that when an employee engages in a conduct that is incompatible with the fulfilment of explicit or implicit terms of the contract of employment, the employer is entitled to dismiss him or her

62 *Barclays Bank of Zimbabwe Limited v Ncube* SC 26/09.

63 Grogan (n1) 200.

64 *Toyota Zimbabwe v Posi* SC 55/07.

65 *ibid*.

66 SC 80/14.

if the circumstances of the commission show that the continuation of a normal employer and employee relationship is no longer possible, notwithstanding what the code of conduct says about the penalty.

7. Conclusion

The double jeopardy principle is commonly known as the *res judicata*. The fundamental reasoning is that a person should not be tried twice for the same offence and that disputes should be finalised. Fairness is the criterion used to assess whether a second hearing is necessary in employment law; hence, this principle is qualified. It is strongly argued that fairness must be the deciding factor when evaluating an employer's decision to intervene with a disciplinary outcome, given the freedom of contract, the importance of collective agreements, economic prosperity, the trust relationship inherent in employment relations, flexibility, and consistency of workplace discipline.

However, when determining whether it is fair to subject an employee to further disciplinary action, the double jeopardy principle is a crucial consideration. Although the employer is ultimately in charge of disciplining an employee, they are not permitted to depart from the disciplinary process and standards they have established without a good reason. To combat the inherent inequalities in the employment relationship, the employer's powers must be limited to a certain degree. When considering whether it is fair to deviate from the double jeopardy rule in labour disputes, a wide approach should be adopted. For fairness to prevail, it should not be impeded by a disciplinary code of conduct, which acts as mere guidelines. It is unreasonable to reject employer intervention based only on the absence of a clause in an employer's disciplinary code of conduct that specifically grants the right to do so. This restrictive approach produces absurd results.

It is essential to establish clear policies that respect the rights of individuals while promoting accountability. There is need to develop comprehensive laws and policies that explicitly define misconduct and outline the conditions under which disciplinary actions can be taken. This helps to prevent ambiguity and ensures consistency. The organisations must adopt policies that prohibit multiple disciplinary actions for the same incident once a final decision has been made. This safeguards against potential abuses and reinforces the principle of fairness.