

The Employment Relationship and the Administration of Workplace Discipline

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PREAMBLE

This Article is about the employment relationship and the administration of discipline through the adherence to fair procedure. It focuses primarily on the governing rules and regulations in an employment relationship and addresses the inevitability of conflicts at the workplace, considering that conflict is inevitable in every relationship. In this context, “conflict” here is looked at from the viewpoint of “workplace conflict,” which may lead to a disciplinary action. Under the employment relationship, which is founded on a contract, there is need for the parties to know their respective roles and responsibilities, such that if a party, especially, the employee is alleged to have done wrong, he/she can be taken through a fair procedure to establish the guilt or otherwise. In this direction, the article considers “fairness” in its various forms - fairness of the procedure, i.e. the worker’s right to a fair hearing, procedural fairness of the hearing process, and fairness of the final decision.

What is Procedure?

Generally, “procedure” is explained as an established way of doing something.

The Merriam-Webster Dictionary defines “Procedure as a series of steps followed in a regular definite order.” Here, “Regular and Definite” suggest that it is an established and known norm that this is how such matters are handled or treated.

This paper basically reviews to an extent “the *regular and definite* way of managing discipline in an employment relationship, as well as “ fair procedure under which a fair hearing is conducted in worker discipline.”

The Basis of Employment Relationship

The basis of employment relationship is a contract between an employer and employee with mutual obligations. A contract of employment is a contract of service. It can be express (oral or written) or implied (conduct of the parties).

Legally, an employment contract is a document that spells out the terms and conditions of the employment relationship between the employer and the employee. The document becomes legally binding after the parties to the relationship agree to all the terms and conditions under the contract and they append their signatures.

Basic Features of Employment Contract

Some of the basic features of employment contract are:

- Position
- Job description
- Pay and rate of pay
- Total compensation package

- Work schedule
- Performance requirements
- Leave/Holiday
- Grievance Procedure/Dispute Resolution
- Disciplinary Issues

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INTRODUCTION

Labour Laws regulate the relationship between workers, employers and government in a country. The State through the Government establishes the institutional framework, which facilitates the enabling environment for businesses and/or industries to be established and for jobs to be created.

Basically, an employment relationship is created between an individual who sought the job because it is looking for the job and it is available and willing to do the job and so was offered the job by an employer who had the job and had the resources for the performance of the job and also the means to compensate the employee for doing the job.

Labour Law establishes the foundation on which an employment relationship is governed and the mechanisms to regulate the relationship, and thus prescribes the minimum standards that may be applicable in employment relationship, and here *relationship* (emphasis mine) is key. This suggests that an employment contract once entered into creates an employment relationship, and once there is a relationship the parties must perform their duties and also respect their responsibilities.

BRIEF ORIGIN OF LABOUR LAW

Labour Law has its origins in the remote past in various parts of the world. Research shows that in the primitive days, European scholars mainly attach importance to guilds and apprenticeship systems, while on the other hand, Asian scholars identified labour standards as far back as the Babylonian Code of Hammurabi during the 18th century. However, all these have limited influence on subsequent developments.

Essentially, Labour Law as it is known today is a product of successive industrial revolutions from the 18th century onwards and this became necessary when customary restraints and intimacy of employment relationships could no longer provide adequate protection against abuses. With the passage of time and developments in the world of work, the limitations of labour law have gradually eroded from its early phases of development where it was only limited to important industries and to undertakings above a certain size and wage earners. Therefore, this body of law which was originally intended to protect manual workers in industrial enterprises is steadily transformed into a broader body of legal principles and standards with two basic functions:

1. the protection of the worker as the weaker party in employment relationship; and
2. the regulation of the relations between organized interest groups, i.e. industrial relations.

The civilization of a country is shaped by the form and nature of its work processes and these inform a society's economic, political and cultural characteristics, which progresses its development. Is work servitude? or is work a contract? The world of work is constantly evolving and it is being shaped by the form and nature of work processes and the status and role of workers in a society. This constant

development of knowledge and the advancement of technology, is consequently impacting the world of work.

What is Labour Law?

“Labour Law is the varied body of laws applied to such matters as employment, remuneration, conditions of work, trade unions, and industrial relations.” It also includes social security and disability insurance. For example, in Labour Law unlike Contract Law, its elements are less homogenous than the rules governing a particular legal relationship. In addition to individual contractual agreements founded on employment relationship, labour law also deals with statutory requirements and collective relationships, the legal relationships between organized economic interests and the State, and the various rights and obligations related to certain types of social services.

Labour Law basically covers employers and employees and the level of coverage and the definition of employer and employees (workers) is determined by the particular jurisdiction. Generally speaking, an employee is a person who has been employed to work for some form of agreed compensation under a contract of employment, i.e. contract of service. Under Labour Law, an employee is an individual working for, or giving services to another person in his state of “dependence.” That is, an individual working in subordination to another person – the employer. This subordination is described or expressed in the “right to direct” whereby the employee is told what kind of work to do (*job/role description*), with prescribed working conditions, working hours, period of rest or leisure, etc. of each or the particular job.

Modern day’s development of labour law is the strengthening of statutory requirements and collective contractual relations founded on rights and obligations created by individual employment relationships.

Research reveals that employment, which is considered as a basic concept and category of labour law is a relatively recent development. Preceding the Great Depression and World War II, the focus was more on prevention or reduction of excessive unemployment rather than long-term employment policy. This was a part of an all-inclusive policy to promote economic stability and growth. This approach, which arises out from changes in political outlook and contemporary economic thought, is what according to theorists has progressively found expression in legal provisions that establish the creation of employment opportunities as a general policy objective.

In the aforementioned discussion on the creation of an employment relationship, it is said to be between an individual referred to as an “employee” and an individual referred to as “employer” acting in its own capacity or in concert with another to engage people to work for them with the ability to pay for the services rendered. But countries use different definitions to define *employees* because no uniform standard exists, but generally speaking, employees are wage earners. The ILO notes that: “The term “employee” is used in both legal texts and statistical analyses – even though there is no international definition of an employee.” employees are “those workers who hold the type of job defined as paid jobs.”

The world of work is constantly experiencing dynamism due to the advancement in knowledge and continuity in technology innovations. Again, work as was known before now, and as it is progressing, comes with its own forms of benefits and challenges, mostly influenced by several factors including economic inclinations. Work has moved from just “jobs” to what the ILO terms “decent jobs.” The employment relationship and the performance of jobs and the recognition and treatment of workers and their inclusion in economic development have witnessed another level of advancement.

The 2030 Agenda for Sustainable Development is a strategy to improve the lives of billions. The decent jobs Agenda is a call for a stronger and more inclusive growth, which means more resources to create decent jobs. Decent jobs according to the ILO is founded on four pillars - promoting jobs and enterprise,

guaranteeing rights at work, extending social protection and promoting social dialogue. These pillars are crucial to the advancement of the sustainable development agenda.

Brief on Ghana's Labour Law

The Labour Law of Ghana, Labour Act, 2003 (Act 651) is a consolidation of all the laws on labour, some of which predated independence, including Decrees enacted during various military interventions after the overthrow of the 1st Ghanaian Government after Ghana attained independence.

In all, seventeen (17) Laws on labour were consolidated and/or reviewed to create Act 651.

They were:

1. The Conspiracy and Protection of Property (Trade Disputes) (Cap 30)
2. The Trade Unions Ordinance (Cap 91)
3. The Trade Unions (Amendment) Ordinance, 1953 (No. 19)
4. The Trade Unions (Amendment) Decree, 1966 (NLCD 110)
5. The Trade Disputes (Arbitration and Inquiry) (Cap 93)
6. The Industrial Relations, Act, 1965 (Act 299)
7. The Industrial Relations Act, 1965 (Amendment) Decree, 1967 (NLCD 189)
8. The Industrial Relations (Amendment) Decree, 1972 (NRCD 22)
9. The Labour Decree, 1967 (NLCD 157)
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13. The Labour (Amendment) Decree, 1969 (NLCD 368)
14. The Labour (Amendment) Decree, 1973 (NRCD 150)
15. The Labour (Amendment) Decree, 1976 (SMCD 33)
16. The Labour (Amendment) Decree, 1976 (SMCD 42)
17. The Public Service (Negotiating Committee) Law, 1992 (PNDCL 309)

The current labour law, Labour Act, 2003 (Act 651) of Ghana replaced the existing laws on labour, which at the time were scattered in various pieces of legislation, some pre-dating independence in 1957. A fundamental principle underlying the labour law reforms was to bring them into conformity with the 1992 Constitution and the International Labour Organization (ILO) Conventions which Ghana had ratified, as a member of the ILO. Another important reason was to take away the “master-servant” relationship, which characterized the employment relations at the time under which the worker only works under the direction and control of the master and he/she is subject to the master’s knowledge and consent.

Another principle was for the Law to prescribe the roles and responsibilities of the employee to the extent that if the employee is alleged to have committed an offence, he/she must be taken through a “fair procedure,” and once the offence is established and the employee is found culpable, then the burden is placed on the employee. Thus, the “Master-Servant Rule” also known as the principle of vicarious liability has been lessened on the employer in some circumstances from the original position where the employer has to assume all legal responsibilities for the actions and conduct of their employees during and in the course of employment.

Act 651 applies to all workers and to all employers except the Armed Forces, the Police Service, the Prison Service and the Security and Intelligence Agencies specified under the Security and Intelligence Act 1996 (Act 526).

That the Law applies to *all workers and all employers* (with exemptions clearly stated) is a recognition of the importance of Labour Laws in setting standards in managing and regulating the employment relationship.

Significant among the key provisions in the Law is the principle of making the employment relationship predictable and to do away with capriciousness, hence, the Law provides for Fair and Unfair Termination of Employment and the Grounds for Termination of Employment, one of which is “the proven misconduct” of the worker.

General Rights and Duties of Employers

Generally speaking, Labour Law seeks to exact the imbalance of power between the employee and the employer and to safeguard the employee from unfair treatment in the employment relationship and to also create a platform for workers to be treated as “equal partners” during negotiations and at the workplace. Moreover, Labour Law regulates the market economy and serves as a safety net for both employers and employees by prescribing rights and duties of the parties in the employment relationship.

They are some basic rights and responsibilities of the parties in the employment relationship, and some of these have been listed in the table below:

Employer’s Rights	Employee’s Rights
Employ	Work under satisfactory, safe and health conditions
Discipline	Receive equal pay for equal work without distinction of any kind
Transfer	Have rest, leisure, enjoy public holidays and have reasonable working hours
Promote	Be trained and retrained for the development of its skills
Terminate or Dismiss	Form or join a trade union
Formulate Policies and Execute Plans	Receive information relevant to its work
Modify, Extend or Cease Operations	

Employer’s Duties	Employee’s Duties
Provide appropriate raw materials and tools, machinery and equipment	Work conscientiously and lawfully in the chosen occupation
Pay the agreed remuneration	Report for work regularly and punctually
Provide and ensure adequate procedure for discipline	Enhance productivity
Develop the human resource through training and retraining	Exercise due care the execution of assigned work
Furnish the work with the terms of the contract of employment	Obey lawful instructions regarding the organization in the execution of its work
Develop measure to protect the worker from injury or damage to its health during the course of work	Take proper care of the employer’s property entrusted to its care
Develop effective channels of communication	Protect the interest of the employer

These Rights and Duties of the parties are key in the relationship and they must be administered fairly and objectively in order to prevent and manage workplace conflicts. Their administration must be through the enactment of appropriate organization policies, rules and regulations that clearly explain them and where there is a dispute over their implementation or application, the medium by which they may be raised and how they must be addressed. Provisions in these policies, rules and regulations must also be made to ensure that where the parties are unable to resolve them internally, they may refer them to a third party for intervention or adjudication by specialized bodies. With these systems in place, the organization recognizes the inevitability of conflicts and consequently establishes systems or mechanisms to manage or effectively resolve conflicts in the employment relationship, because in employment relationship, one significant fact is the need to bring closure to disputes.

ADMINISTERING WORKPLACE DISCIPLINE

What happens when an employer is “aggrieved” due to an employee flouting a policy, rule or regulation pertaining to the workplace, which then becomes a *disciplinary issue*? Studies have shown that the best or effective way to manage discipline is to establish a fair and transparent disciplinary procedure, which must be administered objectively by organization managers and supervisors bearing in mind that the administering of discipline may also lead to a labour or industrial dispute if a worker is aggrieved by the outcome of the disciplinary process. Such disputes may be referred to a Labour Court, Labour Tribunal or Labour Commission. Hence, for the effective application of Discipline, the processes must be clear and transparent and the sanctions must commensurate the offence.

Workplace Offences – What are they?

Below, are highlights of some workplace offences classified into Minor and Major Offences. Research shows that there is no legal definition as to what constitute gross misconduct, which normally forms the basis of major offences in practice at the workplace, but there are some generally accepted offences (by convention) of what they are. Secondly, because organizations are different and their operations vary in terms of industry and sector, some offences, which may be considered as minor may not necessarily be minor offences in other industries or sectors.

Minor offences are those offences, which may be described as unacceptable conducts or behaviours, but are manageable; while major offences are unacceptable conducts which are unlawful. Therefore, minor offences can be “treated” by taking the employee through a procedure to “cure” the offence or for the employee to refrain from indulging in such acts in the future. The handling of minor offences by the employer range from verbal warning, query, written warning, counselling and coaching.

Major offences generally include offences committed by an employee which may be considered as grave in the context of the employment relationship, i.e. an unacceptable or unpardonable offence. Major offences are not “curable” but “sanctionable” because of the effect the action may have on the individual and its identity or the credibility of the offender and the organization as a whole. The handling of major offences often commence with interdiction during investigations and the disciplinary process, and the sanction if offence is established depending on the nature may be demotion, termination of employment or dismissal from employment. In some cases, an alleged offence committed by an employee, which may be seen as minor at the time the act was detected, may be established as a major offence once investigations and the disciplinary processes are conducted. In certain major offences, which may be considered as criminal, the employee may face both administrative trial as well as criminal trial in a court of law.

Some offences generally classified as minor and major offences are captured in the table below.

MINOR OFFENCES	MAJOR OFFENCES	MAJOR OFFENCES (GROSS MISCONDUCT)
Absenteeism	Perjury and/or Falsification of records	Abuse of trust
Tardiness	Stealing	Serious breach of health and safety procedures
Poor task performance	Quarrelling or fighting on the job	Serious breach of mail policy
Un-cooperative attitude or lack of cooperation	Insubordination	Bullying
Insubordination (<i>if it is established that not complying is not deliberate</i>)	Breach of health and safety procedures	Violent Behaviour
	Vacation of Post	Assault
		Dereliction of Duty

The Process of Establishing an Offence

For the effective management of the employer-employee relations, predictability of the relationship, best practice and in the interest of fairness, these workplace offences classified as minor and major must have applicable sanctions and every employee must be well-informed. The procedure and process for establishing an offence must be made known to an employee at the commencement of the employment relationship. It must not only be raised when an employee is alleged to have committed the offence; this is an employment relationship, a “contract of service,” therefore the “*saying ignorance of the law is no excuse*” does also apply here. But then, it is incumbent on the employer to at the inception of the relationship, inform the employee of what the rules are, and once employees have prior information, they cannot claim ignorance.

Every “alleged offence” by an employee must be ascertained through a fair, transparent and objective process and where the alleged offence is considered “criminal” the employee must be referred to the right forum.

In an employment relationship, the grievance procedure allows the employee to express any displeasure he/she has and the disciplinary procedure allows the employer to take the worker through an appropriate process to establish its guilt or otherwise of an alleged offence. Therefore, a grievance procedure must also be created and accessible to an aggrieved employee.

THE LAW AND PROCEDURAL FAIRNESS

The practice of workplace democracy requires that employees must participate in decisions that affect them in order to ensure inclusion and assure ownership as well as acceptance of the outcome, and not for decisions to be merely handed down to them.

There is no employment for life, and so there comes a time or there will be a point where an employment relationship may be legally terminated, such as -

- Retirement - voluntary (at the behest of the employee per the legal age for same) or compulsory (statutory provision)
- Expiration of the employment contract (as in the case of fixed-term contract)
- Medical ground
- Mutual separation
- Resignation
- Termination for cause
- Redundancy (due to lack of need for job, reorganization, merger, restructuring, etc.)
- Dismissal

These grounds for severing the employment relationship must form part of the terms of the employment contract, except that in cases where the employer initiates the process for e.g. where the employee is charged to have committed an alleged offence, the involvement of the employee from query to appearance before an investigative committee to establish the offence is a very important part of the entire process, and these processes must be conducted in a fair and transparent manner.

Procedural fairness is about the procedure leading to the delivery of justice. It is an evidence-based practice relating to higher levels of compliance based on procedural justice, which ultimately result in greater level of satisfaction with decisions rendered by authorities.

The employee must be part of the process through prior information on how the relationship will be legally severed and the processes for separation and all the parties must be satisfied with the processes and same must be compliant to the law. Today, the employment relationship is seen as partnership where both parties have a responsibility in ensuring that their respective and joint interests are protected.

The importance of Procedural Fairness

Studies have shown that procedural fairness is key in the administration of justice; and in the US for example, Americans are very sensitive to procedural fairness processes, hence the perception of unequal or unfair treatment is one important source of popular dissatisfaction when it comes to the US legal system. This perceptiveness is to the extent that a mother cannot punish a child who is alleged to have broken a vase without first consulting a witness, if not she will be perceived to have violated procedural fairness.

Procedural fairness is concerned with the procedures used by a decision-maker. Consequently, in employment relationship, the employer is obliged to ensure procedural fairness at all times when dealing with employee discipline. Procedural fairness should precede administrative decision in order to guarantee natural justice, especially when disciplining an employee or terminating an employee's employment. In the case of employment relationship, the procedures for separation of the relationship may be based on the organization's policy and/or the Labour Law of the jurisdiction in addition to the terms of separation as spelt out in the contract or any other policy regarding same.

The rules of procedural fairness require:

- An appropriate hearing in every circumstance
- The absence of bias
- Inquiry into the alleged offence
- The establishment of the offence to serve as evidence to support the decision.

PROCEDURAL FAIRNESS

Following principles of natural justice

GIVES AN EMPLOYEE THE OPPORTUNITY TO DEFEND THEMSELVES AND PROVIDE INFORMATION BEFORE A DECISION IS MADE INCLUDING...



PUTTING THE ALLEGATION TO THE PERSON



GIVING THEM A CHANCE TO RESPOND



GENUINELY TAKING RESPONSES OR CIRCUMSTANCES INTO CONSIDERATION



MAKING A DECISION BASED ON ALL RELEVANT INFORMATION

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An essential element of procedural fairness is to create fair outcomes by the disciplining authority or the adjudicating body thereby establishing the legitimacy of the decisions rendered. Once a worker is alleged to have committed an offence or flouted a policy as the case may be, he/she should be given the right to a “fair hearing” where he/she can speak to the charge(s) levelled against him/her.

Fair Procedure in a Disciplinary Code

The Disciplinary Code sets out the procedure for meting out discipline. The Code may follow the following procedure:

1. Explain the disciplinary options

2. Prescribe and follow a 'fair' procedure
3. Call for initial investigation to determine whether there is an 'alleged' offence
4. Establish a Disciplinary Committee
5. Conduct a disciplinary hearing
6. Decide on the disciplinary outcome
7. Action after the disciplinary procedure
8. Communicate decision to the employee and make available to employee (offender) copy of the Disciplinary Report
9. Provide room for appeals
10. Be ready to defend your action if any, taken against the employee

Tom Tyler, a Psychology Professor according to Burke & Leben (2007) observed that there are four basic anticipations embodied in procedural fairness –

1. Voice – the ability to participate in the case by expressing their viewpoint
2. Neutrality – consistently applied legal principles, unbiased decision makers, and a “transparency” about how decisions are made.
3. Respectful treatment – individuals are treated with dignity and their rights are obviously protected.
4. Trustworthy authorities – benevolent authorities, caring, and sincerely trying to help the litigant (in this case the employee who is facing the disciplinary hearing) – this trust is garnered by listening to the employee and by explaining or justifying decisions that address the employee’s needs.

The essence of procedural hearing is that it not only ensures a fair judgement but also shapes the thinking and reactions of the offending parties once the decision is arrived at, and it also makes it easier for a party to accept the outcome of the process.

The “hearing rule” is also very crucial to ensuring procedural fairness. Fairness, in workplace disciplinary hearing demands that the employee must be told the offence and given the opportunity to respond to the charge before either action is taken or the disciplinary process is triggered and a decision taken, because an employee’s side of the story is needed before a decision is made.

To ensure procedural fairness an employee has a right:

- To an opportunity to reply in an appropriate way taking into consideration the circumstances of the case or offence.
- That the reply is received and considered to inform the next line of action.
- That the employee is furnished with all relevant information concerning the issue during the hearing process and given a reasonable time in consideration of the exigency of the matter to consider and reply or respond.
- That all submissions in respect of the particular matter(s) must be genuinely and objectively considered before a final decision is taken.

The Second Branch of Labour Law

The making, modification, and termination of individual employment relationship and the resulting obligations for parties is what form a second branch of labour law which may involve aspects such as promotion (workers recognition for hard work or recognition for higher responsibility), transfer, dismissal/termination procedures and compensation. Historically, these matters of the law was described as the *law of master and servant* which implied a contractual relation in which one party agreed to be under the control of the other in the sense that the servant was under obligation to obey orders on how the

work should be executed as well as the details in its execution and the master in return pay a wage in addition to a grant of certain minimum conditions for the protection of the worker.

However, as the Law developed, the implied terms and statutory incidents attached to this relationship concerning matters of termination of employment or dismissal from employment, termination or dismissal procedures and compensation, minimum wages, conditions of work (conditions of service), and social security started to limit freedom of employment contract. Research shows that, legally speaking, the individual contract of employment plays a more important role in the civil-law countries than in common-law countries.

CONCLUSION

The concept of procedural fairness evolved from two common law principles (1) “that a decision-maker should not judge their own case or have an interest in the outcome, and (2) that a decision-maker should listen to both sides of a case before making a decision.” In procedural fairness, the issue is not about whether the **outcome** of the decision was fair, but rather whether **process** was fair. Procedural fairness is a crucial concept in administrative law, which then means procedures must be followed before arriving at an administrative decision. Thus, procedural fairness is fundamental to the administration of justice.

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