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The Worker's Voice

A Comparative Analysis of Natural Justice and Procedural Fairness in Disciplinary Hearings

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The Worker's Voice:

A Comparative Analysis of Natural Justice and Procedural Fairness In Disciplinary Hearings

by

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Abstract

Workplace disciplinary proceedings are a potentially important aspect of working life for many workers and employees. If a worker is investigated for misconduct and subsequently given a formal warning, this could have a very significant impact should further allegations be made since the cumulative effect of a series of warnings could ultimately lead to dismissal. This study found that, in spite of the serious nature of disciplinary hearings – even those falling short of dismissal – other than the non-binding ACAS (Advisory, Conciliatory and Support Service) Code of Practice and the statutory guarantee as regards accompaniment to such hearings under s10 of the Employment Relations Act 1999, there is no general, unqualified right to be heard at such hearings. This was compounded by questions as to precisely what relief was available for a failure to hear a worker at such a hearing with the case of *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* setting out that damages would not be available in such a case and that injunctive relief is the only remedy available. It was also confirmed that there exists an illogical division between certain classes of public sector worker and those in the private sector as regards the application of standards of natural justice and procedural fairness in such matters. Given that standards of fairness in employment matters, particularly as regards dismissal, are a relatively recent phenomena, and, moreover, that there has not been much treatment of this area within the academic literature, it was decided that a comparative study would be an effective way of determining whether, 1) such problems were recognised in what could be regarded as other comparable jurisdictions and 2) how other comparable jurisdictions seek to solve such problems. Using a rigorous and pioneering methodology, it was discovered that such problems are recognised across a range of comparable jurisdictions and that many jurisdictions dealt with this problem in legislative terms. This was more prevalent in Civil Law jurisdictions where a 'rules-based' approach was taken as opposed to an 'accompaniment' approach which was more prevalent in Common Law jurisdictions. The Republic of Ireland was an outlier in this regard having Civil Law style rules in force via statutory instrument. Whilst it was acknowledged that the domestic scene is not an unmitigated failure, on the basis of the evidence it is clear that there is a sizeable lacune in the law that can and should be amended by means more extensive than those presently in place. Although this has been the subject of unsuccessful legislative intervention in the past, this does not mean that improvements are not possible and just as citizens of other comparable jurisdictions appear to benefit from such rights, the lacunae should be eradicated at home. Resultantly, model instruments have been provided which it is hoped will be of use to legislators both domestically and internationally, along with further suggestions for research.

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I would also like to express my thanks to Jonathan Hobson with whom I initially worked with on disciplinary and investigatory matters as part of the USDAW Union at DHL Sherburn in Elmet which with hindsight, in fact sowed the seed of curiosity regarding such procedures and something we would frequently collaborate on outside working hours.

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Foreword

The author of this thesis holds a degree in Law from the University of Sheffield obtained in 2005 and was called to the Bar of England and Wales by the Honourable Society of Inner Temple in 2008.

Professionally, the author also previously worked as a Trades Union representative in the education and logistics sectors representing Union members in a range of disciplinary and investigatory matters.

Viewing these experiences through the prism of legal training, it was apparent that whilst there are commendable and readily accessible sources of guidance available, many of the individuals involved in such proceedings were oblivious as to the legal matrix that governs this area. This is not to say that such individuals were at fault for this. For any lay individual, finding and interpreting such rules would be an onerous and time-consuming task. As a result of this, it was often observed that decision-makers and those against whom allegations had been brought, were often uncertain or misguided on certain matters. This was particularly in relation to matters which could be described as 'natural justice' or 'procedural fairness'. On other occasions, such rules were observed to be breached flagrantly and without consequence. The author subsequently began researching the law and literature in this area which disclosed multiple problems, inconsistencies and an absence of academic attention. Given the relative infancy- and, in places, unsuitability- of the law coupled with a dearth of academic literature, it was decided that the best course of action would be to take a comparative approach and investigate the rules- or absence thereof – of other jurisdictions in this area. As the late Lord Bingham said:

> *"If… a decision is given in this country which offends one's basic sense of justice, and, if consideration of international sources suggest that a different and more acceptable decision would be given in most other jurisdictions, whatever the legal tradition, this must prompt anxious review of the decision in question".*[1]

This particular anxious review was predicated on the basis that the mass of case law which underpins procedural fairness in this country is not a desirable platform from which to conduct hearings of such an important nature. In 'Legal Traditions of the World,'[2] Patrick Glenn gave 4 different reasons to undertake comparative legal analysis; a) expansion of knowledge, b) taxonomy; c) the improvement of one's own legal system; and, d) harmonisation.[3] This study is most closely aligned with purposes a) and c).

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[1] *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32 [66] (Bingham LJ).
[2] Patrick Glenn, *'Legal Traditions of the World'* (2nd ed. OUP 2004).
[3] Van Hoecke M and Warrington M, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47 International & Comparative Law Quarterly 495.

The goals of this study were to compare the rules of natural justice and procedural fairness within workplace disciplinary proceedings in a domestic context with practices worldwide. Through a thorough examination of a range of approaches to procedural and substantive fairness in workplace disciplinary hearings, a comprehensive model for disciplinary procedures was distilled which it is hoped will be of use and interest to legislators and judicial decision makers. It is important to note, at this stage, that this study does not include dismissal through redundancy or remedies for unfair dismissal. Nor was it overly concerned with 'substantive' fairness in dismissal.

The primary research aim was to determine whether, based on overarching ideals of procedural fairness / natural justice, there exists an optimal model for handling disciplinary procedures within the workplace. More specifically, is there a legislative model which could facilitate the adoption of fair hearings in such matters? Is a more prescriptive regime more likely to produce greater fairness and certainty? Moreover, what are the advantages and disadvantages of such an approach? What approaches are taken by other jurisdictions in handling these matters and what can be learned from them?

To this end, a broad selection of jurisdictions were examined following a filtration process to determine a sufficient degree of comparability and to ensure that there was some evidence of enforcement. The jurisdictions selected were Australia, Canada, Estonia, Finland, France, Germany, Ireland, New Zealand, Portugal, Singapore, Slovenia and Spain. The overall fairness of each jurisdiction was examined on the basis of principles of fairness and natural justice as disclosed by judicial decisions in addition to the academic literature. The desirability or not of rigid rules and procedures in this area was also considered and contrasted with open-ended rules. This is by means of informing the draft instruments that have been created pursuant to the findings.

The key finding of this work was that, in answer to the legal lacunae presenting, a legislative solution is to be preferred. This is to counterbalance the proliferation of unqualified decision makers acting in a quasi-judicial capacity within workplaces and the potential for unfairness. This unfairness extends not only to the decisions within the context of disciplinary hearings themselves, but in the case of dismissal hearings made off the back of a series of unfairly conducted disciplinary hearings. This is elaborated upon later in this work.

As a general overview of the thesis, in Chapter 1 I will introduce the problem that exists within the law, illustrate the gaps in the literature, define the key parameters of this study and outline the methodological approach that will

be taken. For the literature review in Chapter 2, I will present an overview of the historical context of this area to show the pace of the evolution of the law and highlight key milestones. There will also be an examination of the academic literature on the concepts of natural justice and procedural fairness generally in addition to looking at some jurisdictions individually. Following this examination, the focus will narrow as I undertake a survey of the relevant domestic case law before drawing some preliminary conclusions.

Chapter 3 will cover the methodology and will begin with an overview and discussion of the Comparative Law method generally and determine which method will be the most appropriate. The research design will then be outlined specifically as it relates to this problem. Following this, the jurisdictions to be examined will be selected along with a rationale for their selection. The sampling exercise will then be undertaken and the comparative jurisdictions will be selected following a filtration process.

Chapter 4 will interrogate the chosen jurisdictions on a range of questions and variables and tabular representations will be used to present the core findings of each area. Contrasts will be drawn between the different legal families / clusters of jurisdictions with summaries made and conclusions drawn along with an assessment of key data points.

In Chapter 5 the final summaries will be made and conclusions will be drawn in respect of the research questions asked. Concrete solutions will be proposed and, furthermore, an model International Labour Organisation (ILO) Standard will also be formulated and proposed.

Chapter 1

1. 1 The Legal Conundrum

Workplace disciplinary hearings involve very important decisions being made with far-reaching consequences. Often there will be no formal knowledge of

the law on the part of either the decision maker or the employee. The best way to illustrate the problem with disciplinary proceedings is with reference to a hypothetical fact pattern.

For an employee with an initially clean disciplinary record, an unfairly managed disciplinary hearing could lead to an oral or a written warning being issued[4]. 'Unfairness' in this sense is taken to mean 'procedural unfairness' or practice inconsistent with the ideals of natural justice. This may be followed by a second disciplinary hearing related to a separate matter. The second disciplinary hearing may also be unfairly managed, and the employee given a written warning. Should the employee face a third disciplinary charge an employer could decide to give a final written warning or decide that, on the basis of the employee's poor disciplinary record, to dismiss the employee. As stated in *London Borough of Harrow v Cunningham*[5]:

"…an employer is entitled to take into account aggravating factors, such as one employee's poor disciplinary record when compared with another man, guilty of the same offence, who has a clear conduct record"[6].

If the employee's final hearing is conducted fairly, the unfairness inherent in the previous two hearings would not ordinarily be the subject of discussion at an unfair dismissal hearing. The fairness and soundness of the other disciplinary hearings may be assumed by the tribunal in such cases.

The fact that the two prior hearings were conducted unfairly must surely render questionable the final outcome. The dismissal of the employee has been based, at least partly, on unfair proceedings- proceedings which will never likely be the subject of any separate hearing or determination. Moreover, if the prior two hearings had been conducted fairly, it is possible that the employee may not have been found liable. There is some strength in the argument that the employee's failure to undertake a curative appeal in such instances may nullify any subsequent objections but this loses force when one considers that the rules are largely opaque, confusing and, at times, contradictory.

In addition, it goes without saying that if the dismissal hearing itself is handled unfairly in a procedural sense, this too has serious consequences. Regarding the consequences of dismissal, as was stated in the seminal Donovan report[7] of 1967:

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[4] *Hewittson v Anderson Springs* [1972] IRLR 56.
[5] [1996] IRLR 256.
[6] Ibid 257.
[7] H.M.SO., *Report of the Royal Commission on Trade Unions and Employer's Associations*, (Cmnd 3623, 1967) para 526.

'…In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations, dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes and families.'

More recently, Lord Hoffman expressed related sentiments in *Johnson v Unisys Ltd*[8]

> *"…a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem."*

It is also important to note that in many other spheres, natural justice rights and procedural fairness are observed as a matter of course, including private clubs and other organisations[9]. Certain individuals also have the right to aspects of procedural fairness, so as to not have their reputations tarnished at public enquiries[10]. The loss of a livelihood must surely, for the reasons such as those given in the Donovan Report and the others set out later in this Chapter, be regarded as equally serious as such matters deserving of procedural safeguards.

The absence of any significant procedural safeguards here arguably breaches Article 23 of the Universal Declaration of Human Rights[11]; the Right to Work, in particular Article 23(1) regarding the right to protection against unemployment, more specifically "*the right to just and favourable conditions of work*". Furthermore, Article 6 (1) of the International Covenant on Economic, Social and Cultural Rights[12] similarly states that "states parties… will take appropriate steps"[13] to safeguard the right to work which would also seem to warrant further action on the part of states party to the agreement.

If it is not accepted that such a 'right to work' exists in so far as rights contained in these international instruments cannot strictly be regarded as a 'legally protected interest'[14] within the domestic context, there is, at least, a moral argument for saying that it should. At the very least, the arbitrary or otherwise unfair deprivation of employment should be protected more than

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[8] [2001] UKHL 13; (2001) ICR 480 at 495 (Hoffman LJ).
[9] See for example *Christopher Cronin v The Greyhound Board of Great Britain Ltd* [2013] EWCA Civ 668.
[10] Richard Scott, "Procedures at Inquiries: The Duty to be Fair", (1995) 11 LQR 596.
[11]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), UNGA, Res 217 A(III) (UDHR), art 23.
[12] International Covenant on Civil and Political Rights (adopted 16 December1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[13] Ibid Art 6 (1).
[14] R.M. Dworkin, *Taking Rights Seriously*, (Duckworth, London 1977).

is presently the case. As Galligan has written, there may be a disconnect between moral rights and legal ones and, where such a disconnect exists, *'moral rights are good grounds for criticizing the law and urging change'*.[15] There is a definite moral right to fairness within the employment relationship given the immense importance such a relationship is for many people.

In support of the moral argument, being '*fired*' is listed very highly on the '*Holmes-Rahe Life Stress Inventory*', ranking at number 8 on a list of 43 stressful life events which can be said to contribute to an individual's illness[16]. Such deleterious health consequences of unemployment are well-documented[17] and there are also studies that correlate property crimes with unemployment[18]. A dismissal stemming from a failure to follow rules of procedural fairness which results in such consequences is regrettable in the least. Even without the consequences of dismissal, as Megarry J stated in the case of John v Rees[19]:

> *"…Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events"*

It follows that resentment harboured by those who have fallen victim to such a decision can hardly be good for workplace morale or employee retention. As has been written by Gonzalez:

> *"Procedural fairness has long been recognized as a key determinant of people's thoughts, feelings, and behaviors. In social spheres as diverse as the family, the work organization, and the legal arena, people react to how fairly they are treated."*[20]

A failure to follow fair procedures by those in higher positions has also been said to send a strong – and negative – message to those occupying the lower echelons of a given hierarchy[21]. This cannot be conducive to a healthy work environment and nor can it be good for individuals within the

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[15] Denis, J. Galligan '*Due Process and Fair Procedures*' (Clarendon, 1996) 98.
[16] Holmes, T. H., and Rahe, R. H, 'The Social Readjustment Rating Scale', (1967) Journal of Psychosomatic Research, 11(2), 213–218.
[17] Thomas Kieselbach, *Unemployment and Health: International and Interdisciplinary Perspectives*, (Australian Academic Press 2006) 1.
[18] Steven Raphael, & Rudolf Winter-Ebmer, 'Identifying the Effect of Unemployment on Crime' (2001) The Journal of Law & Economics, 44(1), 259–283, 280.
[19] [1969] 2 W.L.R. 1294, [1970] Ch. 345, [402] (Megarry J).
[20] Celia M. Gonzalez, *Why Do People Care about Procedural Fairness? The Importance of Membership Monitoring*, (New York University, 2006) 91.
[21] Törnblom, Kjell and Riël Vermunt, *Distributive and Procedural Justice* (Research and Social Applications, Taylor &
Francis Group 2007) 195.

hierarchy itself. Some commentators even go so far as to equate respect for procedural equality with human dignity[22].

On a substantive legal point, the reasonableness of the procedure is more likely to be scrutinized than the substantive reason for dismissal in any case[23]. It is prescribed that tribunals are to consider both procedural and substantive fairness as the same question[24]. In the worst-case scenario, these decisions can involve the loss of livelihood and irreparable damage to one's professional reputation. In some cases, the ultimate sanction will be administered: dismissal.

The Donovan Report[25] led to the first statutory protection for unfair dismissal in the UK, from which it was hoped would encourage employers to adopt voluntary procedures to facilitate fair dismissal and disciplinary hearings. Whilst it has certainly led to this, the law relating to procedural fairness in disciplinary procedures is far from clear or readily understood, particularly for the lay decision maker in a workplace setting. The common law is complex and intricate and often inaccessible. Any decision made stands to fall by the 'Range of Reasonable Responses'[26] test which is, prima facie, vague, technical and widely open to interpretation. The importance of following rules of procedural fairness and natural justice, then, goes beyond the legal and societal and could indeed affect employee loyalty and performance. This is why a comprehensive study of procedural rules in respect of disciplinary and investigatory proceedings in the workplace is important.

1.2 <u>The legal problem</u>

Procedural fairness/natural justice is often defined by the terms '*audi alteram partem'* and '*nemo debet esse judex in propia causa'*; that the other side should be heard and that nobody should be judge in their own cause respectively [27]. As stated by Lord Denning in the case of <u>*R v Gaming Board for Great Britain ex parte Benaim*[28]*:*</u>

> *"Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua and Audi alteram*

[22] Ibid 203.
[23] David Cabrelli, *Employment Law in Context* (OUP 2nd ed. 2016) 673.
[24] *Taylor v OCS Group Ltd.* [2006] EWCA Civ 702, [2006] ICR 1602.
[25] n 7.
[26] British Home Stores v Burchell [1978] IRLR 379 (EAT).
[27] Mark Freeman, *Truth Commissions and Procedural Fairness*, (Cambridge University Press, 2006) 119
[28] [1970] 2 QB 417 (EWCA), [430], (Denning LJ).

partem. They have recently been put in the two words, Impartiality and Fairness."

This thesis will focus essentially on the second maxim: audi alteram partem, ie the right to be heard. These two rules can be explained insofar as parties to a dispute should be given an opportunity to be heard and the decision arrived at should be free from bias. So fundamental is this rule, that Justice Fortescue once stated that:

'God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence … Such proceeding is agreeable to justice'[29]

Quoted less often is the example from Aeschylus play, 'The Eumenides', from around 450 BCE whereby a goddess, tasked with deciding the guilt or innocence of a man accused of murder, stated 'there are two sides to this dispute. I've heard only one half'[30]. The suggestion is, therefore, that natural justice and procedural fairness are a deeply entrenched notion. This is reflected in the legal sphere- rules of natural justice and procedural fairness can be found within a range of international statutes[31] and within domestic law across a range of jurisdictions[32].

Domestically, 'Natural Justice' generally was defined in the case of *Byrne v Kinematograph Renters Society Ltd*[33], per Harman J:

"…*First, I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not myself think that there really is anything more*".

These were stated more succinctly by Mr Justice Megarry in *Fountaine v Chesterton*[34]:

"1-The right to be heard by an unbiased tribunal.
2- The right to have notice of the charged misconduct
3- The right to be heard in answer to those charges".

[29] *The King v Chancellor of Cambridge* (1723) 1 Str 557, 2 Ld Raym 1334, 8 Mod 148, [164].
[30] Steven Churches, 'Western Culture and the Open Fair Hearing Concept in the Common Law: How Safe Is Natural Justice in Twenty-First Century Britain and Australia?' The Chinese Journal of Comparative Law, Volume 3, Issue 1, March 2015, 28.
[31] See, for example, the Universal Declaration of Human Rights and Article 6 of the European Convention on Human Rights.
[32] n 27, 118.
[33] [1958] 1 WLR 762 (ChD), [784], (Harman J).
[34] (1968) 112 Sol Jo 690, (Megarry J)

Natural Justice includes the right to be heard – which is founded upon the ancient maxim *audi alteram partem* (literally, 'hear the other side' or 'let the other side be heard')[35] – the right to be notified of the charged misconduct, and that the decision maker should be free from bias. The right to be heard also implies the right to representation or accompaniment, a necessary requirement for a fair hearing. Natural Justice rights are often referred to in cases involving workplace disciplinary proceedings, breach of which are occasionally found to be pivotal in cases involving unfair dismissal[36]. In the workplace disciplinary environment, the position is confusing – on one hand an employer must give an employee the opportunity of stating his or her case unless, in the words of Sir John Donaldson in *Earl v Slater and Wheeler Airlyne Ltd*[37]:

"*there can be no explanation which could cause the employers to refrain from dismissing the employee. This must be a very rare situation*".

On the other, in the case of *Ridge v Baldwin*[38]. It was held that the rule of *audi alteram partem* does not apply to cases of Master and Servant – in modern language 'employer' and 'employee'- although it has to be stressed that this was prior to the Industrial Relations Act 1971.

In respect of disciplinary and investigatory matters, there have been cases that suggest that the Courts have the jurisdiction to examine their scope. The most recent case of *Yapp (2015)*[39] is instructional. In this case the Court demonstrated a jurisdiction to rule upon the reasonableness of disciplinary matters but concluded that the requirement for different people to carry out the investigation and hearing itself did not represent "a basic principle of natural justice"[40]- an unusual finding given the accepted definition of '*nemo debet esse judex in propia causa'*[41].

However, in spite of the volume of legislation and case law following the 1971 Industrial Relations Act, natural justice rights and rights of procedural fairness do not appear to fully apply to workplace disciplinary hearings generally. Potentially short of an action in tort for an unreasonable initiation of disciplinary and investigatory hearings[42] there is no general, unqualified right to be heard in such matters.

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[35] *Halsbury's Laws of England*, (2022) chapter 297. See also Bagg's Case (1615) 11 Co Rep 93b and Bentley's case- R v University of Cambridge (1723) 1 Stra 557 re Office Holders.
[36] See *Louies v Coventry Hood & Seating Co Ltd* [1990] IRLR 324 (EAT).
[37] [1973] 1 All ER 145 (NIRC), [55] (Donaldson J).
[38] [1963] 2 W.L.R. 935, [1964] AC 40.
[39] *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112.
[40] Ibid 69.
[41] Freeman, (n27) 119.
[42] See *Coventry University v Mian* [2014] EWCA Civ 1275.

Furthermore, employees who could be considered 'professionals' are, it seems, given more protection than non-professionals. Certain categories of public sector worker seem to have more natural justice rights by virtue of being so employed than their counterparts in the private sector[43]. There is, therefore, no general and unqualified right to be heard in workplace disciplinary matters. There also exists an unacceptable division between certain public sector employees and private sector employees in respect of the rights available which persists from the time of *Ridge v Baldwin*[44]. Professional[45] employees have more rights to representation at such hearings it seems.

The standard by which an employer's application of the rules of Natural Justice or Procedural Fairness is judged in dismissal cases falls to be decided under the test of reasonableness in the case of *British Home Stores Ltd v Burchell*[46]. Whilst offering flexibility in individual cases, this case is both unclear and uncertain and overly subjective for lay decision makers. It is also worth considering the composition of a typical disciplinary or investigatory panel in a workplace. These will usually consist of a member of management staff. In a larger organisation this is typically a member of the Human Resources team, the employee facing allegations and – at disciplinary hearings- a trade union representative or companion. With the possible exception of Human Resources staff, none of the other panel members are likely to be legally trained. The objective and legalistic standard of 'reasonableness' is unlikely to be of much assistance to such people.

Symptomatic of the consistent reliance on *Burchell*, development of the law in this area is blighted by judicial reluctance. Moreover, any rights to a fairly administered contractual disciplinary hearing may fall within the '*Johnson*'[47] exclusion zone in which undermines the position although see the discussion of Merrett and Barnard[48]. The position on cross-examination of witnesses is also unhelpful and vague[49]. It is generally not permitted apart from in the most serious of circumstances. Employers – particularly those without recourse to a HR department – are unlikely to know when this is and is not appropriate.

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[43] See *Mattu v University Hospitals Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 641, [2012] 4 All E.R. 359.
[44] n 38.
[45] Astrid Sanders, 'Does Article 6 of the European Convention on Human Rights Apply to Disciplinary Procedures in the Workplace?' Oxford J Legal Studies (2013) 33 (4) 791.
[46] n 26
[47] *Johnson v Unisys Ltd.* [2001] UKHL 13, [2003] 1 AC 518.
[48] Catherine Barnard and Louise Merrett, 'Winners and Losers: Edwards and the Unfair Law of Dismissal' The Cambridge Law Journal, 72 [2013], 313.
[49] *Santamera v Express Cargo Forwarding t/a IEC Ltd* [2003] IRLR (EAT) 272.

Where the case law does provide guidance – and in certain respects, it does – this is not much use to employers or employees who lack legal literacy. As previously stated, those subject to and involved in disciplinary proceedings – managers and employees – are also not likely to have any specialist legal knowledge or training. Although the ACAS (Advisory, Conciliation and Support Service) code[50] provides guidance, it is by no means complete. Nor is its breach- and consequential breach of the underlying case law- determinative of a complete cause of action in its own right[51]. Astrid Sanders has also highlighted the deficiencies of such principles in various articles[52] and in 2017[53] providing useful guidance as to the current state of affairs. According to the research of Sanders there is presently a modified version of Natural Justice operating within employment disputes, that disciplinaries are not regarded as– nor expected to reach the standard of – 'mini trials' by the Court of Appeal.[54]

It is also worth noting the significance of the 'no difference rule' from the case of *Polkey v AE Dayton Services Ltd*[55] regarding failure to follow procedure in dismissal cases as regards remedy. In cases of unfair dismissal, if a dismissal would have occurred regardless of the procedures followed- as Lord Bridge stated:

"*It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with*".[56]

Therefore, the amount of compensation given to the employee can be reduced.

The practical consequence regarding the dispensing of procedure is that a failure to follow, adequately or at all, a disciplinary procedure, can effectively be regarded by employers – particularly large ones- as a simple overhead and a cost of doing business. Although *Polkey* was a considerable improvement on the former line of authority in *British Labour Pump Co v*

[50] Advisory Conciliation and Support Services (ACAS), 'ACAS Code of Practice on Disciplinary and Grievance' (ACAS 2015) issued pursuant to The Code of Practice (Disciplinary and Grievance Procedures) Order 2015, SI 2015/649.
[51] Trade Union and Labour Relations Act 1992, s207.
[52] N 45. Also, see Astrid Sanders, 'A "right" to legal representation (in the workplace) during disciplinary proceedings?' I.L.J. 2010, 39(2), 166 -182, [170].
[53] Astrid Sanders, 'Fairness in the Contract of Employment' ILJ (2017) 46 (4), 508.
[54] Ibid.
[55] [1988] A.C. 344, [1987] 3 WLR 1153 (HoL).
[56] ibid 1156 (Bridge LJ).

Byrne[57], if the employer could show that they would have dismissed the employee in any case this defect would be cured. The preliminary literature review in this area also shows that the natural justice rights commonly upheld by the Courts are the right be heard by an unbiased panel[58], the right to have notice of the charged misconduct[59], the right to be accompanied[60] and the right to make representations[61]

Whilst these rights have been recognised, their enforcement is not consistent, and the approach taken is often variable. The reason for this is nuanced but, ultimately, falls to be judged against the highly flexible and unclear standard of 'reasonableness' laid down by *British Home Stores v Burchell*[62]. The effect of breaching such rights varies. In some cases, there is no consequence[63], in others the overall amount of compensation owed to the claimant may be reduced[64]. These rights also appear not to be universally enjoyed by all employees. Certain classes of public sector employees[65] and those who may be regarded as 'professionals' or those whom a disciplinary process has been specifically contracted for[66] often have more rights in practice. Although the ACAS code offers some clear guidance it is not particularly comprehensive and nor does it have the full effect of law.[67] This area of the law has also not received sufficient development. Many cases never reach the Supreme Court or House of Lords – in at least one important case some cases this was actively repressed[68]. In the rare cases where such cases do reach the highest Courts they appear overly deferential to the case of *British Home Stores v Burchell*[69].

The reliance on the range of reasonable responses test (*British Home Stores v Burchell*)[70], therefore, appears to be stifling in this context. In any case, procedural matters can be abrogated via the inheritance of *Polkey*[71]. This position is both uncertain and unsatisfactory, both for employees and employers. By investigating the rules of other jurisdictions we can see what developments have been made in the law outside of the United Kingdom and consider whether inspiration could – and whether it should – be taken.

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[57] [1979] ICR 347, [1979] I.R.L.R. 94 (EAT).
[58] *Moyes v Hylton Castle Working Men's Social Club & Institute Ltd* [1986] IRLR 482.
[59] *Spink v Express Foods Ltd* [1990] IRLR 320.
[60] Employment Relations Act 1999, s. 10.
[61] Ibid.
[62] n 26.
[63] *Earl v. Slater and Wheeler Airlyne Ltd* [1973] 1 All ER (NIRC) 145 [149] (Sir John Donaldson)
[64] Trade Union and Labour Relations Act 1992, s. 207.
[65] n 53.
[66] *R v BBC, ex parte Lavelle* [1983] 1 WLR 23 (QB).
[67] n 65.
[68] *Alidair Ltd v Taylor* [1978] ICR 445 [para 39] (Denning LJ).
[69] *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16, [2018] 3 All ER 477 [para 34] (Hale LJ).
[70] n 26.
[71] n 55.

Having represented many individuals as a Trade Union Representative at both disciplinary and investigatory hearings across two contrasting sectors, it is the authors experience that both employers and employees are at a loss as to how the law in this sensitive and important area stands. Instruments such as the non-binding ACAS Code of Practice[72] are not a satisfactory substitute for clear legislative guidance. At the very least, meaningful codification of existing rules and principles is desirable. Regardless of the ultimate effect of *Polkey*[73], if both employers and employees had clear and simple rules to follow then both would ultimately benefit.

1.2.1 Legislative Provisions

Although a dismissal may be rendered unfair in respect of a significant breach of procedural fairness, the case law does not always demonstrate a concrete right to be heard for employees in workplace disciplinary hearings falling short of dismissal. The closest direct legislative provisions that exist in respect o are those relating to accompaniment under s10 of the Employment Relations Act 1999. Under s10 (1), where an employee is required to attend a disciplinary or a grievance hearing, the employer must permit a 'reasonable request' to be accompanied. Under s10(3) the companion must be a Trade Union Employee, a trained Trade Union Official or a fellow worker. As will be discussed later in this work, this provision does not have to be adhered to when in conflict with Article 6 rights, ie. in the case of so-called professionals at risk of being deprived of the right to practice their chosen profession. Under s10(2B) a representative may 'put the workers case', 'sum up that case', 'respond on the worker's behalf to any view expressed at the hearing' and 'confer with the worker during the hearing'. The representative is not, however, entitled to 'answer questions on behalf of the worker', or 'address the hearing if the worker indicates at it that he does not wish his companion to do so'.

As will be demonstrated these rules are simply not expansive enough by way of ensuring an adequate right to be heard. More extensive provisions were contained in the ill-fated Employment Act 2002[74] but, as will be argued, these provisions themselves did not go far enough in respect of the exact requirements of disciplinary hearings themselves. They merely served to require reduction to writing and granting a cause of action rather than facilitating procedural fairness as this thesis defines it.

1.2.2 Existing literature

[72] n 50.
[73] n 55.
[74] See Schedules 1 – 3 in particular.

It has been stated that there has been relatively little written on natural justice and procedural fairness generally by philosophers and legal theorists about the standards and procedures officials in a wider sense should use when exercising their powers[75]. Likewise, there is no study in the literature which presents an in-depth comparative examination of this kind. Existing literature leaves open the question of the extent to which natural justice rights apply to disciplinary matters short of dismissal, such as the work of Sanders (2017)[76]. Sanders ponders the existence of a right to legal representation in disciplinary proceedings in line with Article 6 of the European Convention on Human Rights.

Scholars have considered the extent to which actions for breach of contract can be brought in respect of failure to follow a disciplinary procedure- injunctive relief or damages[77]. However, no study has examined what such a failure may consist of or considered whether such an approach would be practical. Although a global oversight of procedural constraint in dismissal cases has been given [78] no study was discovered which examined the similarities and differences between individual rules of procedure across a range of jurisdictions as regards disciplinary and investigatory matters in particular. Authors such as Collins (1992)[79] have addressed dismissal legislation and it's common law framework to an extent but a full- scale review and discussion of the case law and whether it is fit for purpose is absent as regards disciplinary matters specifically. Although comparative studies in dismissal have been made before[80] likewise, none have addressed procedural aspects of disciplinary mechanisms in a comparative context. A comparative exercise would also be very valuable given the law's relative infancy in this area and the fact that the Courts have seemingly been reluctant to develop the law in this field.

It is worth noting that this area of law may become increasingly relevant over the coming years. According to Collins[81] a consequence-based approach under Article 8 of the European Convention on Human Rights to the impact of unjustified dismissals is emerging through the jurisprudence of the European Court of Human Rights. With such a shift in focus it is possible that more attention could be given to procedures

[75] Törnblom, Kjell, and Riël Vermunt *Distributive and Procedural Justice: Research and Social Applications*, (Taylor &
Francis Group 2007) 1.
[76] n 52.
[77] Catherine Barnard and Louise Merrett, 'Winners and Losers: Edwards and the Unfair Law of Dismissal', The Cambridge Law Journal, (2013) vol. 72, 313.
[78] Zoe Adams, Louise Bishop and Simon Deakin, (2016) *CBR Labour Regulation Index (Dataset of 117 Countries)* (Cambridge: Centre for Business Research).
[79] Hugh Collins, *Justice in Dismissal*, (Clarendon, 1992).
[80] Brian Napier, Jean Claude Javillier and Pierre Verge, *Comparative Dismissal Law*, (Croom Helm, 1982).
[81] Hugh Collins, 'An Emerging Human Right to Protection Against Unjustified Dismissal', Industrial Law Journal, Volume 50, Issue 1, March 2021, 36.

adopted in previous disciplinary matters prior to the hearing that resulted in dismissal.

1.3 Research Objectives

The main research objectives of this thesis are: firstly, to investigate the scope of workplace disciplinary proceedings in England and Wales; secondly, to find out the extent to which natural justice and procedural fairness rights apply; and, thirdly to find whether there exists a general right to be heard for employees in actions taken against them resulting in and falling short of dismissal. The fourth research objective is to carry out a comparative study of a range of jurisdictions which will be selected on the basis of their similarity to England and Wales. Similarity will be assessed in terms of the overarching respect for the rule of law and labour law enforcement machinery. This is with a view to setting out some proposals for reform of this area which will hopefully be of interest to legislators at the UK Parliament and potentially beyond. There is no framework of this kind available from the International Labour Organisation and as such, a study would likely be of interest globally, too. Both of these outcomes can be found later in the thesis regarding a domestic legislative proposal and an ILO Model Standard.

Currently there are no definitive and clear legal rules which are intelligible to many people. Besides judicial decision makers these include employers, their management staff involved in making decisions in disciplinary and investigatory hearings and employees who are subjected to such decisions and investigations. Given the highly incremental and reluctant approach taken by the Courts, this particular review is necessary. It is even arguable that, since the vast majority of case law decisions relate exclusively to dismissal, that there are presently no common law rules at all for disciplinary matters rendering such an examination more crucial.

In the words of Lord Bingham, an '*anxious review'*[82] of the practice of other jurisdictions can be undertaken to explore best practice in any given area. This is preferable to a straightforward codification exercise– it is arrogant to assume that English case law is superior, particularly as Labour Law as regards dismissal-related matters- is a relatively new field. The first country to introduce unfair dismissal legislation was Mexico in 1917[83] and the United Kingdom's legislation dates back only 50 years[84]. Other jurisdictions, therefore, may be a much more fruitful place to look.

Following on from the overarching objectives, the main research questions to be critically evaluated by this study are, in relation to the domestic scene:

1) What rules relating to procedural fairness and natural justice have been recognised by the Courts and legislator as applying to disciplinary proceedings?

2) What is the effect of breaching such rights?

3) Are these rights universal to all employees?

4) Are there clear and sufficient substantive guidelines on these rights?

5) Has there been sufficient development of such rights within the case law?

Following the investigation of these rules within English Law, I will investigate, by way of a comparative study, the rules and proceedings of a number of other jurisdictions to find out:

1) How other comparable jurisdictions approach this problem.

2) Whether certain types of legal system have stronger or clearer rules.

3) Whether there is any data relating to the enforcement of such rules.

4) Whether certain procedural rules are given more protection than others across a range of jurisdictions.

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[82] *Fairchild v Glenhaven Funeral Services,* [2002] UKHL 22, [2003] 1 AC 32 [66] (Bingham LJ).
[83] Edward Yermin, 'Job Security: Influence of ILO Standards & Recent Trends', In Matthew W. Finkin and Guy Mundiak (eds), *Comparative Labor Law* (Edward Elgar, 2015) 20.
[84] The Industrial Relations Act 1971.

Secondary points to investigate are whether:

1) There is a consistent, global model of the right to a fair hearing during such proceedings across the different jurisdictions examined; and,

2) Whether a best practice model could be developed and propagated for use by the International Labour Organisation.

1.4 Methodological Approach

This study adopts a comparative legal research method based on a black-letter law analysis of the English law and the law from other jurisdictions. The materials from the English Legal System that will be analysed in the literature review are the existing case law in this area. This will allow the examination of different facets of the disciplinary process. Existing legislative provisions along with various key texts and practitioner guides such as Harvey on Industrial Relations and Employment Law[85] and the seminal Donovan Report[86] will also be of interest.

This review should give an overview of 1) The underpinning philosophy of U.K. Employment Relations, 2) the Legislative Framework, 3) the ways in which the Courts have determined the scope of Natural Justice principles as they apply to Disciplinary Proceedings, and 4), the procedural and substantive impact of failure to follow disciplinary procedures. This will be important to get an overall picture of theory and practice within England and Wales.

Other sources consulted in the UK will include the ACAS Code of Practice[87]. This code provides additional guidance to employers and employees on how disciplinary procedures should be conducted. Although it is non-binding and voluntary, breach of the code can be taken into account by an Employment Tribunal when determining a relevant question under s207(A) of the Trade Union and Labour Relations (Consolidation) Act 1992. Ultimately, there is no compensation available for a breach of the code itself independent of a dismissal which is, itself, problematic.

[85]Brian Napier et al, *Harvey on Industrial Relations and Employment Law (*Butterworths, 1991).
[86] n 7.
[87] n 50.

In respect of international provisions, the relevant ILO instruments will be consulted with a view to establishing the apparent level of international consensus generally and on the procedural requirements in particular. Recommendation 119[88] and Convention 158[89] should be instructive in this regard. Regarding the comparative jurisdictions it is anticipated that a range of other supporting materials will be consulted – codes of practice and best practice guides will be examined to determine the true shape of the disciplinary landscapes in addition to case law.

The choice of comparable jurisdictions must be justified. With Comparative Law, it has been written that "*there are no strict rules and the question of what and who to compare is strongly related to the purpose of comparison"*[90]. Moreover, the set of countries compared may bias the findings and conclusions'[91]. It is important, then, to remember the overall objective of this thesis, which is to determine whether the rules relating to disciplinary proceedings in England and Wales are adequate and do indeed offer a satisfactory right to be heard and, if not, whether or not they can be improved. Appropriate jurisdictions then, would take a broadly similar approach to addressing Employment Law disputes generally and have a demonstrable recognition of labour rights along with a commitment to upholding them.

Regarding the perceived difficulties with examining legal systems of different types and fears that this may not produce valid results, it is proposed that a straightforward examination of the common law jurisdictions in this area could be limiting. In line with the assertions of Marc Ancel[92], It is submitted that an 'intertypal' comparison can provide valuable material that could potentially be used for some form of legal transplantation, or, at the very least inspiration for law makers. There are examples of where civil-style rules have been used within a common law setting, see the Australian Civil Liability Act 2002[93] which codified the rules relating to torts into an instrument resembling a civil statute. Moreover, not all common law jurisdictions are necessarily appropriate within the context of this study. The United States, for example, adopts a 'hire and fire at will' approach with no

[88] Recommendation 119 (R119), Termination of Employment Recommendation, (5th June 1963), International Labour Organisation superseded by Recommendation 158 (R158), Termination of Employment Recommendation (2nd June 1982), Termination of Employment Convention (C158), 2nd June 1982.
[89] Ibid.
[90] Matthew Finkin and Guy Mundiak, *Comparative Labor Law* (Edward Elgar 2015) 7.
[91] Ibid 8.
[92] Gerhard Danneman, '*Comparative Law: Study of Similarities or Difference?*' in Maurice Adams, Jaako Husa, Marie Oderkerke, *Comparative Law Methodology*, vol 1, (Edward Elgar 2017) 375.
[93] Civil Liability Act 2002, No 22.

procedural constraints on dismissal[94]. This is entirely different to the approach in England and Wales and would not make for a productive comparison.

In order to produce a valid comparison, the jurisdictions examined should be at least broadly similar to the United Kingdom. This will be gleaned at least in part from the Cambridge Index as previously mentioned and, also, in terms of: 1) Whether there are any procedural constraints on dismissal within the jurisdiction 2) the commitment demonstrated to upholding and enforcing labour rights generally, and 3) whether the jurisdiction adopts a broadly similar approach to dismissal matters in general.

In summary, the jurisdictions examined should be broadly similar to England and Wales in terms of the overall Labour Law Architecture, be shown to respect and uphold the rule of law and be shown also to have some degree of respect for labour rights generally. Without similar enforcement architecture, the legal process for resolving such disputes may be too alien to England and Wales and be either not capable of overall comparison and hence inspiration or transplantation. Secondly, whilst a jurisdiction may purport to have comprehensive and protective employment measures, without evidence that such rules are in fact enforced there can be no inference made as to their effectiveness in practice. Although there is certainly merit in undertaking a pure textual comparison, to draw on evidence from such jurisdictions without undertaking due diligence as to their actual effectiveness could be disingenuous if seeking to persuade the legislator as to the veracity of any proposals for change.

In the interests of both expediency and building on existing prior research, the overall starting point for determining the jurisdictions will be Cambridge University's Centre for Business Research Labour Regulation Index from 2016[95]. This study objectively maps 117 jurisdictions on various aspects of Labour Regulation including, at point 19, whether or not a jurisdiction requires procedural compliance in instances of dismissal[96]. Given that this study is investigating procedural constraints on dismissal, it makes no sense to compare jurisdictions which have no procedural constraints. The initial filtering process removed 22 jurisdictions from consideration on this basis. Austria, Bangladesh, Brazil, Chile, Colombia, Costa Rica, Ethiopia, Georgia, Honduras, Ivory Coast, Macedonia, Mali, Myanmar, Paraguay, Serbia, Sri Lanka, Switzerland, Taiwan, Thailand, USA, Uruguay and Venezuela.

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[94] n 78.

[95] n 78.

[96] Whilst the 'numerical' approach or quantifying of rights through 'leximetrics' is convenient and useful, the critiques of this approach should also be noted. See for instance, Siems*, Numerical Comparative Law - Do We Need Statistical Evidence in Law in Order to Reduce Complexity?*, Cardozo Journal of International and Comparative Law, Vol. 13, pp. 521-540, 2005, and Irene Dingeldy, Heiner Fechner, Jean-Yves Gerlitz, Jenny Hahs, Ulrich Muckenberger, *Worlds of labour: introducing the standard-setting, privileging and equalising typology as a measure of legal segmentation in labour law*, I.L.J. 2022, 51(3), 560-597 but note 581.

It was then decided that the remaining jurisdictions would be filtered with reference to the World Justice Project's Rule of Law Index from 2020[97]. In particular, the jurisdictions scores on factors 4.8 – 'Guarantee of Labour Rights'[98] and 6.1[99] – 'Effective Regulatory Enforcement' including enforcement of labour rights. As previously stated, the optimum approach for this study involves looking at jurisdictions with a commitment to upholding individual labour rights and which can demonstrate a level of meaningful enforcement. The United Kingdom scored 0.65 for guarantee of Labour Rights and 0.76 for effective regulatory enforcement[100]. It was decided, therefore, that any jurisdiction scoring within less than 0.10 of the score of the United Kingdom for either of these factors would be removed from the list. This figure was decided upon as it seemed wide enough to capture enough comparable jurisdictions to make the study workable whilst also being narrow enough to exclude those who may disregard the rule of law to an impractical degree.

The jurisdictions falling within both of these parameters were Australia, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Japan, the Netherlands, New Zealand, Norway, Portugal, Singapore, Slovenia, Sweden and Spain[101].

The jurisdictions within the Labour Rights parameter, but not Regulatory enforcement, were:

Algeria, Argentina, Botswana, Croatia, Dominican Republic, Ecuador, Ghana, Greece, Hungary, Indonesia, Italy, Kenya, South Korea, Kyrgyrstan, Malaysia, Morocco, Namibia, Panama, Poland, Romania, Russia, Rwanda, Senegal, South Africa, Tanzania, Ukraine, Vietnam[102].

The jurisdictions which fell within neither of these categories were:

Afghanistan, Angola, Bolivia, Cambodia, Cameroon, China, Democratic Republic of Congo, Egypt, India, Iran, Jordan, Kazakhstan, Mexico, Moldova, Mongolia, Nicaragua, Nigeria, Pakistan, Peru, The Phillipines, Tunisia, Turkey, Uganda, Zambia and Zimbabwe.[103]

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[97] The World Justice Project, 'The World Justice Project Rule of Law Index', online at < https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf> accessed 22 April 2021.
[98] ibid 13.
[99] ibid 14.
[100]ibid 153.
[101] See Appendix 1 below for full table including breakdown.
[102] Ibid.
[103] Ibid.

The jurisdictions in these two categories were, therefore, removed from the ambit of the study. Data was not available for Armenia, Azerbaijan, Cuba, Cyprus, Gabon, Iceland, the Republic of Ireland, Israel, Latvia, Lesotho, Lithuania, Luxembourg, Montenegro, Qatar, Saudi Arabia, Slovakia, Sudan, Syria or Yemen.

For purposes of triangulation, it was decided to inspect the World Bank Worldwide Governance Indicators[104] for the Rule of Law and Regulatory Quality should also be consulted to ensure a valid methodology. Under this assessment, the United Kingdom had a percentile rank of 93.75 for Regulatory Quality and 91.35 for the Rule of Law[105]. This was based on the available data from the 2019 Report. As with the World Justice Project, it was decided that jurisdictions that come within 10 points of the UK's percentile would make valid comparators. This would be broad enough to capture enough jurisdictions for comparison but also narrow enough to exclude less helpful ones.

Following the cross-referencing procedure, it was found that all of the jurisdictions which came within 10 points of the UK for the World Justice Project factors also came within 10 points of the UK's percentile in respect of the most relevant World Bank Governance Indicators. The only exception was Spain – narrowly missing out by 2 percentage points in the Rule of Law percentile Rank. This was not considered a significant enough deviation to drop it from the list of comparators, however, given its standings in the other areas and the decision was made to retain it. Furthermore, the World Bank indicators provided data on all of the states that were not covered by the World Justice Project. Of these, Iceland, Ireland, Israel and Luxembourg scored close to the UK and, for this reason, are considered valid comparators at this stage in proceedings.

The 23 chosen States for comparison at this stage were:
Australia, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Japan, Iceland, Ireland, Israel, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Singapore, Slovenia, Sweden and Spain.

To find out whether there appears to be an even spread of jurisdictions across some predominant classifications, the jurisdictions were then categorised into Legal Origin[106] and Legal Grouping[107]. This is set out in

[104]The World Bank, 'Worldwide Governance Indicators' (2021) <https://info.worldbank.org/governance/wgi/> accessed 23 April 2021.
[105] The World Bank (2021) https://info.worldbank.org/governance/wgi/Home/Reports. accessed 23 April 2021.
[106] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert w. Vishny, 'Law and Finance' Journal of Political Economy, Vol. 106, No. 6 (December, 1998).

tabular form in Appendix 1. Whilst at this stage, the jurisdictions lean heavily towards the 'Modern European Legal Culture' of system based on Siems model, this may appear different after the next stage. The next stage of filtering will involve an examination of each of these 23 states individually to determine whether there are any complicating factors which make them potentially unsuitable for comparison as previously discussed. Following a further inspection of labour instruments within these jurisdictions and in the interests of expediency, a further decision was made to cut these jurisdictions down whilst still enabling a representative sample of the world's legal systems. The remaining 12 jurisdictions were Australia, Canada, Estonia, Finland, France, Germany, Ireland, New Zealand, Portugal, Singapore, Slovenia, and Spain.

Following this stage, it is likely that specific data points for investigation and, ultimately comparison, will include:

- Are such procedural rules codified?
- Is the status of different types of 'warning' provided for by law?
- Is there a legal duty for employers to communicate workplace rules to their employees?
- Do employees in the jurisdiction concerned have the right to receive notice of the charged misconduct? If so, how much notice is given?
- Do employees in the jurisdiction concerned have the right to make representations regarding the alleged misconduct?
- Do employees in the jurisdiction concerned have the right to be accompanied to disciplinary hearings?
- What categories of individual can such a companion be chosen from?
- What are the rights of such a companion?
- Is the employee or their companion entitled to cross-examine witnesses at such a hearing?
- Are there any rules on whether or not the decision maker has to be independent of the case?

1.5 Limitations

As with any empirical study, it is important to acknowledge the inherent limitations. Being a comparative study looking at different jurisdictions, one limitation is the language barrier. Not all instruments examined will be in a precise translation and, in some cases, unofficial translations will be relied upon meaning that some information used may not be as precise or accurate as may be hoped. However, it is submitted that, regardless of the

[107] Mattias Siems (2021) 'Classifying Countries', Working Paper, University of Durham,<http://www.law.ntu.edu.tw/aslea2014/file/Siems-Classifying-countries-March2014.> Accessed 23 April 2021.

source used, any significant differences between jurisdictions should be substantial enough to identify for the purpose of this thesis and not be lost in translation. A further limitation may be the difficulty presented in respect of tracking down precise judicial decisions on the finer points of law in such jurisdictions. This may be impractical or, at the least, unreasonably difficult to accommodate given the complexity of the law of other jurisdictions in addition to the prevailing language barrier. However, as stated previously, it is hoped that the differences encountered will be significant enough on a surface reading of national legislation to enable valid findings to be made. A similar contention could be made in respect of enforceability – whilst there may be significant 'black-letter law' provisions available for study, it may not be possible to state with an exact level of certainty,

1.6 Significance and Legal Reform

As outlined previously, there have not been any studies of this kind previously undertaken. As also mentioned, there has not been any significant judicial treatment of these important rules for a long time. Along with providing valuable guidance to the UK Parliament, it is also considered likely that there could be a degree of international impact for this project as well. The author intends to provide the evidence from this study to the International Labour Organisation with a view to discussing a new framework for an international standard on discipline and dismissal since, presently, this area appears to have been largely overlooked on this particular front.

The theoretical significance of this work is that it would present a fresh standard based on research of both the law of England and Wales and of a range of other comparable jurisdictions across the world as to what best practice in terms of natural justice in workplace disciplinary proceedings should resemble. It is hoped that this would fill the gaps left by the absence of judicial treatment of this area and, furthermore, build on the works of authors such as Hugh Collins[108] who has written on the history of dismissal law following the original Industrial Relations Act up until the early 1990's along with the work of the Cambridge Centre for Business Research (Adams, Bishop and Deakin)[109] in relation to their codification of employment rights. It also builds on the work of Astrid Sanders[110] who has written of fairness in the contract of employment and the extent to which representation rights are enjoyed. This work is also unique insofar as it looks exclusively at disciplinary and investigatory hearings as opposed to just dismissal matters. Moreover, the unfortunate absence of Employee protection for action taken against

[108] n 79.
[109] n 78.
[110] n 52 see also Astrid Sanders, 'A "right" to legal representation (in the workplace) during disciplinary proceedings?' (2010) ILJ, vol. 39(2), 166 -182 [170].

them which falls short of dismissal has been commented upon in brief by Deakin and Morris[111]. This work takes their contention further, clarifying exactly what is missing and, importantly, how this can be addressed.

The practical significance of this work is that it would offer a model of best practice for disciplinary and investigatory proceedings within England and Wales which has been developed on the basis of extensive and rigorous investigation of not just the rules within England and Wales itself, but also the rules of various other jurisdictions as they pertain to this particular area. This would also be of great interest to employers' associations, employees, trade unions, human resources practitioners and managerial staff at home as well as, potentially, in some of the other jurisdictions examined.

[111] Simon Deakin and Gillian Morris, *Labour Law* (Hart Publishing, (2009) 5th ed.) 510.

Chapter 2 – Literature Review

In this chapter there will be a review of the legislative background of Labour Law in the United Kingdom generally, with a particular focus on dismissal-related instruments. This is to provide an effective background to the following discussion.

Following this, the existing academic literature on procedural fairness generally will be reviewed. There will follow an examination of how these ideas have manifested themselves in the law both within the international sphere and domestically. This will illustrate the way that legislation has given effect to these ideals in a broad way so as to enable later discussion. There will be some focus on decisions made in a public law context in the UK since this is where most of the seminal decisions in respect of procedural fairness have emanated. This proceeds with the caveat that this is a different legal area, and that it may not faithfully yield transferrable or comparable results.

The focus will then narrow to the specific area under discussion within this thesis- that of disciplinary and dismissal matters in a workplace context. Based on the foregoing study of the ideals and rules relating to procedural fairness, judicial decisions in relation to these aspects will be examined as they have been seen to manifest themselves in this setting.

In this context, the meaning of 'workplace disciplinary hearing' will be examined, followed by an examination of the following matters: workplace rules, the scope of a disciplinary hearing, the right to have notice of the charged misconduct, the right to be heard, the right to representation, freedom from bias and, for the sake of completion, the way in which matters of capability are dealt with. In closing, a summary of the findings from the literature review will be presented.

2.1 The UK Legislative Context

Before examining the academic literature, it is important to examine the legislative history pertaining to employment rights in the UK generally. This will serve to give context to the development of the law and chart its evolution. It will also illustrate the slow pace at which the law has evolved, particularly as regards individual employment rights relating to matters of discipline and, more prominently as this thesis considers, the highly related area of dismissal.

It is important to note, before going forward, that, in respect of international instruments, the United Kingdom historically has adopted a 'dualist' approach to such matters. As has been written by Klabbers, dualism perceives International Law as being entirely distinct from Domestic Law[112]. Thusly, should International Law confer rights upon individuals, a state must create legislation to give life to such rights[113]. This is in opposition to a 'monist' approach, whereby International Law is said to prevail over national law[114] as descending from a common fundamental principle (or *Grundnorm)*[115].

The dualist position of the United Kingdom was set out in a judgment of Lord Oliver in the case of JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry. He stated that whilst the Royal Prerogative, although engaged in the making of treaties, does not extend to legal changes thereafter without parliamentary intervention and, further, that "*a treaty is not part of English law unless and until it has been incorporated into the law by legislation.*"[116]

Such an approach is taken as regards the relevant international instruments discussed in this literature, most notably ILO Recommendation 119 which called for a baseline of dismissal protection amongst Member States[117]. As will be outlined, this Recommendation was implemented in the form of the 1971 Industrial Relations Act following internal discussion. Other instruments referred to obliquely – such as the European Convention on Human Rights[118] in respect of Article 6 – have also been approached in a similar fashion although the ECHR was more directly implemented by the 1998 Human Rights Act through Schedule 1 as given effect by Section 1. As has been written by Lowe[119], however, the ECHR influenced the way in which the domestic Courts interpreted other rules before it was implemented.

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[112] Jan Klabbers, *International Law*, (CUP 2002 3rd Edition) 325.
[113] Ibid.
[114] Ibid, 326.
[115] John P. Grant, *International Law,* (Dundee University Press, 2010).
[116] [1989] 3 W.L.R. 969, [1990] 2 A.C. (HoL) 418 [500], (Oliver LJ).
[117] n 88.
[118] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Rome, 4.XI.1950.
[119] Vaughn Lowe, *International Law*, (Clarendon 2007) 125.

Regarding the domestic legislative history, one of the earliest legal instruments in this area was the Statute of Artificers[120] (1562). Flying in the face of modern '*job security*' justifications for dismissal legislation, one legacy of the Statute of Artificers was, as stated by Deakin and Morris[121], that of 'yearly' employment in respect of agricultural workers during the industrial revolution[122]. According to Hay and Craven, "*Such a ''general hiring'' was presumed to continue unless three months' notice was given on either side*"[123]. Moreover, there could be said to be rudimentary '*unfair dismissal'* rules within the law at this time. "…*The master until the early nineteenth century was assumed to have responsibility for the sick or injured worker, who could not be dismissed until the end of the year. In general, throughout the eighteenth century the judges appeared to require the consent of a magistrate for a lawful dismissal. However, an unmarried pregnant worker might be dismissed after 1777 on the master's own authority*"[124].

Penalties for disciplinary matters were very harsh under the statute by modern standards- up to 1 month's imprisonment by 1562 for refusing to begin work, absence, disregarding orders or insubordination.[125]. Conversely disciplinary penalties today are not delineated by statute. The 'yearly hiring' presumption was also followed through by the "poor laws of the 17th century and subsisted until the relevant provisions of the Statute of Artificers were repealed in 1875 and was only formally abolished as a common law rule by the Court of Appeal in 1969[126].

The Master and Servant Act of 1823[127] formally established the jurisdiction of the Magistrates Court to hear complaints from 'masters' relating to their apprentices with the permitted punishments ranging from partial or full deduction of wages through to three months hard labour and provided for the same in respect of 'Servants in Husbandry, Artificers, Calico Printers, Handicraftsmen, Miner (sic), Collier, Keelmen, Pitmen, Glassmen, Potters, Labourers or other persons'[128]

As has already been identified, sanctions for workplace disciplinary offences were severe. According to Hay and Craven 1,500 workers were imprisoned on a yearly basis, others deducted wages and corporal

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[120] 5 Eliz. 1 c. 4.
[121] n 111.
[122] ibid 362.
[123]Douglas Hay and Paul Craven, *Masters, Servants and Magistrates in Britain and the Empire 1562 -1955,* (University of North Carolina Press 2014) 66
[124] Ibid.
[125] n 123, 67.
[126] See *Richardson v Koeford* [1969] 1 WLR 1812
[127] C. 34, 4, Geo. IV.
[128] Ibid s 3.

punishment was occasionally meted out[129]. In an astronomical sense, this is not a particularly long time ago and serves to illustrate the relative novelty of individual labour rights and, most crucially, respect for dignity in the workplace.

The case of *ex parte Baker*[130] from 1857 provides a further example of the punitive measures that were in place for breach of contract. It involved a potter who received a prison sentence having been convicted on the basis that he did "misconduct himself in his said service"[131]. Essentially he had left his job prior to the contract expiring which, on the basis of the law at the time, warranted a sentence of one month's hard labour[132].

As is evidenced from s4 of the Master and Servant Act 1867 an aggrieved party within an employment relationship could apply to the Magistrates Court for adjudication on matters such as the '*rights and liabilities of either of the parties*', in addition to '*Misusage, Misdemeamour, Misconduct, Ill-treatment, or Injury to the Person or Property of either of the Parties under any Contract of Service*'. The process was that an aggrieved party would submit details of their complaint in writing for adjudication. The principles of '*audi alteram partem*' could be said to be embodied within this process and it somewhat rhymes with the present practice of Employment Tribunals. On the basis of an educated assumption, however, it is unlikely that many workers at the time had the means or ability to make such applications but an examination of this is beyond the scope of this thesis.

Continuing the theme of harshness, under s. 14, punishment for aggravated misconduct could lead to 3 months imprisonment with or without hard labour. Before 1875 an employee's breach of contract could be dealt with as a criminal offence as could breaches of certain aspects thereof after 1875[133] before the Employers and Workmen Act eventually abolished criminal law penalties for breach of contract[134].

This era marked a turning point as regards the use of criminal penalties for breach of discipline. Later, The Truck Act 1887 made it unlawful for an employer to dismiss "…*any worker on account of any particular time, place or manner of expending his wages*.".[135] Further, the Truck Act 1896 emerged as another piece of legislation to impose controls on the disciplinary powers

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[129] n123, 8
[130] (1857) 7 Ellis and Blackburn 697 at 1404.
[131] ibid.
[132] ibid 1405
[133] Paul Davies and Mark Freedland,'*Labour Law; Text and Materials*' (London, 2nd ed.) 422.
[134] Employers and Workmen Act 1875, < http://www.irishstatutebook.ie/eli/1875/act/90/enacted/en/print>
[135] Truck Amendment Act 1887, c. 46, s.6.

of employers by curtailing an employer's ability to fine or otherwise deduct money from employees' wages in respect of misconduct or poor work.

Moving forward significantly, the first Act in what could be considered modern times which may have any bearing on dismissal rights was the Contracts of Employment Act 1963. This gave employees the right to at least 1 weeks' notice after 26 weeks continuous employment, 2 weeks' notice after 2 years and 4 weeks' notice after 5.

Similarly, the Redundancy Payments Act of 1965 granted employees an entitlement to redundancy payment from the employer if dismissed through redundancy. Section 9(2)(b) gave the first glimpse of some form of regulation in the area of fairness and adequacy of dismissal: "*an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy*". According to Deakin and Morris[136], the Redundancy Payments Act did not seek to afford any kind of job security or fetter the discretion of management in any way, but was brought in to "*ensure that employees displaced from declining industries were given incentives to abandon resistance to technical change, and to enhance job mobility by granting displaced workers a form of compensation which would assist them in job search*".

Around the same time as the Contracts of Employment Act, ILO Recommendation 119 on Termination of Employment was approved. Due to the international significance thereof, the relevant extracts are worth quoting in their entirety:[137]

> *'2. (1) Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.*
>
> *3. The following, inter alia, should not constitute valid reasons for termination of employment:*
> *(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;*
> *(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;*
> *(c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations; or*

[136] n 111, 357.
[137] n 88.

(d) race, colour, sex, marital status, religion, political opinion, national extraction or social origin.

4. A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation, to appeal, within a reasonable time, against that termination with the assistance, where the worker so requests, of a person representing him to a body established under a collective agreement or to a neutral body such as a Court, an arbitrator, an arbitration committee or a similar body.'

11. (5) Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case promptly, with the assistance where appropriate of a person representing him.'

This Recommendation was accepted by Britain in 1964[138].

It is important to note at this stage the legal status of ILO Recommendations. These are regarded as merely guidance to Member States of the ILO[139] as opposed to Conventions which have the status of Treaties in international law[140]. Nevertheless, the principles within the recommendation were effectively translated into law following the seminal Donovan Report [141]which would prove to mark a watershed moment in the law of dismissal. The Report was the signal outcome of the Royal Commission on Trade Unions and Employer's Associations. The commission covered a range of Industrial Relations matters – particularly those relating to collective bargaining. In relation to dismissal law it concluded that voluntary actions were to be preferred with a rudimentary legal framework established in respect of unfair dismissal actions so as to encourage such voluntary action[142].

The justification for this *laissez faire* attitude was expanded upon by A. I. Marsh in the corresponding research paper on Dispute Procedures as a 'by-product of common sense'[143] rather than applying rigid rules.[144]He went on

[138] n 79.
[139] Richard Block, Karen Roberts, Cynthia Ozeki and Myron Roomkin, 'Models of International Labor Standards' Industrial Relations: A Journal of Economy and Society, (2001) 40: 258-292. <https://doi.org/10.1111/0019-8676.00208 > accessed 23 April 2022, 268.
[140] Ibid.
[141] n 7.
[142] As reported in *Relations industrielles / Industrial Relations*, vol. 23, n° 4, 695.
[143] n7, 14 para 59: Donovan Report: Royal Commission on Trade Unions and Employers Associations, Research Papers 2 (Part 1), Dispute Procedures in British Industry, A.I. Marsh, HMSO.

to state that employment matters would preferably be resolved on a voluntary basis with minimal state intervention[145] in spite of an overriding perception that regulatory enforcement were to be preferred[146].

Particularly pertinent to this study, at paragraph 66 he commented that the legal profession would not be particularly capable of handling legal disputes:

> *"In the first place, there exists in the legal system no tradition which would suggest that lawyers are adept at handling the problems arising out of industrial relations. Secondly, there is no tradition for subjecting the negotiated contract of employment to legal enforcement."*[147]

It was, however noted within the report that formal procedures had already been established among more forward thinking employers in industry and, further, that it was already routine for trade unions to be involved in such matters[148].

There is evidence here of an acknowledgement that the right to be heard should be incorporated into works procedures, at least as far as dismissal is concerned. This should also be read alongside a reluctance to render workplace processes unduly legalistic. As seminal as the Donovan Report was it should be read alongside the case law that has emerged on rules of procedure in the days since it's publication. As previously noted, the influence of the ILO was also evident within the report[149].

This lead to the establishment of committees to examine how such an approach could be adopted. The general findings were that, in law, employees are generally protected only against dismissal without due notice with no protection for unfair dismissal. Formal procedures for dismissal were found to be uncommon, in any case being limited to large employers. In many cases procedures were completely absent and in non-unionised workplaces it was found that employees would often have no means of redress against dismissal. Even rarer than any formal dismissal procedure was a right of appeal against any decision taken to dismiss.[150]. As noted by Dickens et al, paragraph 141 of the Report stated that the legal position was that 'an employer is legally entitled to dismiss an employee whenever he wishes and for whatever reason, provided only that he gives due notice. At

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144 ibid para 59.
145 ibid para 60.
146 ibid para 65.
147 ibid para 66.
148 ibid para.524.
149 Ministry of Labour, 'Dismissal procedures: report of a Committee of the National Joint Advisory Council on dismissal procedures' (H.M.S.O: London.1967).
150 Ibid para. 525.

common law he does not even have to reveal his reason, much less to justify it', a position at odds with ILO Recommendation 119[151].

This unsatisfactory state of affairs was examined at para 526 with the acute discrepancy highlighted between existing redundancy provisions and the absence of legal redress for unfair dismissals. The amount of trust placed in employers as a class was stated to be somewhat misguided, thus underscoring the need for sensible regulation of some degree[152].

It is interesting to note that at paragraph 530, the committee on dismissals recommended that "*the immediate programme should be to encourage the development and extension of satisfactory voluntary procedures*"[153]. They strongly recommended the development of satisfactory internal procedures, and also stated that the improvement of those already existing, should also be encouraged. At paragraph 545 it was further stated that the ILO Recommendation for a definition of '*unfair dismissal'* should provide good inspiration, ie a dismissal on spurious grounds of race or sex would be unfair per se. Importantly, the Commission also ventured into the territory of 'reasonableness' in relation to works rules which, for the purpose of this thesis is worth quoting in full:

> *"Where an employee is dismissed for breach of rule made by the employer, the labour tribunal should in reaching its decision be able to consider not only the seriousness of the breach but also the reasonableness of the rule. It is the general practice at present for works rules to be laid down unilaterally by managements, and in our view the labour tribunal would be unjustifiably handicapped if it were obliged to accept without question the reasonableness of all such rules…"[154]*

Therefore, the idea of fair procedures and rules were very much at the forefront of the Commission's mind when framing the eventual ground-breaking legislation on dismissal. A perhaps more cynical interpretation of the ethos behind the Donovan Commission comes from Deakin and Morris who regarded this action as more akin to managerial streamlining[155] and that the subsequent legislation was seen as an aid to this rather than any great celebration of worker rights[156]. According to Deakin, the rationale behind this legislation was for '*managerial efficiency'*[157] in the Collins-sense as opposed to any profound concern for the dignity and public

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151 Linda Dickens, Michael Jones, Brian Weekes, Moira Hart, *Dismissed*, (Oxford 1985) 8 -9.
152 n 7.
153 n 7 para 530.
154 n7 at para 565.
155 n 111, 510.
156 ibid.
157 n 111, 356.

rights of individual workers. It also embodied elements of labour market flexibility[158].

Regardless of any perceived failings, the eventual progeny of the Donovan Report was the seminal Industrial Relations Act 1971 which contained s. 22 (1)- the first statutory enactment to enshrine protection against Unfair Dismissal:

> *'(1) In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer; and accordingly, in any such employment, it shall be an unfair industrial practice for an employer to dismiss an employee unfairly.'*

This Act also established the National Industrial Relations Court as the forum for the ultimate resolution of any such disputes under s. 99. As noted by Dickens et al, this provision was supposed to be a last resort to encourage voluntary dispute resolution rather than be the first port of call.[159] The modern and historical status of the Industrial Relations Court here requires some attention. These were not the first tribunals to be created within this field, such fora having previously been established by the Industrial Training Act 1964[160]. However, these early tribunals had a very limited scope and were only used for appeals against the collection of levies.

The National Employment Relations Court created in 1971 was henceforth abolished in 1974 under the Trade Union and Labour Relations Act 1974. The Employment Tribunal in its modern form is largely governed by the Employment Tribunals Act 1996. It has jurisdiction to hear claims – such as claims for unfair dismissal - which arise under various employment- related statutory provisions such as the Health and Safety at Work Act 1974, the Trade Union and Labour Relations Act 1992 and the Employment Rights Act 1996. Decisions of the Employment Tribunal are binding between the parties. Appeals lie to the Employment Appeal Tribunal (EAT). Decisions of the EAT are binding on the Employment Tribunal (ET) but the EAT is not necessarily bound by its own decisions[161].

Around the same time, in 1975 the newly christened[162] Advisory, Conciliation and Arbitration Service (ACAS) was established. ACAS was not an entirely new creation, and state facilitated arbitration in individual matters has a long history going back at least as far as 1800 with the Cotton

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[158] Ibid.
[159] n 151.
[160] s 12.
[161] *Secretary of State for Trade and Industry v Cook and Others* [1997] ICR 288 (EAT).
[162] Employment Protection Act 1975, s.1(1).

Arbitration Act[163] though such matters were largely confined to pay disputes for work already undertaken[164]. The authority of statute for arranging mediation or other such forms of ADR in employment disputes was imparted to the then Labour Department and Board of trade back in 1896 although such services were not particularly well-used[165]. It was not until 1977 that a specific code of conduct for disciplinary practices was authorised for publication by Statutory Instrument[166]. By virtue of s. 6(1) of the Employment Protection Act[167], the first code of practice came into effect on the 20th of June 1977[168].

The Code of Practice in its modern form is brought forward under Chapter 3 of the Trade Union and Labour Relations Act 1992. Although the code lays down guidelines for fairness in disciplinary and investigatory proceedings, the legal force of the code is tempered by sections 207 (a breach of any of the codes provisions by a party will not give rise to an independent cause of action against them in respect of such a breach) and 207A(2) and (3) that such a breach or, in the parlance of the act, 'non-observance' of the codes provisions by either party to the dispute will result in either an uplift or reduction of 25% of any compensation awarded by a tribunal. That being said, the Code is certainly not without force. It has been noted by Professor David Cabrelli that in the light of the *Polkey*[169] decision, failures to follow provisions of the ACAS Code could stand as evidence of unfair dismissal[170].

The Industrial Relations Act could be considered as the measure that 'opened the floodgates' for legislative intervention within the sphere of the employment relationship. The Industrial Relations Act was followed by the Contracts of Employment Act 1972, a consolidation Act which brought together provisions of the Contracts of Employment Act 1963 and the Redundancy Payments Act 1965. It was amended by the Employment Protection Act 1972.

Other instruments which could be said to impact upon job security came thereafter, with the Industrial Relations Act 1974 and the Rehabilitation of Offenders Act 1974 under which s4 rendered it potentially unfair to discriminate against someone based on a spent criminal conviction. There then followed the Employment Protection Act 1975 and the Sex

[163] R.W. Rideout, 'What shall we do with the CAC?', ILJ, (2002) 31(1), 1-34, 1-2.
[164] Ibid.
[165] Ibid.
[166] The Employment Protection Code of Practice (Disciplinary and Procedures) Order 1977, UKSI 1977 No. 867, s1.
[167] 1975, c.71.
[168] Ibid.
[169] n 55.
[170] n 23.

Discrimination Act 1975, s6 of which made it unfair to dismiss an employee based on their sex. Similarly, s4 of the preceding Race Relations Act 1976 rendered dismissal on the grounds of '*race*' unfair.

Following the Race Relations Act 1976 came the Employment Protection Consolidation Act 1978, under which the general unfair dismissal provision was preserved under s. 54 – '*Every employee shall have the right not to be unfairly dismissed from his employer*'. Notably, S. 57 made the somewhat radical step of setting the potentially fair reasons for dismissal out. The Employment Act 1980 amended s. 57 to include reference to the size of employer's resources. According to Dickens, prior to this Act, the burden of proof was formally on the employer rather than a 'neutral' position as is the case now. As Deakin and Morris observe[171], the Employment Act 1980 "*introduced changes to the statutory test of fairness, removing a provision placing the burden of showing fairness on the employer, and allowing for the standard of reasonableness to be modified to take into account the limited size and resources of smaller firms*". Moreover, in 1979, the qualifying period of service for unfair dismissal was raised from six months to a year and in 1985 to a period of two years for all firms[172].

On the international stage, ILO Recommendation 119 was supplanted by Recommendation no 166 which came from ILO Convention 158 on Termination of Employment at the Initiative of the Employer[173] in 1982. Building upon Recommendation 119, Article 7, expanded upon the 'right' to be heard in Article 11(5):

'*The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.*'

Domestic Dismissal Law entered somewhat of a vacuum until the Employment Rights Act 1996 arrived. The right not to be unfairly dismissed was enshrined by virtue of s94. S98(1) affirms that the burden of showing that the dismissal is fair rests upon the employer with 98(4) carrying the proviso that fairness will be assessed relative to the size and administrative resources of the employer in addition to '*equity and the substantial merits of the case*'. As Deakin and Morris further point out that

[171] n 111, 357.
[172] Ibid.
[173] n88.

"*Fundamental principles applied by the Courts under s98(4)…testify to the peripheral pace occupied by notions of substantive fairness in this area of the law; the focus is above all on the process of dismissal or discipline, and only second on the outcome*"[174]

This was shortly followed by the Employment Relations Act 1999 which put into place the modern law on the right to union representation in workplace hearings under s10. Under s10, a worker can make a reasonable request to be accompanied when invited or required to attend such a hearing but only by individuals coming within the scope of subsection 3. Eligible individuals are usually either Trade Union Representatives / Officials or an employee's colleague or other representative from within the local workforce.

Following the 1999 Act came reform of seismic proportions in the shape of the Employment Act 2002 which introduced a statutory dispute resolution procedure[175]. This laid down several steps that an employer would need to follow in order to facilitate a fair disciplinary hearing and, ultimately, dismissal. The requirements included setting out in writing the allegations against the employee prior to the hearing and notifying the employee of these in writing,[176] allowing the employee a reasonable amount of time to prepare for the meeting,[177] notifying the employee in writing of the decision and informing them of their right of appeal.[178] A failure to comply with these procedures would result in a dismissal being rendered automatically unfair. These reforms were, according to the 2007 Gibbons Review[179], not very well-received by employers who claimed a "*high administrative burden*"[180]. They were also said to cause more disputes within the workplace due to the formalisation of matters which may otherwise have been dealt with informally.[181] These increased stressors apparently impacted even more detrimentally on small businesses who "*tend to have a more informal culture and the requirement to express problems in writing can act as a trigger for greater conflict rather than a route to resolution*".[182] To an extent, these words echo the policy sentiments espoused during the committee stage of the Employment Bill 2001 which later came to fruition as the Employment Act 2002. There it was said that overregulation of businesses, particularly smaller

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[174] n111, 510.
[175] Employment Act 2002, Schedule 2, Parts 1 – 3.
[176] ibid, Part 1.
[177] ibid, Part 2.
[178] ibid.
[179] Michael Gibbons, 'Better Dispute Resolution; A review of employment dispute resolution in Great Britain', Department of Trade and Industry, March 2007 <https://webarchive.nationalarchives.gov.uk/20090609022048/http://www.berr.gov.uk/files/file38516.pdf>accessed 13 January 2021.
[180] ibid 8.
[181] Ibid.
[182] ibid 25.

businesses, discourages economic growth and should be avoided where possible.[183] The other side of this coin, however, was presented by Tony Lloyd MP during the same debate who stressed the need to avoid being overly deferential to employers[184]. It is submitted that such sentiments should be taken into consideration when pondering the reform of this particular area where crucial elements of justice are at stake.

Another consequence of the 2002 reforms was to erode the *Polkey* principle – often referred to as the '*no difference*' rule, referred to above. The statutory dispute resolution procedures were repealed by section 1 of the Employment Act 2008. There have not been any direct legislative amendments made to the substantive or procedural law of dismissal since the 2008 Act. However, Professor Cabrelli has noted the effect of the Enterprise and Regulatory Reform Act 2013 and Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 which introduced s18A and 18B of the Employment Tribunals Act 1996.[185] The pre-claim conciliation provisions requiring steps to be taken before pursuing a claim in a tribunal have had the effect of lowering the amount of cases coming to tribunal[186]. In terms of intervention in the field of dismissal legislation over and above the peripheral, it was reported in 2020[187] that the government were considering substantial amendments to the Employment Relations Act 1999[188] on accompaniment at workplace disciplinary or grievance hearings. The question was whether or not to broaden the scope of individuals entitled to act as companions at disciplinary hearings. The logic was that this would enable individuals without access to Union representatives to nevertheless obtain representation from third party organisations. At the time of writing no green-paper has been released on this matter.[189]

A full historical account of the role of shop stewards or companions at disciplinary hearings is beyond the scope of this thesis and a comparative account of the relevant rules in action will be delivered later. For present

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[183] Standing Committee F, 18 December 2001, Employment Bill Clause 34*, Procedural fairness in unfair dismissal*, Column no 234 (Mark Simmonds MP) <https://publications.parliament.uk/pa/cm200102/cmstand/f/st011218/pm/11218s02.htm> accessed 30 June 2019.

[184] ibid, Column no. 237.
[185] n23, 679.
[186] Ibid.
[187]Edward Malnick, 'Boris Johnson's aides plan to break 'stranglehold' of trade unions', (London 23 February 2020) < https://www.telegraph.co.uk/politics/2020/02/23/boris-johnsons-aides-draw-plans-break-stranglehold-trade-unions/?WT.mc_id=tmgliveapp_iosshare_At4PyF7hkrYV > accessed 6 February 2023.
[188] Employment Relations Act 1999.
[189] Alex Simmonds,'Clowning Around? Expanding the Right to Accompaniment in Workplace Disciplinary proceedings in English Law', Coventry Law Journal, (2020) vol. 25(2), 33-45.

purposes it is sufficient to state that shop stewards have a history of advocating on behalf of Union members in a variety of settings, even being compared to 'a sort of QC' by one member of the House of Lords[190]. As has been detailed previously, Shop Stewards are one of a legislated category of individuals who can represent an employee at a hearing under s10 of the 1999 Employment Relations Act.

Regarding the legislative development of such rights, in summary there has been a great transition in respect of individual employment rights pertaining to dismissal over the last few centuries. Scant protections were offered by instruments such as the Statute of Artificers and punishments for rule breaking were often extremely harsh. Recourse could be had to the Magistrates Court for enforcement and penalties could involve terms of imprisonment, hard labour or corporal punishment.

Moving on From these 'dark ages' of labour law, protection against dismissal itself became more of a priority, owing in part at least to the work of the International Labour Organisation. From the watershed moment of the Donovan Report and the initial Industrial Relations Act of 1972 there have been at least some protections against dismissal and the manner in which such dismissals can be carried out procedurally. Legislative advances have also been made in respect of workplace rules and disciplinary matters, becoming further refined up until the point of the 1999 Employment Relations Act which put the right to accompaniment on a statutory footing. The now-repealed Employment Act 2002 attempted to develop the position further by setting out rules that should be followed in respect of disciplinaries but, as has been seen, the Act was quickly swept away. Whilst the law has certainly been moving in the appropriate direction, there has been a period of relative stagnation since the 1999 Act and, arguably, since before.

Regarding the development of the law on dismissals in modernity, in his seminal work, '*Justice in Dismissal*[191]', Professor Hugh Collins proposed a "*tripartite division of dismissals*"[192]. These were *Disciplinary Dismissals, Economic Dismissals and Public Rights Dismissals*: *Economic Dismissals* are characterized with reference to the impact of market forces upon the employer, for employees, this type of dismissal classically manifests itself as redundancy. A *Public Rights Dismissal,* on the other hand, involves a blatant disregard for the employee's public or civil rights. Seemingly, this brand of

[190] Hansard, 13 May 1971, Volume 318, Column 1512, Part Ii, Sections 4(1) To (9) of the Contracts of Employment Act 1963, as amended, (Lord Brown), online [https://hansard.parliament.uk/Lords/1971-05-13/debates/2e67a3ba-457c-4de3-a7d307c5e2477337/(PartIiSection4(1)To(9)OfContractsOfEmploymentAct1963AsAmended?highlight=shop%20steward#contribution-ca7d3fb8-5718-4b0b-b080-45347b4b6a4c] accessed 14/09/2020.

[191] n 77.
[192]ibid, 57.

dismissal would be reflected in what are commonly known as automatically unfair dismissals such as dismissal in connection with the protected characteristics under the Equality Act 2010.

Where dismissal is the ultimate sanction, this thesis is chiefly concerned with the procedural aspects of '*Disciplinary Dismissals'*. Collins summarises these as a "*surprisingly complex form of fault inquiry*"[193]. The way in which the law approaches the substantive aspects of such dismissals are compared by Collins to the criminal law as it relates to self defence. Collins states that "*The legislation renders a dismissal unfair unless a justification such as self-defence can be relied upon*"[194] and, further, that the "*justification which the employer must produce in disciplinary dismissals takes the form of demonstrating fault attributable to the employee*"[195]. In respect of the finding of fault, Collins, encapsulating the 'range of reasonable responses' test, states that "*a tribunal need not explicate its own standard of fault, but merely assess whether the employers' standard was unreasonable. It therefore relieves the tribunal of the task of formulating principles of fairness*"[196]. In addressing the topic of procedural fairness, Collins similarly promulgates 3 models justifying the foundations and purpose of such rules.

The first, *Respect for Dignity,* conflates rules of procedure in disciplinary settings with that seen in the broader legal system embodied in due process and natural justice suggesting that these rules should permeate the disciplinary sphere.[197] Collins goes on to write that, in certain jurisdictions such as France, there are, in fact, legislative provisions which enshrine limited procedural safeguards for employees within the disciplinary context such as a written statement of reasons being given for dismissal and guaranteeing the right to a hearing[198]. Collins further states, however, that "*this strict approach based upon principles of natural justice is out of tune with the flexibility of British law…"[199].* The shortcomings of this model are, according to Collins, essentially that it would be an overly formal requirement with control placed over the power of management which is unlikely to sit well within British law[200].

The second such model is the '*Democratic Participation'* model which emphasises a fair procedure as a way of unlocking employee access to workplace governance and the potential for consultation and participation at the higher levels within the workplace. Consultation prior to dismissals

[193] n 77, 54.
[194] ibid 70.
[195] ibid.
[196] ibid.
[197] n77, 106.
[198] ibid, 107.
[199] ibid.
[200] ibid.

under this model could be rendered in such a way as the Works Councils in Germany[201]. This model apparently fails by means of inflexibility and the unwillingness to power-share in respect of disciplinary decisions between management and the Unions. The third model is that of '*Efficiency*'. It is argued that careful and well thought out decisions are often the best ones and, thus, that procedural fairness would be likely to act as a guarantor insofar as those decisions made would be made in the light of roundly considered information. Erroneous dismissals, potentially damaging to production, would therefore be avoided[202]. This is later described as a principle of 'general welfare'- business efficiency and fair procedures are desirable elements for employers and employees respectively.

In the post-Collins age, the aim of modern dismissal law could be said to be '*job security'* or '*employment security'*[203] and the placing of limits on the employers' rights to fundamentally alter the working relationship at will[204]. Employment has even been said to embody a form of 'property' or ownership as regards the job itself although not in a strict literal sense[205]. The law '*rarely goes to the lengths of granting a worker absolute protection in relation to a specific job classification; but nor is it concerned simply with individuals' opportunities in the labour market'*[206]. The '*key to the meaning of employment security is the existence of some form of regulatory intervention designed to protect workers against arbitral managerial decision making'*[207].

Dickens, Jones, Weekes and Hart credit the initial legislation in this area with stimulating a large amount of growth in terms of the laying down of formal disciplinary procedures. They note that, prior to the 1971 Act, the amount of firms with formal disciplinary procedures stood at less than 3% whilst in 1983 this figure had risen to 83%. Professor Collins also describes the period between 1971 and 1977 as one of '*Symbolic Affirmation'*[208]. He emphasized that, whilst domestic legislation made no specific provision for procedural fairness, the Courts were very keen to highlight the importance of procedural standards within workplace disciplinary procedures. Collins writes that it was the Industrial Courts that insisted in the case of *Hewittson v Anderson Springs*[209] on the necessity of warnings prior to the escalation of disciplinary penalties. Collins finds that this was through the legislative impetus of the Industrial Relations Act 1971 and it's accompanying Code of Practice which respectively encouraged and required this. Collins credits the

[201] n77, 108.
[202] ibid, 110.
[203] n111, 353.
[204] ibid.
[205] ibid.
[206] ibid.
[207] ibid.
[208] n11, 114.
[209] [1972] IRLR 56 (IT).

case of *Devis & Sons Ltd v Atkins*[210] as the one in which the House of Lords gave rules of procedural fairness in this context their blessing when it was held that the Industrial Tribunal was entitled to make a decision in the case based on all the available facts, of which an insufficient level of warning given to the employee was considered pertinent.

In agreement with Collins they write that, initially, the Courts were willing to expect procedural safeguards to be adopted and adhered to. They also find that this newfound importance of procedural safeguards led to "complaints from employers that they were losing cases on '*technicalities*'[211]. It was also around this time that a pronouncement was made by Lord Denning on the substantive focal point of unfair dismissal cases. As Davies and Freedland point out[212], the case of Alidair Ltd v Taylor [1978] ICR 445 is one which:

> "*perfectly encapsulates the robust approach which gives primacy to the perceived merits of the employer's substantive case over defects in the procedure by which the decision to dismiss was arrived at*"[213]

In this case there were various procedural issues – chiefly the constitution of the disciplinary panel and the admission of hearsay evidence. Affirming Davies and Freedland, Lord Denning set out the law as such:

> *"Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent."*[214]

Overseeing the domestic scene during this time, Professor Collins labelled the period between 1977- 1986 as the era of 'Procedure as Substance'[215]. In the case of *Retarded Children's Aid Society Ltd v Day*[216] in which it was held that prior warnings in cases of misconduct were not a necessity in certain circumstances. According to Collins, requirements for a strict adherence to procedure was eroded during this period with the Courts coming to see it as just one piece of the overall picture[217].

This era saw the unabashed emergence of the 'no difference' rule which was ultimately enshrined in the case of *British Labour Pump Co v*

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[210] [1977] ICR 662 (HoL).
[211] n 151, 102.
[212] n 133, 48.
[213] Ibid.
[214] N68, [para 20] (Denning LJ)
[215] n 79, 114.
[216] [1978] ICR 437, [1978] 1 W.L.R. 763 (EWCA).
[217] n 79, 115.

Byrne[218]. Essentially, this decision meant that, if there would be no difference to the outcome of a disciplinary hearing, then there would be no unfairness for lack of following procedural rules. Other Influential decisions included *British United Shoe Machinery Co. Ltd v Clarke*[219] which held that consultation in cases of redundancy was not necessary if it could be shown that a failure to consult would not have made any difference to the outcome as Collins also explained [220].

The icing on the cake within this period came with the case of *Wass Ltd v Binns*[221] during which the Court of Appeal allowed a decision of the Industrial Tribunal to stand in the case of an employee of 13 years standing being dismissed for misconduct in circumstances whereby the employer had not followed its own procedures and disciplinary code. Overall, Collins characterized this period as being one in which "*procedural considerations were treated as a subsidiary element of substance rather than enjoying independent weight as necessary elements of fairness*"[222]. On a macro legislative level, the Conservative governments from 1979 onwards were concerned with ensuring that firms could remain responsive to external market changes and, therefore, concerned with reducing excessive legislative burdens[223].

The period from 1986 onwards was classified by Collins as "*The Revival of Procedural Standards*"[224]. During this period the House of Lords, Collins asserts, re-established procedural fairness as an independent element of the overall standard of fairness in cases of dismissal illustrated through such decisions as *Williams v Compair Maxam*[225] , *Sillifant v Powell Duffryn Timber Ltd*[226] and *Freud v Bentalls Ltd*[227] . Next came the infamous case of *Polkey v A.E. Dayton Services Ltd*[228], whereby, amongst other things, it was made clear that procedural standards were not mandatory. Collins quotes Lord Mackay in that case as making this point:

> "*If the employer could reasonably have concluded in the light of the circumstances known to him at the time of the dismissal that consultation or warning would be utterly useless, he might well act reasonably even if he did not observe the provisions of the code.*

[218] N57.
[219] [1978] ICR 70 (EAT).
[220] n 79, 115.
[221] [1982] ICR 486 (EWCA).
[222] Ibid.
[223] N. 119 at p. 357.
[224] N. 79, 117.
[225] [1982] ICR 156 (EAT).
[226] [1983] IRLR 91 (EAT).
[227] [1982] IRLR 443 (EAT).
[228] n 55.

Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair".[229]

Whilst Collins claims that the decisions in this era restored some credibility to the requirements of procedural fairness, nevertheless, they did not restore it to the level seen in the first era. Ultimately, they are now intrinsically linked to the 'range of reasonable responses' test, hence a 'sliding scale' approach is taken[230]. Collins therefore concludes that by making comparisons with the French Code du Travail which does, in fact, contain guarantees of natural justice in disciplinary proceedings. He concludes by stating that "*if some similar procedures were to be mandated by British legislation, then many of the uncertainties and complexities concerning standards of procedural fairness … would be overcome*"[231].

The overarching rationale of Collins in respect of the prevailing function of disciplinary machinery has been regarded by Deakin and Morris as that of 'business rationality'[232], whereby it is used to increase the efficiency of the employers' operation and to avoid harm. To this end, as Collins points out, the managerial prerogative- the exercise of managerial power in pursuance of the aims of the undertaking – '*can only be legitimate if exercised for rational business purposes and without infringement of individual rights'*[233]. Deakin and Morris are also keen to stress that legal regulation exists to protect both sides of the employment relationship which must surely yield a net benefit overall[234].

In summary, the importance of procedural matters in respect of discipline and dismissal has fluctuated since the legislative instilment of unfair dismissal rules back in 1972. The high watermark of the 2002 Employment Act could be said to embody Collins' praise for the French Code Du Travail[235] as homage was paid in the form of the statutory dispute mechanisms embodied under the Act. As informative and interesting as the literature is on procedural matters over the last century, there hasn't been any specific treatment regarding the extent to which an employee has the right to be heard in a disciplinary matter or investigation. Whilst disciplinary dismissals have obviously been the focus of scholarly attention, there is an acute dearth of treatment where such matters do not ultimately result in dismissal.

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[229] n 79, 118.
[230] Ibid.
[231] n 79, 140.
[232] n 111, 509.
[233] n 79, 273.
[234] n 111, 510.
[235] n 79, 107.

2.2 The Academic Literature on Procedural Fairness and Natural Justice More Generally

Before considering the scope of natural justice or procedural fairness in workplace disciplinary matters it is important to consider these concepts more broadly. There has been relatively little written on this topic in a wider sense[236]. Many contemporary articles and reviews in this area tend to relate to the public law as opposed to the private law context[237] and where private law discussion arises, it tends to be in the areas of Sports Law or Arbitration[238].

Galligan gives a helpful overview of the importance of procedural fairness to the development of the English Common Law generally[239]. Galligan writes that ideas of due process and procedural fairness have been tracked back to the Magna Carta, in particular Clause 39:

> *'No freeman shall be taken and imprisoned or disseized of any tenement or of his liberties or free customs…except by the lawful judgment of his peers or by the law of the land.' The important part is the exception, especially the words 'by the law of the land' (legem terrae)'*[240].

According to Galligan, the influence of the Magna Carta may be overstated[241] but nevertheless, its sentiments echoed and evolved a great deal over the centuries that followed, quoting from a statute passed by Edward III in 1354:

> *"That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned…without being brought in answer by due process of law.'*[242]

Later, these ideals found favour with Lord Coke. It has even been argued that his approach to the 'right to be heard' by a public authority in Boswell's case illustrates that the right is so fundamental that it exists independently of statute[243].

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[236] n 75, 1.
[237] Philip Murray, 'Procedural Fairness, Human Rights and the Parole Board', Cambridge Law Journal, (2014) vol. 73(1), 5; Lisa Whitehouse, 'Improving Procedural Fairness in Housing Possession Cases', CJQ, vol. (2019)'38(3), 351.
[238] Shaun Star and Sarah Kelly, 'A level playing field in anti-doping disputes? The need to scrutinise procedural fairness at first instance hearings', I.S.L.J (2021) 21(1/2), 94.
[239] n 15.
[240] ibid 171.
[241] ibid 167.
[242] ibid 173.
[243] n 30, 31.

Whether this is the case or not, disciples of Coke also discerned the presence of procedural fairness ideals within instruments of the day. As pointed out by Galligan[244], Middle-Temple Scholars of the 17th Century found evidence of such principles at least 100 years hence which not only protected life, liberty and property but also embodied aspects of procedural fairness.

Around this time, the infamous Star Chamber was abolished[245] owing to, amongst other things, a lack of transparency in it's proceedings[246]. The ideal of procedural fairness continued to resonate throughout other legal decisions at this time, notably Bagg's case[247] in addition to an earlier decision in a fishery dispute decided by the Chancery decision in which it was stated that:

> '*[T]he other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method for discovering the truth*'[248]

In addition to the historic and legalistic interpretations of these concepts, to get a more informed view of their objectives it is important to view the broader literature beyond. 'Natural Justice' has been said to be deeply entrenched in the fabric of the law- beyond the narrow dimensions previously discussed. Justice Joseph Story, former Associate Justice of the Supreme Court of the United States, went so far as to claim that the concept of equity even derived from what he called 'natural justice' in his *Commentaries on Equity Jurisprudence* from 1834[249].

It has also been written that Lord Coke's approach to the 'right to be heard' by a public authority in Boswell's case illustrates that the right is so fundamental that it exists independently of statute[250]. In the UK, the ideas of natural justice and procedural fairness tend to be associated with public law judicial review proceedings.

In plain language, the rules for a 'fair hearing' could be said to be set out below:

> "*-the opportunity to know the case against you*

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[244] n 15, 175.
[245] n 15, 177.
[246] ibid.
[247] KBD 1572.
[248] ibid, 33.
[249] Joseph Story, *Commentaries on Equity Jurisprudence* (London, Stevens and Hayes 1834), 1.
[250] n30, 31.

-the opportunity to state your case
-the opportunity to comment on all the material considered
-that no party should communicate with the decision-maker behind the other's back
-the right to an oral hearing
-the right to representation."[251]

Regarding the scope and reach of such rules, Lord Justice Tucker set out in *Russell v Duke of Norfolk*[252] that:

> *"There are… no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth".*

On the importance of following these rules, Megarry J had the following to say about their importance in the case of John v Rees[253] which is worth stating in its entirety:

> *"It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time of framing charges and giving an opportunity to be heard? The result is obvious from the start". Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change…*
>
> *…Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events"*

This case has been cited in respect of procedural fairness at dismissal matters generally. It is also important in respect of the overall importance of following rules of procedural fairness at all disciplinary matters whether they result in

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[251] Ibid.
[252] [1949] 1 ALL ER (EWCA), 109, [118], (Tucker LJ).
[253] N19, [402] (Megarry J).

dismissal or not. As the learned judge stated, an individual who finds themselves to have been judged without being granted a full opportunity to make representations is likely to be resentful. As will be explored later in this thesis, the domestic position as regards such hearings is found wanting in certain regards which make the possibility of such resentment more likely.

2.3 Natural Justice and Procedural Fairness Globally and Domestically

Taking the above contextual information and general definitions of these concepts, the thesis will now look to how such rules operate on the international and domestic scale. This will serve to illustrate their importance further, and strengthen the central argument that the fundamental nature of such matters is such that they should be concretely woven into the fabric of workplace relations.

2.3.1 The International Legislative Context of Procedural Fairness

The right to be heard and rights of procedural fairness are recognised in a variety of international statutes.

Article 10 of The Universal Declaration of Human Rights[254] states that:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

Likewise, Article 6(1) of the European Convention on Human Rights[255] likewise states that:

> *"…in the determination of his civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

Ideals of fair procedure are also seen throughout other similar instruments across the world. The African Charter on Human and People's Rights[256] states

[254] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Article 10.
[255] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 6.
[256] African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) online (https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf) accessed 13 February 2023.

at Article 7(1) that *'Every individual shall have the right to have his cause heard'*. These principles can also be found in numerous other documents and instruments such as the International Covenant on Civil and Political Rights[257] and the Convention on the Rights of the Child. This shows that such ideals transcend the workings of philosophers and legal jurisdictional boundaries and, as such, could be sensibly regarded as internationally recognized and revered principles of law.

2.3.2 The Domestic Legislative Context of Procedural Fairness

It has been found that elements of procedural fairness are endemic across many of the world's legal systems[258]. In the UK, along with the common law duty to act fairly – as examined above- procedural fairness exists in a wide range of instruments across a range of legal areas.

Regarding Employment Law in particular, s. 34 of the Employment Act 2002 alludes to 'Procedural Fairness' but does not define the concept or highlight its key elements. Instead, it's parameters fall to be defined with reference to Common Law decisions which will be looked at in the next section. As previously stated, procedural fairness has been incorporated into English Labour Law to a more limited extent, in particular the provisions of s10 of the Employment Relations Act 1999 on the right to be accompanied.

Outside Employment Law, the term 'procedural fairness' appears in a number of legislative instruments, particularly those relating to education.For example, under The Education (Pupil Exclusions and Appeals) (Miscellaneous Amendments) (England) Regulations 2006[259] there is a requirement under Regulation 3(2)2b(VIII) that appeals clerks sitting on exclusion panels should have training or have received information regarding the importance of the appeals panel to observe matters of procedural fairness and natural justice.

Moreover, the Civil Jurisdictions and Judgments Act 1982[260] Article 9(e) states that recognition or enforcement of a foreign judgment may be declined *'if recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State'*.

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[257] n 12.
[258] n 15, 118.
[259] The Education (Pupil Exclusions and Appeals) (Miscellaneous Amendments) (England) Regulations 2006 No. 2189.
[260] C. 27.

The term 'natural justice' appears in many more instruments affecting a wide range of matters, generally concerning rights to appeal[261] and delineating the power of arbitrators in the event of disputes arising[262].

Regarding the right to be heard before a public authority more generally, besides the provisions previously stated within the Magna Carta and the right of Habeas Corpus, section 3 of the Liberty of Subject Act of 1354[263] provides that no:

> *"Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law".*

Just over a decade later, the Observance of Due Process of Law Act of 1368[264] section 3 stated *"that no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error."*

In the context of housing, 'due process' – a term often used interchangeably with 'procedural fairness'- also finds itself in s3 of the Protection from Eviction Act 1977[265] - 'Prohibition of eviction without due process of law'. More significantly, it can be seen, therefore, that these ideals permeate and indeed constitute a cornerstone of English Law across a number of areas. With the advent of the Employment Relations Act 1999 and subsequent Employment Act 2002, there appears to have been a creep towards such values finding their way into the private employment relationship.

2.4 Leading Public Law Domestic Decisions on Procedural Fairness

Most, if not all, key decisions in this area of the law come from Judicial Review cases. The most famous recent decision regarding breaches of procedural fairness being recognized as a cause of action in such matters is the case of *Council for Civil Service Unions v Minister for Civil Service*[266] and in particular Lord Diplock's statement regarding procedural irregularity.

[261] See The Overseas Companies Regulations 2009 No 1801 Schedule 3 Paragraph 5(1)(c).
[262] See The Cleve Hill Solar Park Order 2020 No. 547 Schedule 9, Paragraph 5.
[263] c3 28 Edw 3.
[264] c3 42 Edw 3.
[265] C. 43.
[266] [1985] AC 374 (HoL).

The precise nature of 'fairness' is difficult to identify. Lord Woolf commented on its variable nature in *Regina (Roberts) v Parole Board and another*[267] in relation to decisions made by procedural bodies:

> "*(i) An administrative body is required to act fairly when reaching a decision which could adversely affect those who are the subject of the decision. (ii) This requirement of fairness is not fixed and its content depends upon all the circumstances and, in particular, the nature of the decision which the body is required to make…*"

Lord Nicholls of Birkenhead went so far as to state, however, that such principles were not rigid and that they attract a degree of fluidity with changes in the law and society[268].

Notwithstanding the foregoing, In the context of this thesis, the narrow type of fairness under examination is that of 'procedural fairness' which, according to Jowitt's Dictionary of English Law[269], is synonymous with Natural Justice. It is accepted, however, that such rules may abide a degree of flexibility. As Lord Bridge said in *Lloyd v McMahon*[270] *"the so-called rules of natural justice are not engraved on tablets of stone"*[271]

Other important milestones in the have been the cases of *Cinnamond v British Airports Authority*[272] where it was held that there will not be a breach of natural justice if it can be shown that there is no prejudice to the affected party. Furthermore, the decision echod the principles invoked in the *Polkey*[273] saga, *Malloch v Aberdeen Corporation*[274] whereby a person not consulted or given an opportunity to state their case will not be held to have been prejudiced where it can be said that no representations made could be said to have made any difference to the outcome.

In the case of *Council of Civil Service Unions and Others v Minister for the Civil Service*[275] it was pronounced by Lord Roskill that there is a flexible standard of fairness when it comes to natural justice in public law proceedings and that the:

> "*extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show.*"

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[267] [2005] UKHL 45, [2005] 2 AC 73 [para 40] (Woolf LJ).
[268] *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618, [para 4] (Nicholls LJ).
[269] 5 ed.
[270] [1987] AC 625 (HoL).
[271] ibid, 702 (Bridge LJ).
[272] [1980] 1 WLR 582 (EWCA).
[273] n 55.
[274] [1971] 1 WLR 1578 (HoL).
[275] n 266, 415 (Roskill LJ).

Lord Denning echoed the same sentiment in the *Cinnamond*[276] case

> *"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter"*

Instruction on the general principles- in particular the definition of the duty to act fairly as borne by those who may be classified as acting in a less than judicial or quasi-judicial capacity-can also be taken from Immigration Law. Lord Parker in the case of r*e H.K. (An infant)*[277] in particular, the statement of Lord Chief Justice Parker[278]

> *"... even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is …"*

As will be shown in the next section, this rich vein of discourse on procedural fairness and natural justice echoes within the law on disciplinary matters. With the broader international context in mind, it is clear that these ideals form part of the global legal consciousness but as will become clear, the fabric of fairness appears ragged and frayed in the context of workplace investigations and disciplinary matters.

2.5 Finding Fairness: The Case Law on Disciplinary Procedures

Having observed the theory relating to natural justice and procedural fairness and the ways in which it manifests itself in both the international and domestic settings, this section will present an examination of these ideals insofar as they relate to workplace disciplinary investigations and hearings. At this stage it is important to note that most, if not all, of the decisions observed are concerned with dismissal hearings. This is because there are very few reported decisions which concern stand-alone disciplinary or investigatory hearings. The thrust of this thesis is to find, insofar as is possible, the rules that implicitly apply to workplace hearings regardless of the eventual outcome which can only be achieved by studying the dicta of cases which have addressed procedural points in this context.

[276] n 272, 590 (Denning LJ).
[277] [1967] 2 Q.B. 617.
[278] ibid 630 (Parker J).

As a reminder of the core concepts discussed, 'Natural Justice' was outlined in Byrne v Kinematograph Renters Society Ltd[279], per Harman J:

"…*First, I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not myself think that there really is anything more*".

Mr Justice Megarry in Fountaine v Chesterton[280], a case involving a member's expulsion from a political party, distilled these rules as:

> "*1-The right to be heard by an unbiased tribunal.*
> *2- The right to have notice of the charged misconduct*
> *3- The right to be heard in answer to those charges*".

Further, he stated that:

> '*…I imagine that it is intended to suggest justice that is simple or elementary, as distinct to justice that is complex, sophisticated and technical'*[281].

In respect of disciplinary hearings in particular, Wood J stated in Clark v Civil Aviation Authority[282]:

> "*…The practice at such hearings will follow the rules of natural justice, which are really matters of fairness and common sense"*[283]

However, the law appears to be in conflict as to how far these rules actually do apply in disciplinary hearings short of dismissal. As reported by Collins[284], an implied term guaranteeing natural justice was rejected for employees by the Court in Ridge v Baldwin. However, as Collins also reports, it was also held in R v East Berkshire Health Authority ex parte Walsh[285], Purchas LJ held that:

> "*The rules of natural justice may well be imported into a private contractual relationship*".

As further stated by Collins, in R v BBC, ex parte Lavelle[286], Lord Woolf made the argument that, because there was an 'elaborate disciplinary

279 n 33, 784 (Harman, J).
280 n 34.
281 Ibid.
282 [1991] IRLR 412 (EAT).
283 ibid, 415 (Wood J).
284 n 79, 135.
285 [1985] Q.B. 152 (CA) (Purchas LJ).
286 ibid.

procedure' provided for within the contract, that this made it appropriate for natural justice principles to be implied therein. This is troubling for a number of reasons; firstly, this statement could discourage employers from setting out elaborate disciplinary procedures if they feel that they are likely to held to a higher procedural standard by the Courts; secondly, this suggests that occupations with more complex contractual provisions imparted into the employment relationship are much more likely to enjoy natural justice protections than those without. These occupations are likely to be those whereby either the employer has extensive legal and human resources advice at their disposal, and / or of a professional nature. Effectively the statement of Lord Woolf could be taken to be creating a two-tier system of natural justice rights.

It is also unclear as to how such rights are to be legally enforced in any case and what the effect of this would be. Moreover, there is also the tension which exists between the use of a contractual notice period whilst disciplinary proceedings are also contractually guaranteed. Barnard and Merrett have written that trouble arises where express contractual terms that guarantee that disciplinary procedures will be followed conflict with the right of the employer to terminate the contract without giving notice[287]. The authors suggest that employers may choose to ignore such procedures entirely and rely on a claim of wrongful dismissal being brought instead of a claim for unfair dismissal which would ultimately be more cost effective for the employer[288]

As the authors instruct, the case of Edwards holds that a failure to follow contractual disciplinary proceedings will also not lead to a claim for damages at common law- and, indeed, no damages at all in the absence of any express contractual agreement. The only remedy, instead, is to obtain an injunction.[289]

Similarly, Deakin and Morris have pointed out that there is very little protection open for an employee where they are subjected to detriment to a degree short of dismissal, noting that the common law will not be able to assist the vast majority of employees in these instances, with only a narrow section of the workplace able to call upon public law rights:

> *"Both judicial review and the equitable remedies of injunction and declaration can, in principle, be deployed to counter disciplinary action short of dismissal, and can also have an effect which is*

[287] n 77, 340.
[288] Ibid.
[289] *Edwards v Chesterfield Royal Hospital NHS Trust* [2011] UKSC 58, [2012] 2 W.L.R. 55.

essentially that of nullifying a purported dismissal, a power denied to the employment tribunals in their statutory jurisdiction"[290]

Further and importantly, they state that existing statutory standards do not do enough by means of providing a disincentive to employers to refrain from taking unreasonable disciplinary action, and that this lacuna is not augmented by common law implied terms[291].

Furthermore, in *E C Cook v Thomas Linnell & Sons Ltd*[292]it was held by the EAT that procedural requirements could be dispensed with when they interfered with an employers' efficient running of a business:

> "*It is important that the operation of the legislation in relation to unfair dismissal should not impede employers unreasonably in the efficient management of their business, which must be in the interest of all.*"[293]

Though, it was also conceded that:

> "*Certainly, employees must not be sacrificed to this need; and employers must act reasonably when removing from a particular post an employee whom they consider to be unsatisfactory.*"[294]

Matters relating to discipline or investigation were not considered.

Indeed, in the case of *British Labour Pump Co. Ltd. v Byrne*[295]it was held that if an employer could demonstrate that they would have dismissed an employee regardless of whether the correct disciplinary procedure was followed or not, then there would be no liability for unfair dismissal. This rule was abolished by *Polkey v A E Dayton Services Ltd*[296]but then resurrected by the Employment Act 2002[297] before being abolished again with the advent of the Employment Act 2008[298]. The position today is that within *Polkey*, that the question of compliance with procedural fairness goes to the question of the remedy rather than the liability but only in cases of dismissal.

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[290] n 111, 510.
[291] ibid, 512.
[292] [1977] ICR 770 (EAT).
[293] ibid, [776] (Phillips J).
[294] ibid.
[295] n 57.
[296] n 55.
[297] C. 22.
[298] C. 24.

Regarding the extent of the application of the rules, as stated in Bentley Engineering Co Ltd v Mistry[299] *(Slynn J., presiding) "We do not say that in every case any particular form of procedure has to be followed… As Bristow J. said, it is all a question of degree".*

It has been held, however, that although procedures need not be uniform, the standards of fairness that underpin them are resolute. In McLaren v National Coal Board[300] Sir John Donaldson MR commented, within the context of the miners' strike, that even the 'heat of industrial warfare' does not displace these rules[301].

Procedural standards, then, are on one hand absolute but on the other hand disposable. On one hand a cornerstone of due process, on the other, completely flexible. In some instances, they may apply to disciplinary matters, in others not.

Deakin and Morris, citing the cases of Gunton v Richmond upon Thames London Borough Council[302]; Dietman v Brent London Borough Council[303]; Boyo v Lambeth London Borough Council[304] have noted, however, that:

> *"the Courts have granted more extensive damages in cases where employers have failed to observe contractual disciplinary procedures"*[305]

And, further, regarding the 'notice' rule:

> *"…as a result of the Court's intervention, the employer can no longer rely on the power of the notice term to dispense with the need for procedural fairness or for adequate substantive grounds for an act of discipline or dismissal"*[306].

However, they also note that these new lines of authority have not received the blessing of the House of Lords.[307] One striking discrepancy within the workplace disciplinary landscape arises when one looks at the difference between public and private sector dismissals. With public authorities, there exists the possibility of subjecting a dismissal to the procedure of judicial review. According to Collins,

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[299] [1979] ICR 47, [51] (Slynn J).
[300] [1988] ICR 370 (EWCA).
[301] ibid, 377
[302] [1981] Ch 448, [1980] 3 W.L.R. 714 (EWCA).
[303] [1987] ICR 737 (QB).
[304] [1995] IRLR 50, (EWCA).
[305] n111, 361.
[306] Ibid.
[307] Ibid.

"the public law jurisdiction offers an employee a much better chance to be able to insist upon strict observance of the rules of natural justice"[308].

Although he points out that availing oneself of the judicial review procedure naturally requires a different application process, this is, nevertheless, a slightly alarming state of affairs. The approach has been refined since the seminal case of Ridge v Baldwin by the decision of the Court of Appeal in the case of R v East Berkshire Area Health Authority, ex parte Walsh[309] whereby a demarcation was established between claims under the private law of contract and those for a breach of natural justice. According to Collins, the Courts have attempted to restrict such claims as much as possible in order to avoid the importation of natural justice rights into the economic sphere; "… the right to dignity which the State must respect in its dealings with citizens should have no application to the economic relations of the labour market"[310].

In the case of *McLaren v Home Office*, Lord Woolf stated that natural justice in public authority cases applies to dismissals carried out of individuals where the process is provided for by Statute and those which result from policy decisions. In any case, ultimately, if there are private law remedies available to the employee such as the possibility of submitting to the jurisdiction of a tribunal then public law jurisdiction can be denied[311]. Nevertheless, the fact that there are some employees who may be entitled to a strict application of natural justice rights over and above those afforded to others through the prism of parity and fairness seems like an unsatisfactory state of affairs. There has been some examination of the public/private divide in the literature. Rodgers has written that public law rules may even be more problematical for employees enjoying them due to difficulty in navigating the 'public law regime'[312] and that such employees also have found difficulty in availing themselves of private law employment rights[313]. Rodgers explains the justification in the overall difference of treatment as derivative of the "important differences in public as opposed to private power"[314] with 'private power' being akin to 'economic' power characterized by an imbalance of overall bargaining power between the employer and employee whilst 'public power' derives from the power of the state which includes "access to 'coercive' power beyond that found

[308] n 79, 129.
[309] [1984] ICR 743 (EWCA).
[310] n 79, 131.
[311] n 83, 132.
[312] Lisa Rodgers 'Public Employment and Access to Justice in Employment Law', ILJ, (2013) vol. 43(4) 373, 375.
[313] ibid.
[314] Ibid.

amongst private bodies"[315] and the fact that it is mandated by democratic processes[316]. Justifications for the differences include the potential need for more public accountability of staff misconduct[317] and the need for more highly regulated recruitment in the interests of 'openness and transparency'[318].

According to Rodgers, there is a contrast between the UK and other countries insofar as there are not separate employment law regimes for public and private sector employees in most other jurisdictions[319]. However, she goes on to cite the police service as an example of where there is a distinct statutory employment regime in respect of employment law rights. Furthermore, they are excluded from employment law provisions such as the Employment Rights Act 1996 and the Trade Union and Labour Relations Act 1992[320] with discipline and conduct matters being dealt with by a separate statutory regime, under the Police Conduct Regulations 2012[321]. The 2012 Regulations have been since superseded by the 2020 Regulations[322], and a further comprehensive investigatory and hearings regime has been prescribed.

There are some similarities with the 'civilian' regime as previously outlined. Regulation 7 provides for a 'police friend' to act in a similar way to a trade union representative or employee companion during associated proceedings but, in stark contrast, also specifically provides for the officer to be legally represented should the circumstances allow this[323]. Regulation 8 provides that a police officer may be represented by a lawyer at any misconduct hearing provided for under the regulations including those where dismissal is not a possibility[324] which goes far beyond the rights afforded to employees in the private sector as previously discussed. Other important dimensions of the misconduct process are also outlined and provided for including the scope and procedure of such hearings[325] and notice requirements[326]. Rodgers states that police officers must rely on judicial review proceedings to cure any breach of natural justice in such proceedings[327]. The extensive regulatory regime provided for such proceedings as outlined combined with the ability to avail themselves of

[315] ibid, 376.
[316] Ibid.
[317] ibid, 376.
[318] Ibid.
[319] ibid, 377.
[320] Ibid.
[321] ibid, 379.
[322] The Police (Conduct) Regulations SI 2020/4.
[323] reg 7(2)(b).
[324] reg 8.
[325] Part 4.
[326] reg 30.
[327] n 312, 378.

legal representation, however, must surely make it less likely that such a breach will arise. Moreover, it should be remembered that private sector employees have no such recourse to judicial review proceedings.

Prison Officers are not treated as Police Officers by the law but have access to most employment rights under the private law and are also subject to a substantial disciplinary code which is highly prescriptive in its scope[328]. Rodgers, however, draws a contrast with Civil Service employees who have not been successful in bringing judicial review proceedings in respect of such breaches[329], noting that this may be due to a 'contractual nexus' between Civil Servants and their employers[330]. Rodgers further states that this is not an easy argument to sustain given the contractual nature of both relationships in reality[331]. Teachers are given as an example of this, employed under contracts but also under power derived from statute[332]. It is accepted that not all public sector employees have access to judicial review. The line is not particularly clear as Rodgers has pointed out:

> *"The availability of judicial review … is limited to those public sector employees who do not have a 'contract of employment' and can show further elements of 'publicness' in the operation of their employment relationship. These criteria dramatically limit the number of public sector employees who can bring a judicial review claim."*[333]

Rodgers concludes that the distinction between public and private sector workers is based on 'weak' theoretical underpinnings.

In summary of the above, the precise application of procedural fairness and natural justice to workplace disciplinary processes is very difficult to gauge. Their application or not, apparently fall to be decided at the whim of the employer and there is seemingly no uniform recourse available for failure to follow even contractual disciplinary proceedings. Whilst this uncertainty permeates the private sector, the public sector appears to have much more protection with some- such as police officers- having apparently very high levels of protection and very rigid processes in place. By reason of deduction it can be argued that such rights were never intended by Parliament to attach themselves to disciplinary matters.

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328 Ministry of Justice, 'Code of Conduct for Prison Officers' (PSI 2010/06) <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2010/psi_2010_06_conduct_and_discipline.doc.> accessed 3 February 2021.
329 n 312, 378.
330 Ibid.
331 n 312, 380.
332 Ibid.
333 Ibid.

2.5.1 The Application of the Rules of Natural Justice and Procedural Fairness to Disciplinary Proceedings

The previous section was concerned with the overarching rules relating to procedural fairness and their application to disciplinary matters in different sectors. The following sections take a 'root and branch' approach to defining exactly what, for the purpose of the law, a disciplinary hearing is. Secondly, such hearings will be distinguished from other kinds of meetings between management/employers and employees before the constituent parts of such hearings are examined. These are the meaning of workplace rules and their contravention along with the Courts view on the application of natural justice and procedural fairness at disciplinary hearings generally. This is then followed by an examination of how the individual rules of natural justice manifest themselves at such hearings as evidenced by case law.

Sequentially, the case law as it applies to the 3 'limbs' of natural justice /procedural fairness will be set out. This begins with the right to be informed of the alleged misconduct, followed by the right to be heard and the right to be heard by an unbiased decision maker. For the sake of completeness, there will also be a discussion of the related branch of capability matters.

2.5.2 The scope of a 'Disciplinary Hearing'

In *Jones (1960)* cited in *Wheeler*[334], defines a workplace disciplinary hearing as '*some action taken against an individual when he (sic) fails to conform to the rules of the industrial organisation of which they are a member*'.

In statute they are defined under s13(4) of the Employment Relations Act 1999 as:

S.13(4) defines a disciplinary hearing as a hearing that could result in:
"(a) the administration of a formal warning to a worker by his employer.
(b) the taking of some other action in respect of a worker by his employer, or
(c) the confirmation of a warning issued or some other action taken".

The question of what constitutes a 'warning' can be a technical matter in its own right but the cases of *London Underground Ltd v Ferenc-Batchelor*[335] and *Harding v London Underground Ltd*[336] help to amplify. In the first case, the employee was a train driver who went through a red light. The

[334] Wheeler, H.N. 'Punishment theory and industrial discipline', Industrial Relations, (1976) Vol.15, No. 2.
[335] [2003] ICR 656 (EAT).
[336] Ibid.

employers held an investigation into the incident during which it was possible that she could have been issued with what the employer classed as an "*informal warning*". She asked to be allowed representation by her Union at this series of hearings but was told that she was "*not allowed trade union representation at this level*". At the conclusion of their investigations the management decided that further action was needed and her case should be taken to the formal disciplinary procedure. The employee argued that what management were calling an "*informal warning*" was in fact a "*formal warning*" due to the implications that would follow from being given one. The EAT took a detailed look at what London Underground were classifying as an "*Informal Warning*". It turned out to be, 1) Confirmed in writing, 2) had a formal timescale for continuation (ie, stating that it would be a live warning for a period of 12 months) and 3) was to become part of the employee's disciplinary record.

Firstly, confirming anything of this nature in writing does make it in a sense more formal. On the second point, despite the argument that it is, in a way, advantageous to an employee to know how long a particular warning will last for, the Court held that this inevitably gave a degree of formality to what is intended to be an informal procedure. They went on to say that "*the purpose of the informal oral warning is to help the employee improve and its nature is that it will fade and disappear naturally with the passage of time*"[337]. On the subject of whether this makes it more "*formal*" than "*informal*" the Court said "*To give a warning a set time limit to apply in all cases is to apply a standard formula and consequently it amounts to a degree of standardisation, which is a degree of formality*"[338]. In exploring the point of standardisation, the Court looked at the written notes that took place in the interview with Ms Ferenc Batchelor- "*When she herself asked for representation her manager is recorded as saying that: "Under the LUL disciplinary system you are not allowed trade union representation at this level*"[339]. Therefore, whatever is intended by senior management, management on the ground are clearly under the impression that it is a 'level', and therefore part of a procedure".

On the third point, London Underground tried to argue that it was necessary to attach the warning to the disciplinary record of employees due to the large size of the organisation and the fact that employees would often work under different managers at different times with the possibility of rapid change over. Their argument on this point was summed up by the presiding Judge as being along the lines of "*what on earth is the point of an oral warning if it is not recorded for management purposes somehow or*

[337] ibid, para. 21.
[338] ibid, para. 21.
[339] ibid, para. 21.

another?"[340]. The Courts answer to this was "*…that seems to us to be a totally different matter. For management to record for their own purposes in their daily log or their ordinary reports what has occurred is wholly different from making the warning part and parcel of an individual employee's disciplinary record, even if the entry of a manager's notes or book or log is initialled by the employee concerned by way of confirmation that it has taken place*"[341].

The EAT stated, in the words of the Tribunal that heard the case initially, that "*An informal warning would be something that was not recorded and would be, as set out in the ACAS Code something simply between a worker and a manager as part of an informal interview or counselling session*"[342]. They agreed with the employee that what London Underground classed as an "Informal Warning" was in fact a "Formal Warning" for the purposes of the 1999 Employment Relations Act and that she should have been given the opportunity for Union Representation at her hearing. Mr Harding's case against London Underground was heard by the same Court on the same day. The details of his case were different to Ms Ferenc-Batchelor's, but it was essentially the same insofar as the question was whether or not London Underground's informal warnings were in fact, formal ones. Mr Harding, the employee, had been called in to an interview under London Underground's attendance at work procedure. At the interview Mr Harding insisted that in the circumstances he should be allowed Union Representation. When this was refused he left the room. In his absence he was issued with an informal warning which was of the kind we have previously discussed. The Court agreed with Mr Harding that he should have been offered representation.

The above position was summarised in *Skiggs v Southwest Trains*[343] thus:

> "*whether a discussion or meeting between management and a worker takes on the character of a "disciplinary hearing" within this definition depends on the nature of the meeting itself, and not on the description either or both parties happen to attach to it or its possible consequences*"[344].

It was also stated in this case that:

> ""*some other action" in section 13(4) means some other disciplinary action, in the form of a sanction analogous to what has gone before*"[345].

[340] ibid, para. 20.
[341] ibid, para. 20.
[342] Ibid, para 26.
[343] [2005] IRLR 459 (EAT).
[344] ibid, para 10.
[345] ibid, para 9.

On the subject of warnings, it has been held that there should be a timeframe on warnings. This is also established within the ACAS Code of Practice[346]. Employees have been dismissed however on the basis of expired warnings. In the case of *Diosynth Ltd vs Thompson*[347], an employee was dismissed for a serious breach of health and safety rules. He had previously been given a written warning in July 2000 which stated that it was to be considered to be 'live' for a period of 12 months. In November 2001 he was dismissed following an explosion at his workplace which resulted in the death of one person. At the disciplinary hearing it was stated that if it was not for his previous written warning he would not have been sacked. The Court of Session in Scotland decided that an employee who receives a warning which states it is to be open only for a specified time is entitled to rely on that as being true, and that it was unfair to take the expired warning into consideration when making the decision to dismiss. Lord Phillip stated:

> "*In any event, it was a contravention of the principle of fairness for an employer to put a time limit on a warning and then take it into account as a determining factor in a dismissal of an employee for a misdemeanour after the expiry date. An employee had a reasonable expectation that the employer meant what he said*"[348].

Another relevant case involving expired warnings is *Airbus UK v Webb*[349]. In this case decided by the Court of Appeal involved 5 employees who had been caught watching TV during working time. 1 of them had previously been on a final written warning – in fact, this had been expired for a period of 1 month. The others had clean disciplinary records. His dismissal was held to be fair. This was held to be because of prior misconduct in addition to the charge in the instant case. His dismissal was held to be within the range of reasonable responses, despite the fact that his prior warning had expired.

Disparity of treatment in respect of corrective actions taken has come before the Courts a number of times. Wood, J stated in the case of *Proctor v British Gypsum* [350], in cases where an employee is facing dismissal:

> *"if the employee or those representing him know of other such (similar) incidents it will no doubt be in his best interests that they should be*

[346] n 50, para. 21.
[347] [2006] IRLR 284 (Court of Session).
[348] ibid, para. 24.
[349] [2008] EWCA Civ 49, [2008] IRLR 309.
[350] [1992] IRLR 7 (EAT).

identified or at least drawn to the attention of the employer. If necessary, an adjournment can be taken for further investigation"[351].

Disparity may be justified depending on the circumstances. In *London Borough of Harrow v Cunningham*[352]. Mr Cunningham and his colleague were investigated and subsequently disciplined for trading on their own account in the course of their employment. Mr Cunningham was dismissed while his colleague, Mr Weatherly, received a final written warning. Mr Cunningham took his case to a tribunal arguing that his dismissal was unfair because Mr Weatherly had been allowed to stay in his job. Mr Cunningham had been on a final written warning at the time, whilst Mr Weatherly had a clean disciplinary record. As stated at paragraph 17:

> "*…an employer is entitled to take into account aggravating factors, such as one employee's poor disciplinary record when compared with another man, guilty of the same offence, who has a clear conduct record"*[353].

In the case of *The Post Office v Fennell* [354]however, the Court of Appeal found that the employer had acted inconsistently in dismissing one of their employees for assaulting a colleague where this level of action had not been taken in similar cases. The employee had struck one of his colleagues in the works canteen following an argument and was subsequently dismissed for "gross misconduct". His colleague suffered blows to the mouth and cheeks and was apparently knocked to the floor where he lay "bleeding and dazed"[355].

Several other employees had committed similar offences in the past and were not dismissed and a range of examples were given. For instance, Brandon LJ stated that:

> "*an [employment] tribunal is entitled to say that where… one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal*"[356]

[351] ibid, 9.
[352] [1996] IRLR 256 (EAT).
[353] ibid, 257.
[354] [1981] IRLR 221 (EWCA).
[355] ibid, 222.
[356] ibid, 223.

It was stated in the case of *Proctor v British Gypsum*[357] that an employer "should consider truly comparable cases of which he knew, or ought reasonably to have known"[358].

However, Wood J. espoused the opinion that there must be some flexibility in such a principle:

> *"Industrial situations within a unit or on a site may change from time to time as may physical conditions. There may be an increase in dishonesty, fighting or absenteeism."*[359]

Relatedly, in the case of *Cain v Leeds Western Health Authority*[360], an employee was dismissed for gross misconduct due to fighting with a colleague whilst on duty. He argued that this constituted unfair dismissal on the grounds of inconsistency and disparity since other employees of the same health service had been treated differently. The employer argued that because these cases took place and had been heard at different hospitals by different people there was no issue of inconsistency. Sir David Croom-Johnson stated:

> *"If the rules of the employer are applied by different servants or agents of the employer, of course they may be applied differently from time to time. But what has to be taken into account is whether it is the employer's consistency which is being considered. Because the employer is acting in one case through his servants, A and B, and the other case through his servants C and D, it is no answer to a complaint of inconsistency to say that there were two different employees considering the seriousness of the two alleged cases of misconduct. The consistency must be consistency as between all employees of the employer"*[361].

In the case of *Dairy Produce Packers Ltd v Beverstock*[362], an employee was dismissed after he was found to have been drinking at a pub during work hours. The employers considered that this was a worse offence than drinking on works premises because of the nature of the work the employee was engaged in on the day in question. The employee usually worked as a forklift truck driver at the employer's dairy produce depot in Glasgow, but, on the day in question, he had been assigned the duty of being a "*second man*" in one of the delivery lorries on the run to Edinburgh. The van returned

[357] [1992] IRLR 7 (EAT).
[358] ibid, para 27.
[359] ibid, para 28.
[360] [1990] IRLR 168 (EAT).
[361] ibid, 169 (Croom Johnson J).
[362] [1981] IRLR 265 (EAT).

to Glasgow at around 4pm but the employee and his colleague decided to go to the pub where they stayed until around 6:40pm. The employee did not turn up for work until 11AM the next day. On his arrival he was told to attend a disciplinary meeting at 2PM. At the meeting he was dismissed on the charge of drinking in a public house during company time. It was heard in evidence that many of the employee's colleagues had received punishments far short of dismissal for other alcohol related offences. One of the examples given was of a worker who had been found to have been under the influence of alcohol whilst at work on no less than 4 separate occasions and was given 3 warnings before being dismissed. Another worker had turned up drunk but was simply warned and sent home. Another had returned half an hour late from his lunch break with a bag which contained cans of beer and was met by the factory manager who suspected that he may have been drinking. The only action taken against him was a verbal warning.

The employers argued that by drinking in a pub during working hours was a massive breach of trust because by the nature of the work the employee was engaged in at the time, there was no way of checking what he or his colleagues were doing as they were outside the factory. When an employee was away from the factory the employers argued, they had to know that he or she could be trusted not to do such things.

In fact, Lord McDonald in the Employment Appeal Tribunal decided that in the absence of any specific term in the contract of employment relating to the issue of drunkenness/alcohol use during works time, the employers could not simply pick and choose which cases were worse than others, stating:

> *"Where it is considered necessary to have specific penalties attached to the misuse of alcohol in a particular enterprise then it is proper… that this should be clearly laid down and made a term of the contract of employment"*[363].

In terms of the level of disciplinary warning to be applied, this is question of fact that Is open for the tribunal to determine. In *Grant v Amplex Great Britain Ltd* [364] it was held that a tribunal had not erred in reaching the conclusion that an employee had been fairly dismissed on the basis of the quality of his work even though he had not received a specific warning. Further, Slynn J. stated at para. 13 that the need for prior warning would be a question of degree in each case. It is also worth noting that this was a case on capability rather than conduct, however, but in the case of *Stanley Cole*

[363] ibid, 266.
[364] [1980] IRLR 461 (EAT).

(Wainfleet) Ltd v Sheridan[365]the employee left the office without permission following an altercation with a colleague which left her feeling upset and ill. She was absent from work for a period of one and a half hours which included her lunch hour. She was later invited to a disciplinary meeting regarding this absence and was given a final written warning. Mrs Sheridan appealed against the decision, but it was allowed to stand. Mrs Sheridan resigned from the job claiming constructive dismissal. Mr Recorder Langstaff QC, sitting in the EAT, stated:

"*Taking an additional hour for lunch… or arriving an hour late at work without prior permission and without good excuse… would seem to none of us to justify a final written warning, at least in the absence of other (circumstances)"*[366].

On the subject of final written warnings generally, he had this to say on the severity of a final written warning:

> "*a final written warning is, as the name suggests, final. Most disciplinary procedures begin with informal resolution. Records begin to be kept, perhaps where there is a verbal warning, certainly a first written warning, and some disciplinary procedures of which we are aware, even provide for an intermediate warning stage before a final written warning"*[367]

On a related note, regarding demotion as a sanction it has been held that employers have a considerable degree of flexibility, as long as it is not an unreasonable measure the tribunal will not interfere with the imposition as such, as was stated in *Nunn v Royal Mail Group Ltd:*[368]

> *"Unless there was a glaringly obvious reason why the demotion was unfair, such that the claimant would be entitled to resist it, we cannot see that the tribunal were required to examine in detail the precise allegations and the procedure involved."*[369]

In the case of *Auguste Noel Ltd v Curtis*[370]. Regarding warnings given for previous different offences and the bearing they may have on the level of punishment that should be given, as per Wood J. sitting in the Employment Appeal Tribunal espoused that: "*The mere fact that the conduct was of a*

[365] [2003] IRLR 52 (EAT).
[366] ibid, para 74 (Langstaff J).
[367] ibid paras, 75 -76.
[368] [2011] ICR 162 (EAT).
[369] ibid, para 21.
[370] [1990] IRLR 326 (EAT).

different kind on those occasions when warnings were given does not seem to us to render them irrelevant. It is essentially a matter of balance,"[371].

In the more recent case of *Wincanton Group v Stone* [372]it was held that the Employment Tribunal had erred in denying the employer's entitlement to rely upon the previous warning:

> *"The focus is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. It is not upon the actions of the employee. If a tribunal is satisfied that the first warning was not issued for an oblique motive and was not manifestly inappropriate or, put another way, that it was issued in good faith and with prima facie grounds for making it, then that warning will be valid. If it is not so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently."*[373]

As praiseworthy as this sentiment is, it stops short of laying down that previous warnings must have complied with basic standards of procedural fairness. Furthermore, an employee does not generally have the right to challenge the breach of such standards and seldom is this actually done in practice.

On the basis of the cases thus far investigated, a disciplinary hearing is one in which some form of recorded action could be taken against an employee which is more than a mere note-to-file or managerial conversation. As has been gleaned from the research thus far, a warning of any level could have serious consequences for an employee. Also of note is that the confusion around what is and is not a potential warning. If such matters were prescribed or defined in statute this may simplify matters, particularly if there was a requirement – as per the ill-fated 2002 reforms – to put forward a notification in writing of the level of warning given in each case.

2.5.3 Workplace Rules

Having considered what does and does not constitute a disciplinary hearing, it is prudent to identify what, in law actually constitutes a disciplinary rule. A disciplinary hearing in and of itself is unlikely to occur but for the suspicion of a breach of discipline. This section seeks to examine what, exactly, could be classed as a breach of discipline and the extent to which an employee has

[371] ibid, para 10.
[372] [2013] IRLR 178 (EAT).
[373] Ibid, para. 37.

to be made aware of such rules. Moreover, it will also consider whether the scope of any alleged misconduct has to fall within the ambit of codified rules or whether there is any degree of flexibility afforded.

Section 3(1) of the1996 Employment Rights Act requires that employment particulars must be given to the employee which must contain reference to disciplinary rules and, moreover, under s. 3(1)(aa) such particulars much also '*specify any procedure applicable to the taking of disciplinary decisions relating to or to a decision to dismiss'*. As has previously been outlined, there is no structure provided in statute for how such procedures should ensure a fair hearing.

Regarding the scope of such rules, an employer's disciplinary rules do not have to list every single possible offence. For example, in the case of *The Distillers Company (bottling services) LTD v Gardner*[374], an employee employed as a loader who failed to report his colleagues for stealing whiskey. This offence was not specifically contained within the companies' disciplinary rules. Lord McDonald had the following to say on the subject:

> "*A catalogue of offences which carry the potential sanction of dismissal contained in company rules may occasionally be useful in assessing the quality of an offence, but it does not follow that no offence which does not fall within it can ever merit dismissal*"[375]

An interesting case in this area is that of *Trust House Forte (Catering) Ltd v Adonis*[376]. Mr Adonis, a waiter, was reprimanded for smoking in a non-smoking area. 6 months later the management put a notice up on a board stating "*It is the last time that a warning will be given. Anyone caught smoking in the no smoking areas will be dismissed for gross misconduct*"[377].

Only 10 days after this notice had been put up, the employer re-issued staff with new copies of their terms and conditions of employment. The new terms and conditions listed "Smoking in any other than designated areas" as an example of "misconduct and/or poor performance". They then went on to list a series of offences that would be considered gross misconduct. This list included "*theft, forgery, fighting or physically striking another employee, customer or guest and rudeness to customers or guests*"[378].

Some six months later Mr Adonis was caught smoking beneath a "No Smoking" sign and was subsequently sacked. The employers argued that the

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[374] [1982] IRLR 47 (EAT).
[375] ibid, para 16 (McDonald J).
[376] [1984] IRLR 382 (EAT).
[377] ibid, para. 4.
[378] ibid, para. 6.

notice that had been put up on the board stating that smoking in a non-smoking area would be dealt with by summary dismissal justified this, although it was inconsistent with Mr Adonis's terms and conditions of employment. The Court found that this was unfair dismissal. The notice that was put up on the board was found to be a "unilateral statement" from the employer to the employees and that an employee is not legally bound by such statements "*if he can show that they do not represent the contract between himself and his employer*"[379]

As Lord Justice Beldam said in *Paul v East Surrey District Health Authority*[380]:

"If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious action is justified"[381].

As has been noted, there are no legislative provisions as to the levels of warning that can be given following disciplinary action. There are also no requirements as to what should and should not be taken into account at a disciplinary meeting and form the basis of the ultimate decision.

Similarly, in the case of *Proctor v British Gypsum*[382], the Union and the Employer both agreed that a sign should be put up in the workplace explicitly outlining that fighting was an offence that could be dealt with by way of summary dismissal. This was in response to a fighting related disciplinary case which resulted in the dismissal of an employee. It was felt that, despite the fact that this had been brought to the attention of the employees through the companies revised procedures, this should be clearly spelled out so there is no confusion.

A further example of the requirement for communication can be seen in the case of *W Brooks & Son v Skinner*[383]. In this case the employer had entered into an agreement with the trade union that any employee who overindulged at the staff Christmas party and failed to attend work the following day would be dismissed from their employment. Mr Skinner became inebriated on the night in question and the next day did not attend work. He was dismissed. He later won his case in the EAT for unfair dismissal

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379 ibid, para. 13.
380 [1995] IRLR 305 (EWCA) (Beldam LJ).
381 ibid, para. 35.
382 n 50.
383 [1984] IRLR 379 (EAT).

because the employer had not taken sufficient steps to communicate the consequences to him.

Likewise, an employee was dismissed in the case of *Rigden-Murphy v Securicor*[384]for breaking one the rules in his company manual, which had a section described as "*10 Golden Rules*"[385]. The rule that he had broken was to be found in amidst many others which included "*Beware of complacency. Build up the habit of discipline*"[386]. Even though the manual contained a statement that said a failure to comply could lead to instant dismissal, the Court held that the dismissal was unfair due to the manual being unclear on which rules attracted that sanction.

The Courts have also allowed employers some flexibility in how they use workplace rules in cases of misconduct. The case of *British Railways Board v Jackson*[387]was the case of a "…*British Railways buffet car steward found to be in possession of bread and bacon on railway premises with the suspected intention of using them to trade in sandwiches on his own account*"[388]. At the material time, British Rail were having serious problems with this kind of activity which was thus depriving British Rail of a source of income.[389]
In response, the British Railways Board enacted the following rule, rule G43, which was incorporated into its employee's contracts of employment:

> "*Staff must not engage in trade or business for themselves or others whilst on duty. Only items purchased by, or on behalf of, Intercity on-board services are to be served on refreshment cars. Personal food or drink items must not be carried on refreshment cars*".[390]

At 5:39 AM on the morning in question, Mr Jackson, a buffet car steward with 14 years loyal service to British Rail, was seen by a member of management staff entering the station yard carrying a plastic bag. He was then observed to head in the direction of the locker rooms and put the contents of the plastic bag into his locker. The manager, Mr Goodenough, followed him there and questioned him as to the bag's contents. Mr Jackson revealed that the bag had contained 3 packs of bacon, a sliced loaf of bread and a couple of cans of soft drink. He was immediately suspended.[391]
He was charged as such:

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384 [1976] IRLR 106 (IT).
385 ibid, para 8.
386 ibid, para. 11.
387 [1994] IRLR 235 (EWCA).
388 ibid, para. 2.
389 ibid.
390 ibid, para. 4.
391 ibid, paras. 5 – 6.

"…you were found to be in possession of a quantity of bacon and a loaf of bread which were not the property of Intercity on-board services, but were in your possession for the purpose of engaging in trade or business for yourself during your rostered turn of duty. This is contrary to paragraph G43 of the Intercity on-board services manual of standing instructions"[392].

Mr Jackson argued that he had bought the bacon for his own consumption from a small store on the morning as their bacon was very cheap. It was put to him, that "…*surely there must be other shops open in Portsmouth after 1.45PM?*"[393]. His response was that that specific shop sells a particular type of cheap bacon that wouldn't be available anywhere else, moreover, the shop was a family run one that would not ordinarily be open that late in the day.

He also argued that he could not possibly have been in breach of paragraph G43 since he had never set foot inside a train carriage with the items. The rule was there precisely to outlaw taking items onto train carriages and selling them. He had done neither of these things.
The Court of Appeal stated, however, that the conduct complained of – trading on his own account -was serious enough in its own right, whether or not on a literal interpretation, the charge had been made out[394].

The Court of Appeal were not satisfied that the employee was telling the truth and stated that "*the circumstances which the board was entitled to take into account included the prevalence of this type of misconduct among their stewards (and) the need to deal with it severely as a deterrent to others who might be similarly tempted*"[395].

As Lord Justice Hoffman aptly put it on the matter:

"*(paragraph G43) says nothing about being in possession of food or drink otherwise than on a train. In the last sentence of the charge, "this is contrary to paragraph G43", the word "this" must mean the engaging in trade or business, not the being in possession with which Mr Jackson was charged; in other words, the substance of the charge was, by analogy with the criminal law, going equipped to commit the disciplinary offence contained in G43*"[396].

A recent Court of Appeal decision set out the requirements for whether or not rules or a document purporting to contain workplace rules can be

[392] ibid, para 9.
[393] ibid, para 7.
[394] ibid, para 10
[395] ibid, para 28
[396] Ibid, para 34 (Hoffman LJ).

considered to be incorporated into a Contract of Employment. The 2016 case of *Sparks v Department for Transport* [397]concerned provisions within a staff handbook regarding the sickness-absence procedure. The Court considered whether such provisions could be construed as being incorporated into the employee's contract of Employment. It has been held however that failure to communicate rules relating to conduct that is clearly unacceptable or illegal will not mean that the employer forfeits their right to take disciplinary action[398].

Where a disciplinary matter involves potential criminal allegations there are deemed to be stricter rules of procedure. For example, where there have been allegations of dishonesty made against an employee, the case of *John Lewis plc v Coyne*[399] states that the criminal standard of dishonesty is the test to be used. An employee had been found to have been making a large volume of personal telephone calls in breach of a rule in the employee guidebook which stated: "*You must not use the departmental telephones for making personal calls. Any breach of this regulation is viewed very seriously and may lead to dismissal if the circumstances justify it*"[400]. It transpired that Mrs Coyne had made 111 phone calls totalling 13.5 hours at a cost to the company of £37.76. She was dismissed on the grounds that she had acted dishonestly in breaching the rules relating to personal phone calls.

Wood, J, in the Employment Appeals Tribunal, held that the correct legal test for dishonesty was to be found in the case of *R v Ghosh*[401]. Applying the test to Mrs Coyne's case, Mr Justice Wood said that the approach taken by the employer was not thorough enough in the circumstances[402].

It can be concluded that in order to commence a disciplinary hearing, then, that there must be some breach of workplace rules. Not all rules have to be codified but specific rules should, ideally, be brought to the attention of the employee. This is particularly important where breach of the rule could result in dismissal. It can also be deduced that where such a breach is potentially a transgression of the criminal law, that the employer will be required to conduct any investigation in a much stricter way.

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397 [2016] EWCA Civ 360, [2016] ICR 695.
398 *Pringle (RA) v Lucas Industrial Equipment Ltd* [1975] IRLR 266 (IT), *Mathewson v RB Wilson Dental Laboratory* [1988] IRLR 512 (EAT).
399 [2001] IRLR 139 (EAT).
400 ibid, para. 2.
401 [1982] QB 1053, [1982] 2 All E.R. 689.
402 Ibid, para. 27, (Wood J).

2.5.4 How the Courts treat Matters of Procedural Fairness at Disciplinary Hearings Generally

From the proceeding sections a definition of a disciplinary hearing has been established in addition to the likely kind of transgression which will result in one being called. This section will consider the ways in which the Courts have treated the application of rules of natural justice at such hearings generally. Following this, the application by the Courts of the rules relating to each specific 'limb' of procedural fairness in disciplinary matters will be considered in turn.

It is well established that the rules of natural justice need not be strictly followed at disciplinary hearings. As Bristow, J, stated in *Khanum v Mid Glamorgan Area Health Authority*[403],

> "*how nearly a domestic disciplinary inquiry... must approach to the full-blown procedure of a Court of justice in order to comply with the rules of natural justice is no doubt a matter of degree*"[404]

Moreover, it was stated in *Slater v Leicestershire Health Authority* [405] that a failure to follow natural justice cannot be used as an independent ground to attack a decision to dismiss.

> Also as stated in *ILEA v Gravett* per Wood, J.:
>
> '*…at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required is likely to increase. The sufficiency of the relevant evidence and the reasonableness of the conclusion seem to us to be inextricably intertwined'*[406]

The seminal case regarding the degree of investigation required in individual cases is *British Home Stores Ltd v Burchell*[407]. The appropriate test for establishing whether or not an employer has acted reasonably in terms of their investigation of an allegation against an employee was put forward by Arnold J: [408]

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403 [1978] IRLR 215 (EAT).
404 ibid, 217.
405 [1989] IRLR 16 (EAT).
406 [1988] IRLR 497, [para 15] (Wood J)
407 [1978] IRLR 379.
408 ibid. (Arnold J).

> *"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.*

This approach has come to be known as the 'classic formulation of the employer's obligation in misconduct cases'[409] and is now thought of as part of the "*band of reasonable responses*" test. As Elias LJ stated in *Turner v East Midlands Trains Ltd,*[410] the "band of reasonable responses" test has been affirmed in the cases of *Post Office v Foley,*[411] *Sainsbury's Supermarkets v Hitt,*[412]*London Ambulance Service NHS Trust v Small*[413] and *Orr v Milton Keynes Council.*[414]

Not without it's judicial critics, Hugh Collins has also criticized the range of reasonable responses as being weighted in favour of the employer:

> "*The exclusive emphasis on the interests of the firm in settling the gravity and types of conduct which will be regarded as constituting sufficient fault to justify dismissal has the tendency to discount systematically any conflicting interests of the employee and the public*"[415]

The case of *ILEA v Gravett*[416] illustrates an instance whereby the 'reasonable responses' test was not complied with. The employee concerned was a swimming instructor who was accused of indecently exposing himself to a 13-year-old girl. The interviews carried out by the employer did not yield any conclusive evidence and the overall process was held to be disordered. The dismissal was held to be unfair. The question of reasonableness of the employers' conduct was considered by Browne-Wilkinson J who concluded that the tribunals role was to consider whether or not the employers response fell within the band of reasonable responses. If the response fell outside this, it was unfair[417].

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[409] [2016] EWCA Civ 766, [2016] I.R.L.R. 779 [para 21].
[410] [2012] EWCA Civ 1470, [2013] 3 All E.R. 375 [para 1] (Elias LJ).
[411] [2000] IRLR 827 (EWCA).
[412] [2002] EWCA Civ 1588, [2003] ICR 111.
[413] [2009] EWCA Civ 220, [2009] IRLR 563.
[414] [2011] EWCA Civ 62, [2011] ICR 704.
[415] n79, 100.
[416] [1988] IRLR 497 (EAT).
[417] *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, [25] (Browne-Wilkinson J).

Under this line of authority, the role of the tribunal is to not to make a decision on whether the employer's decision is correct but to decide whether or not the employer's response falls within a 'range of reasonable responses'. The UK's Supreme Court recently appeared to question the validity of this approach in the case of *Reilly v Sandwell Metropolitan Borough Council*[418], a case regarding the non-disclosure by a Head Teacher of an external relationship with a convicted sex offender. It was held that, given her level of power vis a vis the school, that dismissal for non-disclosure of such a matter was within the range of reasonable responses. In discussion, Lady Hale stated[419] that:

> *'Even in relation to the first part of the inquiry, as to the reason for the dismissal, the British Home Stores approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair.'*

But further still that although the Court should be careful not to disturb the line of cases decided under it and, further, that any changes should be the preserve of Parliament.

Section 98(4) states that[420]:

> *"… Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

There is no statutory guidance on the standard of 'reasonableness'. The reference to 'equity and the substantial merits of the case' does not appear to take matters much further in this regard. There is also a dearth of case law on the interpretation of section 98(4)(b), as has been stated in the EAT[421]

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[418] [2018] UKSC 16, [2018] 3 All ER 477.
[419] ibid (Hale LJ).
[420] Employment Rights Act 1996.
[421] *Enable Care & Home Support Ltd v Mrs J A Pearson* UKEAT/0366/09/SM [para 24].

throwing doubt on the overall importance of this strand. The case of *Post Office v Fennell*[422] gives a small hint of its meaning:

> *'The word 'equity' in the phrase…comprehends the concept that employees who behave in much the same way should have meted out to them much the same punishment'*

As noted later on in this thesis, this interpretation has not been applied forcefully by the Courts[423]. Moreover, this concept of 'equity' does not seem to apply to disciplinary or investigatory matters.

The 'reasonableness' or not of an employers belief in an employee's guild will be judged on the evidence that they had for holding such a belief. In *Salford Royal NHS Foundation Trust vs Rodlan [2010] IRLR 721*it was held that the employer had not sought enough evidence in relation to a disciplinary case which ultimately led to a dismissal. The allegations were that the employee, a nurse, had mistreated a number of patients. In investigating the matter, the employers had taken the evidence of just one person – one Keely Denton - who was in the room at the time of the alleged offence. The disciplinary managers appeared to accept the evidence of Keely Denton at face value, saying that they "*could see no reason why she would lie, and that she was a relatively recent recruit and that as a more junior person, it took some considerable courage for her to raise the complaint*"[424]. The tribunal felt that the employer "did not in any way seek to question the reliability of her evidence. In particular, when Mrs Pemberton conducted her investigation, she spoke only to the claimant and Ms Denton and did not cast her net any wider in looking for witnesses who may have observed Ms Roldan's interaction with (the patient)"[425]. The evidence against the employee was not particularly strong, prompting Elias, LJ to state that:

> "*In cases of alleged misconduct, where the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other, employers should remember that they must form a genuine belief on reasonable grounds that the misconduct occurred*"[426]

As outlined previously, should the allegations be criminal in nature, the Courts have held that there is a greater need for a thorough investigation as was stated by Elias, J[427].The more serious the accusations the more "intrusive"

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[422] [1981] IRLR 221 (EWCA).
[423] See *Airbus v Webb* [2008] EWCA 29 and *Proctor v British Gypsum* [1991] IRLR 7.
[424] *Salford Royal NHS Foundation Trust vs Rodlan* [2010] EWCA Civ 522, [2010] IRLR 721 At para. 21.
[425] Ibid.
[426] ibid para 73, (Elias J).
[427] *A v B* [2003] IRLR 405 (EAT) [para 60].

the investigation can be in line with matters of proportionality. In the case of *McGowan v Scottish Water [2005] IRLR 167* an employer's use of a private investigator to covertly investigate time-sheet falsification was found to be justified. In this case the employee's job involved answering call-outs which could come in at any time during the day or night. The employers became suspicious that some of the call-out sheets he was presenting were actually falsified. The employers hired a firm of private investigators to monitor the employee, and they hid in front of his house for a week filming all the times he entered and left the property. The Employment Appeal Tribunal held that this was justified, in spite of the fact that the employee's father-in-law had died during the week of surveillance.

Lord Johnstone, in defence of the surveillance, stated: "*It is not the case where surveillance was simply undertaken for external or whimsical reasons. In our view it goes to the essence of the obligations and indeed rights of the employer to protect their assets"*[428]

As with a lot of the law in this area, a preferable position may be for the limitations and scope of such investigatory powers to be set out in statute or other instrument. This would be conducive to transparency and fairness but at the same time the need for flexibility must be honoured.

Regardless of the seriousness or not of the allegation, investigations should take all relevant matters into careful consideration and should not be too hasty in reaching a conclusion. In the case of *Johnson Matthey Metals Ltd. vs Harding*[429], Mr Harding, an employee with 15 years unblemished service was dismissed over the apparent theft of a fellow employee's watch. His case was that he had found the watch in the yard some months prior and had, in fact, mentioned it to one of his co-workers. The employers in this case took only a few hours in total to come to their conclusion and did not seek to hear the evidence of his witness. This was held to be an unfair dismissal on the basis that the investigation carried out was not thorough enough.

A further example comes from the case of *Marley Homecare Ltd vs Dutton*[430]an employee shop worker was confronted about two purchases that she hadn't rung through the till one week prior. It was held that this was an unreasonable length of time for an investigation of these matters as the memory of the employee would have become hazy in the interim. The scope of a 'reasonable investigation' was recently discussed by the Court of

[428] ibid para. 13, (Johnstone LJ).
[429] [1978] IRLR 248 (EAT).
[430] [1981] IRLR 380 (EAT).

Appeal in the case of *Shrestha v. Genesis Housing Association Ltd*[431]. This case involved an employee accused of claiming excess mileage in respect of journeys associated with work. It was argued that, in order to have conducted a full investigation, the employer should have investigated the routes he took by physically recreating the journeys. The employee's case was that owing to parking difficulties and roadworks certain journeys had covered more miles.

As per Lord Justice Richards:

> *"As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole."*[432]

Broadening our overall scope and application of these matters, it is arguable that no case is more important than the seminal case of *Ridge v Baldwin.*[433] In this case, the Chief Constable of Brighton, Charles Field William Ridge, was dismissed by the Borough Watch Committee without being given an opportunity to make representations. A declaration of *ultra vires* was sought by Ridge on the grounds that the Watch Committee, in making the decision to dismiss in the absence of any representations being made by himself, had breached the rules of natural justice. Ultimately, his declaration was granted by the then House of Lords.

Of note in this case, is the fact that, notwithstanding the principle of '*Audi Alteram Partem'* being a cornerstone of the legal system and part of our law for '*many centuries*'[434], this fundamental right was confirmed as not applying to cases of 'master and servant' (employer and employee). Lord Reid held that Ridge's case was not strictly one of 'master and servant' as Ridge was an 'officer', and thus was entitled to know the nature of the case against him[435]. Lord Reid also stated that there was a 'line of unbroken authority' confirming that 'officers' are covered by '*Audi Alteram Partem'* at least as far back as 1615[436].

Following the Industrial Relations Act 1971, the rules of natural justice have crept – to a limited extent - into the legal matrix which surrounds workplace disciplinary hearings. An example of where this was stated in the

[431] [2015] EWCA Civ 94, [2015] IRLR 399.
[432] Ibid, [para 23] (Richards LJ).
[433] [1964] AC 40 (HoL).
[434] Ibid, 64.
[435] Ibid, 65.
[436] Ibid, 66.

post-1971 case law is within the case of *Earl v. Slater* and *Wheeler Airlyne Ltd.*[437] Where Sir John Donaldson stated that the only exception to the rule that an employer must give an employee a chance to state their case would be '*…where there can be no explanation which could cause the employers to refrain from dismissing the employee. This must be a very rare situation'*[438]. In this case, however, it is important to note, as Professor Cabrelli has pointed out[439] that the rule of *audi alteram partem* was rejected in this case as forming part of unfair dismissal legislation.

A disciplinary investigation, then, at least as far as cases resulting in dismissal are concerned, must be a reasonable one, carried out in a proportionate way and also, unless the very rare situation arises in which '*there can be no explanation which could cause the employers to refrain from dismissing the employee',* the right to be heard must be offered. Also, as has been stated previously, these cases apply to hearings whereby dismissal is an option. However, no explicit judicial statements exist pertaining to the application of such rules in situations where dismissal is not on the table as an option for the employer.

2.5.5 The Rules of Natural Justice and Procedural Fairness At Disciplinary Hearings: '…the right to have notice of the charged misconduct'[440]

As outlined, natural justice and procedural fairness requires that the accused individual has the right to know the nature of the case against them. Case law is replete with examples of this in disciplinary / dismissal matters. In the case of *Louies v Coventry Hood & Seating Co Ltd*[441], the employee had been dismissed for stealing company property. The evidence against him was contained in two statements. During the disciplinary proceedings and subsequent appeal, the employee was refused sight of these documents. This was held to be a gross breach of natural justice.

As per Wood J. stated the following:

"*It does seem to me that it must be a very rare case indeed for the procedures to be fair where statements which have been given in writing by witnesses and upon which in essence the employer is going to rely almost entirely … that an employee should not have a sight of*

[437] n 37.
[438] ibid, 149.
[439] n23, 675.
[440] N34 (Megarry LJ).
[441] [1990] IRLR 324 (EAT).

them or that he should not be told very clearly exactly what is in them or possibly have them read to himself."[442]

As before, this appears to extend to disciplinary matters short of dismissal only implicitly. The importance of correctly framing the disciplinary charge itself was highlighted by Pill LJ, in the case of *Strouthos v London Underground* [443]. The facts of the case were that a tube driver with the London Underground had used a company vehicle to go abroad. On his return he was stopped by customs officers investigating the quantity of cigarettes he had purchased. The car was impounded for a time and the employee was ultimately dismissed for gross misconduct.

Notably, the charge against the employee was framed as such:

"*Gross misconduct in that on Friday 14 September 2001, you took the line car and failed to disclose the destination to the duty manager. You then without permission, and the appropriate insurance, took the car to Belgium, during which time you used the vehicle for the transportation of alcohol and tobacco, which was deemed by HM Customs and Excise to be excessive and not for personal use. Subsequently HM Customs and Excise impounded the car on 15 September until 15 November. By your actions you damaged (London Underground's) reputation and brought the company into disrepute, contrary to s9.2.1 of the code of conduct*"[444].

This charge omitted a specific allegation of dishonesty. Lord Justice Pill stated that:

"*It does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him.*".[445]

The Court of Appeal decided that the Employment Tribunal had been entitled to find that the employee had been unfairly dismissed, at least partly as a result of him not having the specific allegation put to him in the charge.

Other cases that have dealt with this point include *Spink v Express Foods Ltd*[446]. The facts of this case were that a sales representative was called to a disciplinary meeting but was given no information about the allegations to be put to him. He was ultimately dismissed. Wood, J opined that:

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[442] ibid, 326.
[443] [2004] EWCA Civ 402, [2004] I.R.L.R. 636.
[444] Ibid, para. 6 (Pill LJ).
[445] Ibid, para 38.
[446] [1990] IRLR 320 (EAT).

'It is a fundamental part of a fair disciplinary procedure that an employee know the case against him. Fairness requires that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case.'[447]

The dismissal was ultimately found to be unfair.

The most recent authoritative case on this matter is *Kenyon Road Haulage Ltd v Kingston*[448]. The employee was invited to a disciplinary meeting but the invitation letter did not make clear what the allegation of gross misconduct with which he was being charged amounted to, confusingly referring the employee to a paragraph of the company handbook. This confusion was not addressed at the disciplinary hearing and, in the Employment Tribunal, the dismissing officer stated under cross-examination that the reason for the dismissal was 'theft', an allegation which did not appear on the invitation letter and for which the essential element of 'dishonesty' was found to have been missing.

In *Fuller v Lloyds Bank plc*[449]however, it was held that the withholding of key witness statements from an employee would not, in and of itself, render a dismissal unfair. In this particular case the tribunal found that the defendant knew exactly what the allegations against him were – the case was one which had a criminal dimension to it with the allegations being that the defendant had caused serious injuries to a co-worker with a glass during a Christmas party. Similarly, in *Hussein v Elonex*[450], the employee was dismissed for headbutting a colleague. At, and prior to the disciplinary hearing, he did not have sight of any of the witness statements. His dismissal was held to be fair by the Court of Appeal. As Lord Justice Mummery stated, there is not:

"…*a failure of natural justice where witness statements are obtained but not disclosed, but there is a failure of natural justice if the essence of the case on the employee's conduct is contained in statements which have not been disclosed to him, and where he has not been informed at the hearing, or orally or in other manner, of the nature of the case against him*"[451].

[447] Ibid, para. 26 (Wood J).
[448] [2016] EWCA 967.
[449] [1991] IRLR 336 (EAT).
[450] [1999] IRLR 420 (EWCA).
[451] Ibid, 423 (Mummery LJ).

The right to be notified of the allegations, therefore, consists of informing an employee of the 'essence' of the allegations, as opposed to the formal and prescribed furnishing of documents

Relatedly, in the case of *Spence v Department of Agriculture and Regional Development* [452]from the Northern Irish Court of Appeal, a dismissal was not held to be unfair when a report was withheld from the employee, on the basis that the case against the employee was known satisfactorily by him. As postulated by Hart J.:

> *"We recognise that the employer may be justified in withholding a report such as this, particularly where it may disclose sensitive information such as the existence or identity of an informer, or as in the Civil Service, sensitive material being developed for submission to ministers and which is not yet in the public domain. These are merely some examples of circumstances where an employer may withhold information from an employee during disciplinary proceedings, and there may be other situations where some or all of a report may be legitimately withheld from an employee…. Nevertheless, subject to constraints such as these, we feel that a fair procedure requires that normally an employer should consider disclosing anything in its possession which may be of assistance to an employee who is contesting the disciplinary charge or wishes to make submissions in relation to penalty."*[453]

In the case of *Ramsey v Walkers Snack Foods Ltd*[454] anonymous statements were tendered as part of an investigation into theft. The employees were dismissed on the basis of these statements and the EAT held that the employer was entitled to keep them anonymous. The witnesses were genuinely concerned about reprisals should their identities be revealed.

Consistent with the emerging theme, the standard here appears variable and context dependent and, as in previous examples, appears to apply to disciplinary matters falling short of dismissal only implicitly.

2.5.6 The Rules of Natural Justice and Procedural Fairness At Disciplinary Hearings: 'The Right to be heard'

The Right to be Heard – Audi Alteram Partem - is arguably the most fundamental of the rules of natural justice. The importance of the right to

[452] [2011] NICA 27, [2011] IRLR 806.
[453] Ibid, para. 21.
[454] [2004] IRLR 754 (EAT).

state one's case was highlighted by Sir John Donaldson in the case of *Earl v Slater and Wheeler Airlyne Ltd* [455]. The only exception to the rule that an employer must give an employee a chance to state their case would be:

> "…*where there can be no explanation which could cause the employers to refrain from dismissing the employee. This must be a very rare situation*".

A recent high-profile example of this right in action was from the case of Sharon Shoesmith, the director of Children's services in Haringey at the time of the case of "Baby P" and was dismissed summarily with no opportunity being granted to her to state her case in *R (on the application of Shoesmith) v OFSTED*[456].

In reviewing the decision not to give Ms Shoesmith the opportunity to put her case, Maurice-Kay LJ stated:

> *"I find it a deeply unattractive proposition that the mere juxtaposition of a state of affairs and a person who is 'accountable' should mean that there is nothing that that person might say which could conceivably explain, excuse or mitigate her predicament"*[457].

This case is also illustrative of the public/private divide that permeates this area- the fact that Ms Shoesmith was a government employee likely gave higher levels of protection. However, taken at face value, it serves to underscore the overriding importance of the right to be heard.

Similar to the Shoesmith case, in *Abbey National v Formoso* [458]it was held by the EAT to be unfair to try a pregnant employee in her absence and that the proceedings should have been stayed until a time she was fit to attend, further highlighting the fundamental importance of this right.

Sir John Donaldson, MR, even had the following to say against the backdrop of the miners strikes of the 1980's, it was stated in the case of *McClaren v National Coal Board* [459]that:

> "…*No amount of industrial warfare, and no amount of heat can of itself ever justify failing to give an employee an opportunity of giving an explanation of his conduct. I phrase that, I hope, accurately, No*

[455] n37 (Donaldson J).
[456] [2011] EWCA Civ 642, [2011] IRLR 679.
[457] Ibid, 688, (Maurice Kay, LJ).
[458] [1999] IRLR 222 (EAT).
[459] [1988] IRLR 215 (EWCA).

amount of heat in industrial warfare can justify failing to give an employee an opportunity of giving an explanation"[460]

Even against the heated backdrop of the miners strikes, the right to be heard was of the utmost importance and could not be compromised as a result of such circumstances.

Predictably, the right to be heard is not an 'absolute' right. However, in *Carr v Alexander Russell Ltd*[461]. Lord McDonald stated that dismissing an employee before hearing their side of events would firmly be the exception rather than the rule[462].

Lord Macdonald went on to quote a passage from Sir John Donaldson MR in *Earl v Slater & Wheeler (Airlyne) Ltd* [463]:

"Whilst we do not say that in all circumstances the employee must be given an opportunity of stating his case, the only exception can be the case where there can be no explanation which could cause the employers to refrain from dismissing the employee"'[464]

Further, In the case of *Lowndes v Specialist Heavy Engineering Ltd*[465] a 'proper procedure' had not been followed but it was held that this would not have altered the end result in any case. This failure did not, therefore, render the dismissal unfair[466].

These pronouncements underscore the lacuna that presently exists within the law; if the only situation in which it is permissible not to hear the employee is the situation where dismissal is the only option, this clearly does not apply to matters that could be dealt with by means of a verbal or written or even final written warning.

On a related note, particularly of interest in respect of remote disciplinary matters, in *Pirelli General Cable Works Ltd v Murray* [467] as per Bristow J:

"*The concept of natural justice does not include the right to be personally present throughout*"[468].

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[460] Ibid, 218 (Donaldson J).
[461] [1976] IRLR 220 (CoS Outer House).
[462] Ibid, para 3, (Macdonald L).
[463] n37.
[464] Ibid, para. 12.
[465] [1976] IRLR 246 (EAT).
[466] Ibid.
[467] [1979] IRLR 190 (EAT).
[468] Ibid, 192.

The author elaborated upon this matter in a previous work[469] regarding the practicalities of conducting disciplinary and investigatory hearings during the COVID-19 pandemic, concluding, ultimately, that a fair disciplinary / investigatory hearing could be held remotely.

This echoes the decision in *Ayanlowo v IRC*[470] which concerned a Tax Officer who challenged his dismissal on the basis of a failure to give a fair hearing. In this particular matter, however, it was held that his right to a fair hearing had not been abrogated since he had been offered the chance to make written representations. This case has received no further judicial consideration since it's hearing but it is submitted that this decision presents a danger in respect of the right to be heard generally, particularly as some individuals may lack the ability to articulate their arguments in writing effectively. Surely the interests of fairness demand that, should a person be entitled to be heard, that being heard itself should be effective.

In terms of the employee's right to give evidence at the disciplinary proceedings, there is no general right to cross-examine witnesses and it is well documented that a disciplinary hearing is not to be classed as a 'quasi-judicial investigation'[471] However, in *Santamera v Express Cargo Forwarding*[472] it was held by Wall J. that:

> "…*We do not exclude the possibility that there will be cases in which it would be impossible for an employer to act fairly or reasonably unless cross examination of a particular witness is permitted*".[473]

And, further, that:

> *"the question, however, in each case is whether or not the employer fulfils the test laid down in British Homes Stores v Burchell, and it will be for the tribunal to decide whether or not the employer has acted reasonably, and whether or not the process has been fair."*[474]

Professor Cabrelli has also noted this state of affairs, opining that the focus in Tribunal hearings for unfair dismissal is usually on the conduct of the employer rather than on the question of whether injustice has been caused

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[469] Alex Simmonds, *Dangerous circumstances, discipline and dismissal: Some employment law impacts of COVID-19* in Luo Li, Carlos Espaliu Berdud, Steve Foster & Ben Stanford Eds, *Global Pandemic, Technology and Business: Comparative Explorations of COVID-19 and the Law* (Routledge 2022).
[470] [1975] IRLR 253 (EWCA).
[471] N49.
[472] Ibid (Wall J).
[473] Ibid para. 42.
[474] Ibid.

to the employee[475]. Therefore, there are no defined circumstances in which an employee will be permitted to cross-examine witnesses in the case against them. Even in a case where two witnesses were called to give evidence at such a hearing[476]:

> *"To some extent that* (cross-examination) *was permitted here since two witnesses were called, but the failure to make all the witnesses available for cross-examination could not in our view render the dismissal unfair."*[477]

Elsewhere, the ACAS Code of Practice 2015[478] states at paragraph 12 that

> *"The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this."*

This stops short of expecting employees to be given a full right of cross examination.

Curiously, the Courts have recognised an, albeit limited, right to cross-examination in respect of 'professionals'. Where an individual's right to practice their chosen profession is at stake then, in certain circumstances, there is a 'fact-sensitive'[479] right to cross-examine. It was held in the case of *R.(on the application of Boenhoeffer) v General Medical Council)*[480] it was held that where very serious disciplinary charges were brought against the accused there would have to be 'compelling reasons' for not allowing the cross-examination of key witnesses. In argument, the Public Law case of *Bushell and Another v Secretary of State for the Environment* [481]was raised, in particular the statement of Lord Diplock at p. 97:

> *'Whether fairness requires an inspector to permit a person who has made statements on matters of fact or opinion, whether expert or otherwise, to be cross-examined by a party to the inquiry who wishes to dispute a particular statement must depend on all the circumstances."*

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[475] N23, 677.
[476] *Rhondda Cynon Taf County Borough Council and Close* [2008] IRLR 868 (EAT).
[477] Ibid, para. 23, (Elias J.).
[478] N50.
[479] *R (Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin), [2012] I.R.L.R. 37, [para 79].
[480] Ibid.
[481] [1981] UKHL 1, [1980] 2 All E.R. 608 [75].

In his dissenting judgment, Lord Edmund-Davies stated the following as regards the rules of natural justice and cross examination generally:

> *"The general law may, I think, be summarised in this way:*
> *(a) In holding an administrative inquiry (such as that presently being considered) the inspector was performing quasi-judicial duties.*
> *(b) He must therefore discharge them in accordance with the rules of natural justice*
> *(c) Natural justice requires that objectors (no less than departmental representatives) be allowed to cross-examine witnesses called for the other side on all relevant matters, be they matters of fact or matters of expert opinion."*[482]

Whilst the automatic granting of rights of cross-examination in all disciplinary and investigatory matters regardless of the seriousness of the allegations is likely disproportionate, it is submitted that fairness would demand that any employee facing dismissal have recourse to cross-examination, regardless of whether the individual could be considered a 'professional'.

There is an argument to say that a right to appeal could be curative of any breach of natural justice or procedural fairness. It should be noted at the same time that there is no legislative requirement for there to be an appeals process within an employer's disciplinary process, at least not where a disciplinary hearing falls short of dismissal. Under paragraph 4 of the ACAS Code of Practice for Disciplinary and Grievance Procedures it is stated that 'Employers should allow an employee to appeal against any formal decision made'[483]. Further, at paragraph 22, a manager who makes a decision in a disciplinary matter should inform an employee of their right to appeal it whilst paragraphs 26 – 29 set this out in more detail including the fact that there is a statutory right to be accompanied at such hearings[484]. However, as has been stated, the ACAS Code is not legally binding in a strict sense save for enabling the Court to make an increase or reduction in compensation for non-compliance in dismissal cases, and, further, does not create an independent cause of action[485]. Where dismissal does arise, however, the fairness of an appeal within that process can be considered by a tribunal[486]. Once again, this is not satisfactory as regards matters falling short of dismissal.

Outside the framework of any internal disciplinary procedures lies the right of an employee to raise a grievance with an employer by means of an

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[482] Ibid, 116 (Edmund Davies LJ).
[483] N50.
[484] Ibid.
[485] Trade Union and Labour Relations Act 1992, s207.
[486] *Taylor v OCS Group Ltd* [2006] EWCA Civ 702; [2006] I.C.R. 1602.

implied term. It has been held that a failure to reasonably hear such a grievance, since such a right has effectively been conferred by Parliament[487], can be regarded as a repudiatory breach of contract[488]. An employee, then, dissatisfied with the means by which a disciplinary process has been conducted, could, in theory, raise a grievance as a *de facto* appeal. Whilst offering a right to be heard in a peripheral sense, this is not satisfactory. Firstly, if there was a full right to be heard at disciplinary matters in the first place there would be no need for a grievance to be raised. Secondly, this assumes that any given employee would be willing and able to undertake such a process and thirdly, in line with the first objection, is, to coin a phrase, akin to shutting the door after the horse has bolted.

As seen from the foregoing, the right to be heard in dismissal hearings is held to be universally sacrosanct save for very rare occasions, ie, whereby holding a hearing would 'make no difference' to the ultimate result. Implicitly, therefore, such deference should also extend to disciplinary and investigatory matters which, as has been previously seen regarding warnings, can lead to a dismissal through 'totting up' or following a certain number of 'strikes', ie Verbal Warning – Written Warning – Final Written Warning – Dismissal. It is concerning that other than some associated supporting architecture, there exists no such explicit statutory recognition of the right to be heard in matters falling short of dismissal.

Supportive of the right to be heard is the right to be accompanied or represented in a disciplinary hearing. The importance of such was illustrated in Waud's Employment Law[489]. If an employee is to attend a disciplinary by themselves:

> *'…he might become inarticulate or confused, or be 'reduced to jelly' when confronted by senior members of management. He might fail to put his case effectively, which could lead to a dismissal on the basis of erroneous information'.*

The right to be heard in disciplinary hearings derives from s10 of the Employment Relations Act 1999. A reasonable request for accompaniment can be made under this section but only for a very limited class of individuals:

"A person is within this subsection if he is—

[487] See s10 Employment Relations Act 1999 on the Right to be Accompanied.
[488] *WA Goold (Pearmak) Ltd v McConnell* [1995] I.R.L.R. 516 (EAT).
[489] Peter Chandler, *Waud's Employment Law* (Kogan Page: London 13th ed. 2001) 94.

(a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,
(b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or
(c) another of the employer's workers."

The case of *Toal v GB Oils Ltd*[490] was the most recent substantive case involving this section. In this case, a pair of employees were told that they could not have their chosen representative appear for them in a grievance hearing. The employer argued that, within the requirement that the employee makes a reasonable request to be accompanied, the choice of companion itself must also be 'reasonable'. The EAT held[491] that this could not have been Parliament's intention.

The employer also argued that since the employees had, on being denied their first choice of representative, chosen a different person, that they had waived their initial entitlement to their original representative. This was rejected on the basis of offending s203 Employment Rights Act 1996[492] - the 'statutory prohibition on waiver'.

Following this case, ACAS opened a public consultation[493] and the ACAS Code of Practice on Disciplinary and Grievance Procedures[494] was amended in 2015 to reflect the situation in the law that the employer 'must' allow the employee to be represented by his or her chosen companion. It was recently reported[495] that the government were considering making amendments to this particular section, but as of yet, no concrete proposals have been put forward nor consultations open.

However, there exists some ambiguity regarding this category of potential companions. Sanders has argued[496] that Article 6(1) of the European Convention on Human Rights could apply to disciplinary hearings and thus import a right to full legal representation. Jurisprudence of the

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490 [2013] IRLR 696 (EAT).
491 Ibid, para 16.
492 Employment Rights Act 1996 C 18.
493 ACAS, *ACAS response to the public consultation on the revision of paragraphs 15 and 36 of the ACAS Code of Practice Disciplinary and Grievance*, January 2015, <https://archive.acas.org.uk/media/4213/Acas-response-to-the-public-consultation-on-the-revision-of-paragraphs-15-and-36-of-the-Acas-code-of-practice-disciplinary-and-grievance-procedures/pdf/Acas-response-to-the-public-consultation-on-the-revised-paragraphs-of-Acas-code-of-practice-discipli.pdf >accessed 11 November 2020.
494 N 50.
495 N187.
496 n45, 791.

European Court of Human Rights - *Le Compte, Van Leuven & de Meyere v Belgium*[497] and the English cases of *Kulkarni*[498] and *Mattu*[499] (above) suggest such a right may exist in circumstances where the employee is likely to lose a 'civil right to practice their chosen profession'. Sanders also points out that, as stated by Burnton LJ in the case of *Mattu*, "*Article 6 'in particular' is supposed to be 'blind to social class and social professional and economic status*".[500]

Examining the cases of *Kulkarni and Mattu* more closely, it can be seen that the development of the law looks to risk branching into two tiers of legal representation, one of a Union Representative or colleague for the 'employee' and possibly full legal representative for 'professionals. The present state of the law was enunciated thus in the case of Kulkarni, that loss of a 'specific' job would not engage Article 6 but the potential deprivation of a right to practise a chosen profession would do [501]. Moreover, the role of any such legally qualified companion -be they appearing as a legal representative or a 'mere' companion, was clarified as such:

> '*…once a lawyer is admitted as a representative, he or she is entitled to use all his or her professional skills in the practitioner's service.'*[502]

The justification for the engagement of Article 6 was also enunciated in *Mattu*:

> "*… the right to carry on one's profession is undoubtedly a civil right. Hence a decision that may result in a legal prohibition on the carrying on of a profession engages Article 6*"[503]

Following the subsequent decision of *G v X*[504]*, Professor* Cabrelli commented that the case curtailed:

> "*…severely the employee's right to have a legal representative present at the disciplinary hearing and, from the angle of employment protection, one could argue that it was somewhat disappointing*"[505]

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[497] (1982) 4 EHRR 1.
[498] [2009] EWCA Civ 789, [2009] I.R.L.R. 829.
[499] *Mattu v University Hospitals of Coventry & Warwickshire NHS Trust* [2012] EWCA Civ 641, [2012] I.R.L.R. 661.
[500] n53, 809.
[501] N 498, para. 65.
[502] Ibid, para. 60.
[503] Ibid, para. 50.
[504] [2011] UKSC 30, [2011] 3 W.L.R. 237.
[505] N23, 690.

Once again, the passage from the seminal Donovan Report comes to mind, that "…*In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue..*"[506]

On the basis of the decisions examined it seems grossly inconsistent for there to be a qualified right to representation dependent upon whether or not an individual is classed as a 'professional'. As Sanders has written, 'professionals' – defined as 'employees working in sectors where there is a professional regulatory body regulating membership of the profession'[507] in fact have an 'extra layer'[508] of protection as things stand in the form of a right to petition their regulatory body. This is compounded by the common-sense presumption that such individuals are, by definition, more likely to be more articulate having spent more time in higher-education hence more likely to be well-versed in preparing written arguments and having more highly developed presentational skills [509].

2.5.7 The Rules of Natural Justice and Procedural Fairness At Disciplinary Hearing:' The Right to be heard by an unbiased decision maker'

Another fundamental rule deriving from the principles of natural justice at workplace dismissal hearings is that the hearing should be conducted 'in good faith' – or be free from bias. An example of the application of these principles is to be found in the decision of the EAT in *Moyes v Hylton Castle Working Men's Social Club & Institute Ltd*[510] . The case is also interesting for the reason that it shows that, unlike the other two strands, in some circumstances, strict adherence to the principle will not be feasible:

> "*There will inevitably be cases in industrial relations where a witness to an incident will be the person who has to make the decision to dismiss. Thus, a sole proprietor who is abused by a foreman can scarcely expect someone else to make the decision for dismissal. One partner in a firm of two could scarcely be criticised for telling his other partner of what had happened and at the same time coming to the decision of dismissal*"[511]

[506] Ibid, para. 526.
[507] N52, 170.
[508] Ibid, 171.
[509] Ibid.
[510] [1986] IRLR 482 (EAT).
[511] Ibid, para 6 (Popplewell J).

Within this case, the case of *Hannam v Bradford City Council*[512] was referred to, whereby Sachs, LJ. stated[513] that a definitive summary of the law in relation to bias could be taken from Lord Denning in *Metropolitan Properties Co (FGC) Ltd v Lannon*[514], who espoused that the test would be whether the impression given to reasonable and right-thinking people in any such determination would be one of bias. Solely within the Employment Law context. the rule against bias appears to have impacted upon the extent to which a Human Resources department can be involved in disciplinary matters. In the case of *Ramphal v. Department for Transport* [515]it was held by the EAT that:

> "*An investigating officer is entitled to call for advice from HR; but HR must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability insofar as the advice went beyond addressing issues of consistency*"[516]

Moreover, it was held by Lord Hodge of the Supreme Court in *West London Mental Health NHS Trust v Chhabra*[517], that whilst it would be ordinary and proper for advice to be sought from a Human Resources department on matters of procedure, inserting their own conclusions into a written report or otherwise exerting influence in a substantive sense would not be acceptable [518].

To summarise, where possible the individual carrying out the investigation should be a different individual to the one making the ultimate decision in order to avoid the appearance of bias, at least insofar as dismissal hearings go, with only implicit acknowledgment that the same must apply to disciplinary matters.

A Brief Note on Appeals

It has also been held that failure to allow an employee to appeal a decision may be unfair, especially where this is a contractual right[519]. The appeal process must also be fair[520]. The tribunal's stance on appeals is:

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[512] [1970] 2 All ER 690 (EWCA).
[513] Ibid, 694 (Sachs J).
[514] Ibid.
[515] [2015] IRLR 985 (EAT).
[516] Ibid, para. 65.
[517] [2013] UKSC 80, [2014] 1 All ER 943 (Hodge LJ).
[518] Ibid, para. 37.
[519] *West Midlands Co-Operative Society v Tipton* [1986] AC 536 (HoL).
[520] *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 (EAT).

'to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage'[521].

2.5.8 Capability

For the sake of completeness, it is important that some attention is paid to the situation regarding capability hearings. Deakin and Morris have stated that:

> "*Broadly, the same principles concerning procedural fairness apply by extension to cases of dismissal for incapability on the grounds of lack of competence or illness*"[522]

It is usual practice for an employer to have two separate procedures for capability and conduct. The Employment Appeals Tribunal said in the case of *Littlewoods Organisation Ltd v Egenti*[523], that there is a difference between them. Disciplinary procedures have to be applied strictly whereas capability procedures do not. In terms of what these two phrases mean, Capability has been said to be "Can't do" and conduct has been said to be "Won't do". Capability is basically whether or not an employee can do his or her job. If a member has been performing their job at a standard below that which the employer expects it is expected that they will start capability proceedings against them.

In the case of *James v Waltham Holy Cross UDC*[524], Sir John Donaldson had this to say about capability in the workplace:

> "*An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately*"

As the case of *Bevan Harris Ltd v Gair* [525]demonstrated. In that case, the foreman of a small leather factory was dismissed on the grounds of incapability after having been given sufficient warning due to his work receiving a number of complaints. It was argued on behalf of the employee

[521] N24, [46-47].
[522] N111, 460.
[523] [1976] ICR 516 (EAT).
[524] [1973] IRLR 202 (NIRC) (Donaldson, J).
[525] [1981] IRLR 520 (EAT).

that he should have been given a job as a "shaver operator" within the same company but the Employment Appeal Tribunal rejected this idea. Lord McDonald went on to state that there would ordinarily be no obligation to consider a different or subordinate role[526].

The size of the employers' business is a very important factor when dealing with capability issues. In the case above the employers had considered putting the employee in a different role within the company, as a shaving machine operator but they had decided against this on the grounds of the awkwardness it would cause to the employee.

It is worth noting that there is a distinction between Capability and Qualification. In *Blue Star Ship Management v Williams*[527] a qualification was held to be a "degree, diploma or other academic technical or professional qualification"[528]. This is taken to mean some form of qualification that relates to the employee's ability to perform their job. This is taken to differ from mere registration with a professional body unless the employee has had to demonstrate their level of ability to a required standard in order to obtain such registration.

The case of *Sutton & Gates (Luton) Ltd v Boxall*[529] raised an interesting point of argument in relation to the issue of the overlap between levels of capability and conduct. On one hand you may have an employee who is perfectly capable of doing the job expected of them but chooses not to – this would be a conduct issue; and on the other hand you may have one who is simply not capable of performing. The dilemma faced by the employer in this case was summarised by Mr Justice Kilner Brown[530].

The difficulty of dealing with capability issues was highlighted in an extract from the judgment of Sir John Donaldson in the case of *James v Waltham Holy Cross UDC*[531]:

> "*If an employee is not measuring up to the job, it may be because he is not exerting himself sufficiently or it may be because he really lacks the capability to do so. An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of*

526 Ibid, para. 9 (Macdonald J).
527 [1978] ICR 770 (EAT).
528 Ibid, 774.
529 [1979] ICR 67 (EAT).
530 Ibid, 72 (Kilner Brown J).
531 [1973] IRLR 202 (NIRC).

the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance"[532]

In the *Sutton & Gates*[533] case, Mr Justice Kilner-Brown went on to state the following in relation to capability and suggested that employers should proceed in such a manner[534].

It is clear, then, that an ultimate dismissal on the grounds of capability, then, can arise in a similar manner to the way in which it can through disciplinary matters; incrementally and following a number of 'hearings. The importance of the right to be heard in addition to the other rules of natural justice could be said to be as vital to areas of capability as they are to conduct. Although this thesis is concerned primarily with the latter, the spirit and eventual outcome of the work is such that capability matters should also attract a degree of legislative protection. Although this will not be formally proposed, it would make a viable and interesting area for future research.

2.6 Summary

This review of the literature, statutory provisions and case law in this area reveals several pressing problems.

Firstly, there is no general, unqualified right to a fair hearing in workplace disciplinary proceedings. This is surprising given the importance of gainful employment to the life of the employee[535]. There are statements from senior judges and commentators which firmly suggest that, not only is there no right to a fair hearing, but basic rules of natural justice do not, in fact, apply to disciplinary proceedings[536]. In the seminal case of *Ridge v Baldwin* the existence of an implied term guaranteeing natural justice was rejected[537] and, throughout the case law, there have been other adverse statements made. As David Cabrelli has pointed out, the idea of Audi Alteram Partem forming part of Unfair Dismissal Legislation was rejected in the case of *Earl v Slater & Wheeler (Airlyne) Ltd*[538]. Highlighting this is the dicta of Lord Macdonald from *Carr v Alexander Russell Ltd*[539]. In relation to an employee being dismissed without a hearing, he stated:

[532] Ibid, para 23.
[533] N529.
[534] Ibid, 71.
[535] N 7.
[536] N38.
[537] Ibid.
[538] N23, 675.
[539] N461.

"…In many situations this would be unfair, but each case must be judged in the light of its own circumstances.'[540]

Thus, no absolute right to a hearing exists, let alone a fair one. Furthermore, where judges have acknowledged the existence of some natural justice rights within this context, it has usually been framed in very imprecise terms, see for example, the statement of Wood J in *Clark v Civil Aviation Authority*[541], stating that the rules of natural justice are simply matters of "*fairness and common sense*"[542].

Moreover, as stated in *Bentley Engineering Co Ltd v Mistry*[543], the extent to which procedure is to be followed in each case as a matter of natural justice is: "…*all a question of degree.*". It is also worth remembering that, ultimately, it has been held that any such procedural requirements can be dismissed in the interests of running an efficient business[544].

Symptomatic of such opacity – and illustrative of the paucity of natural justice rights in this area is the situation regarding cross-examination of witnesses. Once again, there is no general right to this save for where 'serious charges' have been brought[545] and whether or not the right to cross-examine will be granted will yet again depend on the circumstances of the case[546]. Although 'serious allegations' in the context of *Boenhoeffer*[547] refer to charges that are either actual criminal charges or charges that could be regarded as criminal, surely any allegations that have been brought against an employee which could result in dismissal ought be regarded as 'serious' bearing in mind the potential personal, social and financial consequences such a decision can have on an employee. Moreover, if natural justice rights be synonymous with the right to cross-examine, this underscores the first deficiency with the law highlighted above. Relatedly, there is the problematic situation whereby natural justice principles can be implied into the employee's contract where it is provided that there exists a sophisticated disciplinary regime[548]. What degree of sophistry must exist before such principles can be implied?

Furthermore, many cases have hailed the importance of the right to be heard – *McClaren v National Coal Board*, *Louies v Coventry Hood and Seating* for example- unless there are other circumstances, ie unless the

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[540] Ibid, para. 3.
[541] N282.
[542] Ibid, 415.
[543] N299.
[544] N292.
[545] N472.
[546] N49. at para. 42.
[547] N472.
[548] N66.

employee has been caught 'red-handed' so to speak and that, thusly, following the procedure would have made 'no difference' to coin the *Polkey* terminology. Not much- if any- judicial attention has been paid to the situation regarding allegations which would result in action short of dismissal, ie. every other conceivable investigation and disciplinary matter, in particular addressing the question of whether such rights should also apply. This could be said to be implicit within the decisions on dismissal and a failure to follow procedural fairness or rules of natural justice in that context. However, be that as it may, this cannot be said to be effective as regards the governance of such procedures- lay people are very likely to be both unaware of this and unable to locate the relevant rules even if they wanted to find them. It follows, that this is not a desirable situation. As pointed out by Deakin and Morris "…*a major weakness of the current law is that the protection of employees against unfair disciplinary action short of dismissal is limited"*[549].

Secondly, there is an unacceptable division between certain classes of public sector employee and most other employees. This discrepancy was talked of openly in the case of *Ridge v Baldwin*[550] by Lord Reid who made the distinction between cases of 'master and servant' and those of 'officers'. The main practical difference being that 'officers' were entitled to know the nature of the case against them and 'servants' were not on the basis of more than 400 years of authority.[551] It is also very important to note that, like the claimant in *Ridge v Baldwin,* public sector employees have the power to launch Judicial Review proceedings for *ultra vires* if the public authority they are employed by has acted outside the rules of natural justice. Already we are presented with a two-tier system; two different employees of equal levels of skill, experience and knowledge but employed by different sectors have radically different entitlements to natural justice rights in disciplinary matters. As a matter of basic fairness there is no justification for this discrepancy.

Thirdly, the situation with 'professional' employees is also problematic in this regard. As has been seen, there is potentially a right to legal representation in disciplinary hearings if the 'civil right' to practice one's profession is threatened at what amounts to a 'quasi-judicial hearing'[552] but not otherwise. Whilst as a matter of technical construction this state of affairs may be correct, it is, once again, deeply unsatisfactory from the standpoint of basic fairness and equality of arms. Whilst being deprived of ones right to practice ones chosen profession is no doubt a personal catastrophe for the employee concerned, being dismissed from a long-held and much-

[549] N111, 510.
[550] N38.
[551] Ibid, [65-66].
[552] N45.

cherished job will likewise be the case for the 'non-professional'. This is before we even considering the serious problems which flow from this occurrence for both professionals and non-professionals alike.

Fourthly, there are problems with the use of *British Home Stores Ltd v Burchell* [553]as the definitive authority in such matters. The test of 'reasonableness' is both unclear and uncertain for the employee as well as the employer. Essentially an employer must entertain a 'reasonable belief' in the allegations which are borne out through a 'reasonable' investigation. The standard of 'reasonableness' depends upon the circumstances of the case. Although the ACAS code may make provisions for what may and may not be reasonable, the code is ultimately non-binding. The law in this respect cries out for at least some concrete rules rather than a vague test. As has been hinted at in recent case law[554], whilst this case may have had recent historical significance as the definitive authority it should not be regarded as untouchable. Moreover, judicial reluctance to intervene appears to stem from a desire to avoid disturbing the status quo[555].

Fifthly, there are some issues surrounding workplace rules. *Rigden-Murphy v Securicor* [556]demonstrates this along with *British Railways Board v Jackson* [557]. Michael Jefferson has written that works rules are an actual source of labour law, stating that "*the employers works rules, trade union "custom and practice" and collective agreements are as much a part of the ordering of labour relations as are executive orders, legislation and judicial decisions.*"[558]That there is no definitive statutory or judicial direction on the communication of workplace rules seems desperately out of sync with domestic constitutional principles, for example, the celebrated case of *Entick v Carrington*[559] and Lord Camden's statement: "*if this is law it would be found in our books, but no such law ever existed in this country*". The position regarding works rules seems to be "if this is law it *may* be found in our books". S3(1) of the1996 Employment Rights Act states that employment particulars must be given to the employee but the precise rules that should be detailed are not specified.

The above problems are accentuated by the lack of judicial initiative being taken in the higher Courts to develop this area of the law. In addition to Baroness Hale's recent comments[560] reluctance has been shown in the past. The exchange between Lord Denning and Counsel for the Appellants

[553] N26.
[554] N69.
[555] Ibid, [para. 34] (Hale LJ).
[556] [1976] IRLR 106 (IT).
[557] N387.
[558] Emp. Law R. 55: June 2005 1A-201, at 1A-2.2.
[559] (1765) 19 St. Tr. 1030.
[560] N555.

in the case of *Alidair Ltd v Taylor*[561] is telling in this regard and is worth quoting in full:

> "*MR DEHN: My Lord, I ask for leave to appeal to the House of Lords. Your Lordships' decision does raise important questions as to the relevance, amongst other things, of procedure in matters of this sort.*
>
> *THE MASTER OF THE ROLLS: You should see the number of Tribunal cases we have — the Industrial Tribunal, the Employment Appeal Tribunal and then this Tribunal. I am not sure in this case that it ought not to rest here. We do not want too many appeals in these cases.*
>
> *MR DEHN: Your Lordships have in a sense laid down rather important new principles about honest beliefs on reasonable grounds as being the principal matter, and so far as procedure is concerned your Lordships have indicated that the Industrial Tribunal went wrong in law in considering the validity of the procedure adopted by the employers, and that is an important matter which, in my submission, it would be right to take to the highest tribunal.*
>
> *THE MASTER OF THE ROLLS: We do not give you leave to appeal. Appeal dismissed with costs."*[562]

Lord Denning was famous for championing the extension of the powers of the Court of Appeal, his forceful articulation in the case of *Davis v Johnson*[563]being the oft cited example[564]. Lord Denning's approach in the case of *Alidair* is, for all intents and purposes, regarding the Court of Appeal as a final Court of Appeal for such employment matters- the very presence of he appears to marginally disapprove of. No leave was ever granted to appeal to the House of Lords in such matters, who could have explored and refined such concepts. It is also worth considering that, given the House of Lords' (as it then was) remit of considering only matters of general public importance, that there can scarcely be any matters that could be said to be more public – or important – than employment and livelihood.

In more modern times, the picture is not much better. Since its inception, the Supreme Court has heard only 6 cases on Unfair Dismissal[565] and only one of

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[561] N68.
[562] Ibid, para 39.
[563] [1978] 2 WLR 182 (EWCA).
[564] Ibid, 93.
[565] See *Royal Mail v Jhuti* [2019] UKSC 55; *Reilley v Sandwell MBC* [2018] UKSC 16; *Moore v President of the Methodist Conference* [2013] UKSC 29; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58; *Duncombe v Secretary of State for Children, Schools and Families* [2011] UKSC 36; and, *Gisda Cyf v Barratt* [2010] UKSC 41.

these[566] has considered the case of *British Home Stores v Burchell* to any extent.

The contribution that this work will make to the existing scholarship and academic literature will be several-fold. In an immediate sense it will build on the work of Astrid Sanders in respect of the right to legal representation in disciplinary matters where dismissal is a possibility. Specifically, this includes the articles 'Does Article 6 of the European Convention on Human Rights Apply to Disciplinary Procedures in the Workplace?', 'Fairness in the Contract of Employment' and 'A "right" to legal representation (in the workplace) during disciplinary proceedings?'[567]. Part of the comparative study assesses the extent to which the right to accompaniment at disciplinary hearings is guaranteed at disciplinary and investigatory hearings. This will complement the work of Sanders in respect of determining whether a right to legal representation exists generally amongst comparable jurisdictions. Moreover, it will also explore whether or not such a right is dependent on 'professional' status as seems to be the requirement as per Sanders work in relation to Article 6 of the European Convention on Human Rights. Moreover, it explores further the contention of Deakin and Morris that protection for action short of dismissal in the law of employment is sorely lacking[568].

Furthermore, the work will contribute to the scholarship of Hugh Collins, in particular his work 'Justice in Dismissal'[569]. In particular, while Collins examines the substantive basis for disciplinary dismissals[570], this work will examine the procedural basis. Whilst this is usually done in relation to the procedural fairness of a hearing which results in dismissal, this work expands this analysis to inspect hearings short of dismissal, hence adding an additional dimension to the literature.

To a more limited extent, the work will also add to that of Hay and Craven[571] in respect of a wider examination of disciplinary sanctions though in a more contemporary context. Whilst Hay and Craven present the ways in which disciplinary sanctions were managed by the criminal law, this work, through the literature review at least, shows how these sanctions have become much less onerous since the 19th century although, as is the central thrust of the thesis, there are significant gaps regarding procedural fairness.

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[566] N69.
[567] Sanders, A. 'Does Article 6 of the European Convention on Human Rights Apply to Disciplinary Procedures in the Workplace?' Oxford J Legal Studies (2013) 33 (4) 791, Sanders, A. 'Fairness in the Contract of Employment' Ind Law J (2017) 46 (4): Sanders, A. 'A "right" to legal representation (in the workplace) during disciplinary proceedings?' I.L.J. 2010, 39(2), 166, 170.
[568] N111, 510.
[569] N79.
[570] Ibid, 70.
[571] N123.

Finally, in a comparative law sense as will be discussed later, this work will build on the work of Adams, Bishop and Deakin[572] in terms of their numerical approach in addition to that of La Porta et al[573]. The work also takes a unique approach to the question of comparative law methodology in both a specific labour law sense and a general context. Arguments relating to the usefulness or not of comparative law, specifically 'textual' comparisons as opposed to in-depth cultural knowledge of the legal context, are considered. Whilst it is submitted that textual comparisons can have their usefulness, counter-arguments are acknowledged within the methodological approach. Essentially, the question of 'legal culture', is answered by inspecting the labour law architecture and respect for the rule of law within the jurisdictions chosen so as to ensure some degree of similarity. A range of jurisdictions from different legal families and types are assessed on both a numerical and qualitative level to determine how the problem of procedural fairness is dealt with in those jurisdictions and, moreover, how this can inform the answer to the domestic question.

In the next Chapter, this study will outline the methodological approach that will be used to explore the ways in which such rights are protected in other jurisdictions, in addition to the sampling exercise. Firstly, the overall comparative method will be identified following a discussion of the different approaches along with an explanation as to why this particular method is deemed the most appropriate within the context of this study. Following this, the parameters of the study will be laid down and the variables delineated. There will also be an overview of the different 'legal families' and conventional categories of legal system followed by a justification for the rationale of the selection for this study. The sampling process will be outlined and the final jurisdictions put forward.

[572] N78.
[573] N106.

Chapter 3 – Methodology

As outlined previously, the research questions regarding the state of the law in England and Wales were focused on the scope of workplace disciplinary proceedings to determine whether there: a) exists a general right to be heard and b) to what extent such rights are protected. It was desired that the following be explored:

1) What rules relating to procedural fairness have been recognised by the Courts as applying to disciplinary proceedings?;
2) What is the effect of breaching such rights?;
3) Are these rights universal to all employees?;
4) Are there clear and sufficient substantive guidelines on these rights?; and,
5) Has been sufficient development of such rights within the case law?

In summary, it was found that whilst there was substantial judicial coverage of the necessity and desirability of procedural fairness and natural justice rights at hearings concerned with dismissal, such concern extended tenuously albeit implicitly to hearings whereby disciplinary matters short of dismissal were concerned. The existing legislative provisions in this area extended only to ensuring that disciplinary rules were made available to employees, guaranteeing the right to appeal in respect of such decisions and, moreover, ensuring that employees have the right to be accompanied in such hearings albeit from a limited class of individuals.

Whilst this is commendable and, indeed, represents an improvement in such matters, there is still a sizeable lacunae as regards substantive protections in action short of dismissal, an area also highlighted by Deakin and Morris[574]. As written, the cumulative effect of such an absence of procedural protections can incrementally lead to a series of warnings from which a dismissal hearing could follow. Such an absence of procedural fairness in these stages could, therefore, effectively render any dismissal

[574] N111.

unfair – or at least, questionable – in a moral sense. The fact that prior disciplinary matters are not, as a matter of course, forensically examined by tribunals in cases of dismissal following a string of warnings compounds the situation. Moreover, there is a gulf between the available remedies between public and private sector employees in respect of action that could potentially be taken for breaches of procedural fairness in such matters. There are potential differences between the rights that so-called 'professionals' can avail themselves of in such matters as opposed to 'non-professionals.

The next stage of this thesis is to examine the extent to which other jurisdictions seek to tackle this problem. As outlined in the literature review, employment protection is a relatively new phenomenon globally and domestically speaking and domestic case law and legislative provisions have disclosed little in the way of fertile ground for discussion. The clearest and strongest of such provisions appear in respect of what could be termed public sector employees, namely Police and Prison Officers[575]. For reasons of efficiency, such rules may ultimately not be suitable for the private sector, particularly those involving police officers who can request legal representation at any stage of a disciplinary matter[576]. Such provisions may lead to an unreasonable cost burden should all employers be required to accommodate them should they feel obliged to seek legal counsel themselves to ensure equality of arms.

With this in mind, it is submitted that the most effective approach to determine what a sensible regime for disciplinary and investigatory matters might look like would be to observe the experiences of other jurisdictions in how they treat this problem as it applies to all employees, not just a narrow and highly specialised sector of the workforce. The collective experience of how a range of comparable jurisdictions have approached this matter over this relatively short period of time should prove informative in determining a way forward; to insist that such an inquiry be limited to domestic ruminations would be blinkered.

The general questions to be asked of the eventual chosen jurisdictions will be:

1) How other comparable jurisdictions approach this problem?

2) Whether certain types of legal system have stronger or clearer rules?

[575] See Chapter 2.
[576] See Chapter 2.

3) Whether there is any data relating to the enforcement of such rules?

4) Whether certain procedural rules are given more protection than others across a range of jurisdictions?

3.1 The Comparative Method

As stated, given the absence of a consistent 'home-grown' framework in this area, a logical development is to explore the rules and practices of other jurisdictions to investigate how these problems are dealt with therein. Improvements to the domestic framework based on an overall assessment of such practices can then be considered.

3.1.1 What is the Comparative Method?

Stated succinctly, "*Comparison is the construction of relations of similarity or dissimilarity between different matters of fact*."[577]. 'Comparative Law' at its most elementary, therefore, is essentially the comparison of the rules of different legal systems and the point of comparative methodology has been said to be "a way of understanding solutions developed at one place or at one point of time"[578]. Likewise, a comparative approach has been successfully employed in the past to propose solutions to existing legal problems[579].

Comparative Law is a relatively recent development. It has been written that:

> "*It was only in the fifteenth and sixteenth centuries that lawyers in Europe started looking to the wider world. Initially their interest was sparked by the conquest of the Americas and the opening of Trade Routes to the East*"[580]

As a formal discipline it is said to have emerged in 1869[581]. It was stated in 1871 that "*The chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law*"[582]. Historically, the comparative approach has been used to do just this. This approach has

[577] Nils Jansen, *Comparative Law and Comparative Knowledge* (2019) In *The Oxford Handbook of Comparative Law*, Mathias Reimann and Reinhard Zimmermann, eds (OUP 2019), 310.
[578] Matthew Finkiln, Guy Mundlak *Comparative Labor Law*, (Elgar, Cheltenham 2015) 5.
[579] Ibid.
[580] T.W. Bennet, '*Comparative Law and African Customary Law*' in Reinmann and Reinhard Zimmerman (eds.) *The Oxford Handbook of Comparative Law*, (OUP 2019), 642. See also 3-4.
[581] L Neville Brown, 'A Century of Comparative Law in England: 1869-1969', (1971) 19 Am J Comp L 232.
[582] Ibid, 233.

been enshrined in legislation as being one of the cornerstones of the function of the Law Commission. The Law Commission Act 1965 specifically states that its functions are, at least partly:

> "*To obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of their functions*"[583].

This approach had been used in England prior to the Law Commissions Act. Brown reports that several committees and agencies had been using a comparative method since at least 1912 – the Royal Commission on Divorce, the Law Revision Committee, the Law Reform Committee and the Criminal Law Committee all recognised comparative law prior to the Act.[584] Brown even goes so far as to imply that the seminal 1966 House of Lords Practice Statement[585] could have been inspired by practices in continental Europe[586].

Further as regards real-world consequences, comparative approaches can legitimately and effectively be used to solve legal problems. As Danneman has written:

> "*Comparative legal enquiries are frequently made as part of an effort to improve a legal rule or institution which has been suspected or recognized as a source of problems.*"[587]

Danneman then cites the famous example of how a comparative exercise by the Law Commission helped to formulate the Contracts (Rights of Third Parties) Act 1999[588].

Another definition, as quoted in Brown[589], from the American comparative lawyer Hessel E. Yntem was that Comparative Law is:

> '*like other branches of science… has a universal humanistic outlook: it contemplates that, while techniques may vary, the problems of justice are basically the same in time and space throughout the world*"[590]

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[583] Law Commissions Act 1965, section 3(1)(f).
[584] N581, 248.
[585] [1966] 3 All ER 77.
[586] N581, 243.
[587] Gerhard Dannemann '*Comparative Law: Study of Similarities or Differences'* in Reinmann and Reinhard Zimmerman (eds.) *The Oxford Handbook of Comparative Law*, (OUP 2019), 403.
[588] Ibid.
[589] N581.
[590] N555, 52.

Further, "*If we comparative lawyers want to retain (or regain) relevance, we need to bring our particular expertise to bear on projects as important as law reform*." [591]

The desire of this project is, hopefully, to facilitate the practical improvement of the law as stated from the outset. As this particular area of Labour Law is still in its relative infancy coupled with the relative dearth of academic literature in this area, looking to the experiences of other jurisdictions to facilitate improvement seems a logical approach.

3.2 Which Comparative Method to use?

With Comparative Law, there is no singular, overarching methodology. Adams and Bonhoff have written that:

> "*Contemporary thinking about the role of method in comparative legal scholarship often seems trapped between two kinds of exhortations which, while both containing some measure of truth, are both also unfortunately to some extent unproductive. On one side lie complaints that 'attempts to develop even a moderately sophisticated method of comparison' are 'exceedingly rare' in comparative legal studies, with many projects apparently simply adopting an 'anything goes' attitude to methodological questions*"[592]

Zweigart and Kotz[593] have stated that Comparative Law's basic methodology is functionality. This was described by Roscoe Pound as

> *'the study of how the same thing may be brought about, the same problem may be met by one legal institution or doctrine or precept in one body of law and by another and quite different institution or doctrine or precept in another'.*[594]

And, further, that:

> "*The functional method has become both the mantra and the bête noire of comparative law*."[595]

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[591]. Ralf Michaels; 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law', The American Journal of Comparative Law, FALL 2009, Vol. 57, No. 4, 795.

[592] Maurice Adams & Jacco Bomhoff, *Comparing law: Practice and theory*. In M. Adams & J. Bomhoff (Eds.), Practice and Theory in Comparative Law, (Cambridge University Press 2012), 1.

[593] Konrad Zweigart and Hein Kotz '*An Introduction to Comparative Law'* (OUP 3rd ed) 34.

[594] Ralf Michaels,'*The Functional Method of Comparative Law'* in Reinmann and Reinhard Zimmerman (eds.) *The Oxford Handbook of Comparative Law*, (OUP 2019), 349.

[595] Ibid. 340.

Functionalist approaches are not without criticism. As has been stated by Cotterell:

> *"Functionalist approaches are seen as failing to recognize that purposes and tasks of law are inevitably defined using the terms of reference provided by particular cultures, and cannot be satisfactorily generalized or abstracted from these"*[596]

Cotterell also emphasises that there is a broad school of thought regarding comparative legal enquiries which posits that "…the letter of the law can *only* be read in the cultural context that gives it meaning."[597].

The definition of "culture", however is somewhat imprecise. As Cotterell further points out, "the American legal sociologist Lawrence Friedman sees a vast 'modern' legal culture: the legal culture of modern, industrial, "advanced" societies' as being in process of formation"[598] and, moreover, that *"Phillip Selznick refers to a broad 'rule of law culture' founded in 'the Western legal tradition' and an emerging 'postmodern legal culture' that promises to extend the rule of law 'to all spheres in which power is exercised and may be abused'"*[599].

As will be seen from the following filtration exercise, the majority of the jurisdictions compared will be of a broadly similar culture insofar as the definitions tendered above are concerned. Furthermore, as pointed out by Geoffrey Samuel, culture 'is too weak a concept to act as an epistemological model in itself'[600]. Further, Samuel asks, in the words of Cotterell, "if… an Italian lawyer cannot think like an English lawyer, why should it be assumed that a lawyer from Welsh-speaking North Wales can think like an English lawyer born and bred in London?"[601]. Moreover, whilst this thesis rejects the position that a valid comparison cannot be drawn without total cultural immersion on the part of the comparatist – see Marc Ancel[602] and the process that lead to the Contracts (Rights of Third Parties) Act 1999 as outlined by Danneman[603]- nevertheless this will be acknowledged as an accepted limitation when drawing the final conclusions on this work.

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[596] Roger Cotterell, *Comparative Law and Legal Culture*, in Reinmann and Reinhard Zimmerman (eds.) *The Oxford Handbook of Comparative Law*, (OUP 2019) 710 – 711.
[597] Ibid, 712.
[598] Ibid,716-717.
[599] Ibid, 717.
[600] N596, 724-725.
[601] Ibid, 725.
[602] N 92.
[603] N 604.

The interpretation of 'culture' that this thesis will rely upon, will be narrowed to the extent of the overarching legal architecture employed in the comparative jurisdictions as it applies to employment matters. This will be measured in terms of the overall respect for the Rule of Law and protection of employment rights in particular along with an assessment of the resolution machinery for individual labour disputes; they should mirror the tribunal system in the United Kingdom to a comparable degree. For the reasons discussed, this will include systems of both Civil and Common Law tradition.

The thesis will borrow from the 'functionalist' tradition within Comparative Law. Functionalist Comparative law is factual, it focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events. As a consequence, its objects are often judicial decisions as responses to real life situations, and legal systems are compared by considering their various judicial responses to similar situations. Second, functionalist comparative law combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society. Law and society are thus thought to be separable but related. Consequently, and third, function itself serves as '*tertium comparationis*'. Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfill similar functions in different legal systems. A fourth element, not shared by all variants of functional method, is that functionality can serve as an evaluative criterion. Functionalist comparative law then becomes a 'better law comparison'— the better of several laws is that which fulfills its function better than the others.[604]

3. 3 How this study will use a Comparative Approach

Regarding the approach of this thesis, the starting point is 'what will be compared?'. Danneman has written, 'There is no point comparing what is identical, and little point in comparing what has nothing in common'[605]. Whilst an extensive polemic on the different schools of thought in Comparative Law is beyond the scope of this thesis, the selection of jurisdictions and instruments to compare must make some logical sense, in order to have any validity. Danneman[606] further writes that when the purpose of a Comparative exercise is to solve legal problems- as is the case here-

[604] N92, 342.
[605] N 92, 384.
[605] Ibid, 7.
[606] Ibid.

"…The enquiry seeks to establish whether different rules or institutions would reduce or eliminate the problem in question because of the different effects which these rules or institutions are likely to produce."

This is exactly how this study will proceed. Different rules from different jurisdictions will be examined to determine the extent to which the law of England and Wales could be improved by following similar ones. The main emphasis will be on the style and form of individual rules within the jurisdictions examined as opposed to the overarching institutions of Labour Law. However, the administration of Labour Law within in each jurisdiction and the ways in which each jurisdiction seeks to solve individual labour disputes generally will be examined in order to ensure at least some degree of comparability. This should aid in determining the likelihood of actually finding such sought-after rules in addition to determining the likelihood of rules of such a nature being a good fit for the English Legal System.

The stance of Gutteridge who "*urges us to look for similarity in 'the state of legal, political and economic development' when selecting the legal systems under comparison, in order to avoid what he calls 'illusory comparison*"[607] is borne in mind to a general degree here, but the Ancel school of thought on inter-typal studies – the study of different systems of law, Civil v Common Law for example - more so. Inter-typal' Comparative study is no radical approach,[608] but the Gutteridge[609] school-of-thought would oppose this. The theorist Marc Ancel proposed that a '*comparison contrastee'* is still a valuable source of information, and that '*comparing radically different legal systems might yield more significant results than comparing similar legal systems*', and, also, that '*…comparison with foreign law poses the most significant tasks and gives the most substantial results not when similar systems are compared, but, on the contrary, when radically different systems are the object thereof*'.[610]

Based on this, it is decided that a range of systems should be observed- neglecting to investigate some jurisdictions based simply on the fact that they may be 'too' different could lead to valuable sources being overlooked. Indeed, it has been written that "there are no strict rules and the question of what and who to compare is strongly related to the purpose of comparison"[611]. Moreover, that 'there is no 'right' or 'wrong' in this decision,

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[607] Harold Gutteridge, *Comparative Law*, (Cambridge University Press 1946) 8.
[608] Vladimir Aleksandrovich Tumanov, *On Comparing Various Types of Legal Systems*, in William Elliott Butler, Vladimir Nikolaevich Kudriavtsev, eds '*Comparative Law and Legal System: Historical and Socio-legal perspectives'* (Oceana Publications, Studies on Socialist Legal Systems, 1985) 78.
[609] N607.
[610] N92, 375.
[611] N621, 7.

but it is important to be aware that the set of countries compared may bias the findings and conclusions'[612].

Rodolfo Sacco, in his article on 'Legal Formants'[613] also stated that:

> *'Jurists who denied the comparability of Capitalist and Socialist law were assuming that comparison was impossible simply because these systems appeared dissimilar. Moreover, they underestimated the importance of the so-called "surface-layer" of legal systems in the belief that only the infrastructure mattered.'*

Whilst this study will, as stated, strive to compare legal systems which are at least similar to an overarching extent as regards their individual employment law architecture, it must be stressed that there are some[614] who view with disdain any approach to comparative study which does not examine, in any great detail, the historical and cultural background within which the system operates. They may be offended by a '*Textual Comparison*'. '*To truly understand a legal system…',* they may say, '*one must undertake a root-and-branch examination of the society which gave birth to it*'. Palmer has dismissed this notion,[615] writing that '*Textual Comparisons can have legitimacy and value in practical forms of legal research'*. Palmer also dismisses the argument that a deep knowledge of each legal culture examined is required:[616] '*context lies beyond the positive law in which lawyers are trained'* and, further, that such requirements '*threaten to make the comparative law quite impractical' establishing 'standards of research that are quite unattainable'*. When attempting to observe the practices of a range of broadly comparable jurisdictions it would not be possible within the parameters of this thesis to delve into a deep historical examination of each jurisdiction and, as previously stated, there is demonstrable value in undertaking a comparison that leans towards the 'textual' as opposed to the 'cultural' whilst not being neglectful of the latter.

With this being said it has to be stated that pure textual comparisons have, in the past, been highly successful, an example being the Brandeis Brief,[617] whereby Louies Brandeis – a future justice of the United States Supreme Court, representing the State of Oregon, presented over 112 pages of statutes from foreign jurisdictions regarding the limitations of working hours

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[612] Ibid, 8.
[613] Rodololfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law,* in Maurice Adams, Jaako Husa, Marie Oderkerke, *Comparative Law Methodology*, vol 1 (Edward Elgar 2017) 6.
[614] Edward J. Eberle,'The Method and Role of Comparative Law', 8 Wash. U. Global Stud. L. Rev. (2009), 451.
[615] Veron Valentine Palmer, *From Lerotholi to Caro: Some Examples of Comparative Law Methodology Explained*, in Maurice Adams, Jaako Husa, Marie Oderkerke, *Comparative Law Methodology*, vol 1: (Edward Elgar 2017), 6.
[616] Ibid, 5.
[617] Ibid ,4.

for women to the Supreme Court with the result that the Court found agreement with him. Within a legislative context, it has been written that "*the use of comparative law whilst drafting new legislation is as old as the phenomenon of Statutory Law itself*"[618] which provides a counterpoint to the sanctity of deep cultural examinations.

Regarding the overall method, Professor Harding of the University of Singapore divided Comparative Law into two broad categories: 1 – '*theoretical Comparative Law*', interesting '*but not essentially very useful*' and 2- '*applied Comparative Law*' which can lead to transplantation and legal development or reform.".[619] It is very important to note that 'Legal transplants' must be used cautiously; Professor Sir Otto Kahn Freund was highly critical of this method.[620] However, it should be born in mind that with Labour Law, it has been written that '*…Rules relating to the power relations in the industrial relations systems and also in society as a whole will be the most difficult to transplant*" .[621] and, more specifically, transplants of *collective* rights- see the EU V Directive[622] - are more precarious than those involving individual rights - the ILO Conventions on dismissal are a strong example.[623]

The spirit of these conventions was to lay down 'protection standards' and effectively represent a 'large scale legal transplant'.[624] 11 years since the implementation of ILO Recommendation 119 on termination in 1963 major improvements were reported in over 20 countries.[625] Cambodia, Cyprus, Rwanda and Zaire (Democratic Republic of the Congo) invited the ILO to provide technical assistance with building their own laws of dismissal.[626] ILO Convention 158 on Termination has so far been ratified by 36 countries.[627]

Given that this thesis will proceed on the basis that legal transplants can be, firstly, possible, and secondly, desirable, it is important to address the

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[618] Jan Smits, *Comparative Law and its Influence on National Legal Systems*, in Maurice Adams, Jaako Husa, Marie Oderkerke, *Comparative Law Methodology*, vol 1 (Edward Elgar 2017) 503.
[619] Chris Nwachukwu Okeke, 'African Law in Comparative Law: Does Comparativism Have Worth?', Roger Williams University Law Review 2011, Vol. 16: Iss. 1, Art 1, 22.
[620] Otto Khan-Freund, 'On uses and misuses of Comparative Law' (1974) Modern Law Review 37.
[621] Roger Blanpain '*Comparative Labour Law & Industrial Relations in Industrialised Market Economies*' VIIIth and revised edition, (Kluwer Law International 2001)) 19.
[622] Ibid.
[623] Ibid.
[624] Ibid.
[625] The International Labour Organisation, 'Termination of Employment (1974): General Survey of Experts on the Applicability of Conventions and Recommendations', Report 3 (Part 4B), International Labour Conference, 59th Session, Geneva, 161.
[626] Edward Yermin, *Job Security: Influence of ILO Standards & Recent Trends*, In Matthew W. Finkin, Guy Mundiak, '*Comparative Labor Law*' (Edward Elgar 2015) 20.
[627] The International Labour Organisation, Convention Status, available online at <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:31233> accessed 31 October 2019.

controversy that surrounds them and acknowledge, to a degree, their limitation. Pierre Legrand is famously hostile towards the idea. As reported by Du Pleiss, "To him, there is no such thing as a 'legal transplant'. Consequently, it makes no sense for comparative lawyers to examine such 'transplants'. The basis for this view is the notion that one cannot think of the law as rules which take the form of 'propositional statements' that are not socially connected in any meaningful way. A meaningful 'legal transplant' can only occur '…when both the propositional statement as such and its invested meaning – which jointly constitute the rule – are transported from one culture to another' Given that the meaning of the rule is specific to a particular culture, the meaning therefore stays behind if the culture itself cannot be transplanted as well"[628]. Legrand refers to such transplants as a 'meaningless form of words'[629]. As previously stated, the author regards such an approach as needlessly fatalistic and binary as it appears to completely disregard any value of comparative law in this sense as a matter of absolutism, even when there is clear evidence that successful inspiration has been drawn from investigating the laws of other systems[630], even in a basic, textual sense.

Michele Griziadei has forcefully argued that the 'meaningless form of words' position is wrong: *"That would be true only if cultures were so totally distinct that the law of one culture meant nothing in another. But cultures are not that distinct. Although they are unique configurations produced by the individuals who share them, cultures interact and change through the transmission of cultural elements- every day and throughout the world."*[631]

The simplistic interpretation of 'transplantation' as a process has also been doubted. Professors Bogg and Ewing have written that "*for the most part law is not transplanted, but is rather adopted and adapted for the national conditions to which it is to apply…"*[632]. The thesis of Alan Watts also supports this contention as he comments upon the absorption by others states of various civil codes in his work, *The Evolution of Western Private Law*[633]. Resultantly, this study will not suggest that England and Wales copy and paste the employment legislation on disciplinary proceedings wholesale from other jurisdictions, but will, instead, seek to find a workable model of good practice based on the research findings. It is worth noting that Du

[628] Jacques Du Pleissis (2019)'*Comparative Law and the Study of Mixed Legal Systems',* in Reinmann and Reinhard Zimmerman (eds.) *The Oxford Handbook of Comparative Law*, (OUP 2019), p. 487.
[629] Ibid.
[630] See the Contracts (Rights of Third Parties) Act 1999.
[631] Michele Griziadei) '*Comparative Law as the Study of Transplants and Receptions'* in Reinmann and Reinhard Zimmerman (eds.) *The Oxford Handbook of Comparative Law*, (OUP 2019), 470.
[632] Alan Bogg and Keith D. Ewing '*Freedom of Association'* in Matthew W. Firkin and Guy Mundlak eds'*Comparative Labour Law'* (Elgar 2015), 297.
[633] Alan Watts, *The Evolution of Western Private Law,* (Johns Hopkins University Press 2000), Chapter 8.

Pleissis recognizes that, within an actual transfer of law it is also possible that cultural transfer could occur as a result[634].

3.4 Scope

For the avoidance of any doubt, this study is not primarily concerned with the overarching institutions of Labour Law and the means by which individual labour rights are upheld, rather the presence of certain individual labour rights – or the codification thereof. Hence, this study is a 'Micro' rather than a 'Macro' comparison. These concepts were defined by Jaako Husa as dealing:

> "…*with specific legal institutions or problems, whereas macro-comparison is interested in the legal profession, the spirit and style of law or the emblematic methods of thought and characteristic legal procedures of different legal systems. In essence, macro-comparative law is the study of whole systems and not particular legal institutions (e.g. marriage, contract and so on) or specific legal questions*."[635]

For the sake of clarity, the initial filtering stages in respect of choosing the comparative jurisdictions will involve an examination on the 'macro' level but this will not be the studies ultimate focus.

In summary, the study will choose a range of jurisdictions based on certain overarching similarities and, from there, focus on the specific provisions regarding individual labour rights in the limited domain of rules in place at disciplinary and investigatory hearings and the extent to which they enable or facilitate procedural fairness and natural justice. Whilst this approach will not embody a thorough examination of the legal culture of each jurisdiction it is submitted that the jurisdictions chosen will be at least similar enough in a 'cultural' sense to enable a sensible comparison of the targeted rights. Whilst this could be regarded as a drawback, the corollary of this is twofold, firstly, that whilst this study does not fall squarely within the description, there is immense value in pure textual comparisons and, secondly, that in order to compare an adequate selection of jurisdictions representing a range of approaches it would not be expedient to embark on a deep historical study of each and every one of them. Moreover, given the accepted value of a textual comparison, it is submitted that such an examination is not only unduly burdensome within the context of this thesis but may even be unnecessary in an empirical sense.

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[634] Ibid 488.

[635] Jaako Husa, 'Macro-Comparative Law Reloaded', Scandinavian Journal of Law Vol. 131 (2018), 414.

Regarding the desire to examine a range of jurisdictions, this is felt to be important owing to the dearth of literature in this specific area. As disclosed through the literature review, there are no comparative studies which comparatively examine disciplinary rules in England and Wales with those in other jurisdictions. Therefore, it is desirable by means of breaking new ground to cast the net as wide as reasonably possible to discover what the key differences are between jurisdictions. This will firstly, offer a broader view of the overall attitudes to such a problem across various jurisdictions and, secondly, provide a platform for future enquiries to narrow the scope as regards particular legal families or models. As the first known comparative study of this kind, it would be more desirable to map the contours of the existing landscape rather than narrowly observe a much smaller number of jurisdictions and potentially miss out on important findings. Furthermore, a desired secondary objective of this study is to find a model of best practice for disciplinary and investigatory proceedings which would be broad enough for adoption as a general standard. Any such model will be more authoritative if based on findings from a larger number of jurisdictions as opposed to a narrower one.

3.5 Research Design

Having examined the justifications for and limitations of this particular approach, attention will now be given to the technical dimensions of how the research will be conducted.

Beginning with the central theme and question, as stated previously, 'Natural Justice' was defined in the case of *Byrne v Kinematograph Renters Society Ltd*[636], per Harman J:

> "*…First, I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not myself think that there really is anything more*".

More succinctly stated by Mr Justice Megarry in *Fountaine v Chesterton*[637]:

> "*1-The right to be heard by an unbiased tribunal.*
> *2- The right to have notice of the charged misconduct*
> *3- The right to be heard in answer to those charges*"

[636] N33, 784.
[637] N34, 690.

As outlined previously, these points manifest themselves throughout the case law as it relates to disciplinary proceedings to varying degrees. Areas which seem controversial under English Law presently will also be the subject of investigation, such as the legal status of warnings and whether there is a duty to bring workplace rules to the attention of employees. The study will not concern itself solely with the question of whether or not an employee in the examined jurisdictions has 'the right to be heard' although this will be the central tenet. Additional rights which support and facilitate this will also be examine.

The hearings this study is concerned with under English Law are defined under s13(4) of the Employment Relations Act 1999[638] as hearings that could result in:

"(a) the administration of a formal warning to a worker by his employer.
(b) the taking of some other action in respect of a worker by his employer, or
(c) the confirmation of a warning issued or some other action taken".

Therefore, this study will be seeking to find information from other jurisdictions in respect of such hearings.

The points for investigation will be:

- Are such procedural rules codified?
- Is the status of different types of 'warning' provided for by law?
- Is there a legal duty for employers to communicate workplace rules to their employees?
- Do employees in the jurisdiction concerned have the right to receive notice of the charged misconduct? If so, how much notice is given?
- Do employees in the jurisdiction concerned have the right to make representations regarding the alleged misconduct?
- Do employees in the jurisdiction concerned have the right to be accompanied to disciplinary hearings?
- What categories of individual can such a companion be chosen from?
- What are the rights of such a companion?
- Is the employee or their companion entitled to cross-examine witnesses at such a hearing?
- Are there any rules on whether or not the decision maker has to be independent of the case?

[638] Employment Relations Act 1999 C. 26.

The overall research design will be that of a Comparative Legal approach embodying both qualitative and quantitative elements. The qualitative dimension will be used for comparing individual legal instruments from different jurisdictions whilst the quantitative element will be used to gain an overall picture of the different jurisdictions. As previously outlined, being the first of its kind, this study will aim to break new ground in this area by examining as broad a range of jurisdictions as practicable to build an overall consensus on both the state of development and the state of the art in respect of how these rights are provided for. This will be both valuable for the sake of legislative discussion in the United Kingdom in addition to a possible new standard at higher levels.

Siems describes a system of "*numerical comparative law*"[639] which has existing successful precedents, the renowned Comparative Constitutions project[640] being one such example. The approach has been successfully used in a number of other studies, notably in the seminal article 'Law and Finance'[641] whereby a sample of 49 countries was used and the financial instruments therein given marks for whether particular legislative norms were followed – 1 mark if the norm was followed and 0 if not[642]. This was then displayed in tabular form[643] and conclusions drawn accordingly. There are numerous other studies where this approach has been successfully adopted[644] and, as Siems shows us, this spans a range of legal areas from Environmental Regulation to Property Rights and access to justice and the quality of legal systems[645].

One further useful study is '*Courts'*[646] which examined the procedures adopted by landlords in eviction cases across a range of jurisdictions in order to establish degrees of procedural formalism within civil v common law jurisdictions. Although this study relied on surveys completed by law firms rather than black letter research the methodological approach was still sound with the variables being defined and explained in tabular format prior to the findings being displayed and established. This study will also follow such a format. Once again, the variables were scored on a basis of 1 and 0 depending upon whether the criteria was met. Given this study focused on

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[639] Matias Siems, 'Numerical Comparative Law: Do we need statistical evidence in law in order to reduce complexity?' Cardozo Journal of International & Comparative Law (2005), 13.
[640] Zachary Elkins, Tom Ginsburg, James Melton, Comparative Constitutions Project, Report, <https://comparativeconstitutionsproject.org >accessed 18 April 2023.
[641] N106.
[642] Ibid.
[643] N106, 1122.
[644] See, for example, William J. Carney 'The Political Economy of Competition for Corporate Charters' 36. J. Legal Stud 2002, 318; Lucian A. Bebchuk et al. 'Does the Evidence Favor State Competition in Corporate Law?' 90 Cal. L. Rev, 2002, 1775.
[645] Matias Siems (2014) *A Network-Based Taxonomy of the World's Legal Systems*, Durham Law School Working Paper, March 2014.
[646] Djankov et al, 'Courts' (2003), 118 Q.J. Econ. 453.

procedural aspects of eviction, it also included similar variables to the ones to be adopted by this study, such as 'Legal Representation is Mandatory'[647]. Within the study there is also a significant range of variables dedicated to what could broadly be described as defining a 'right to a fair hearing', ie. 'Opposition' and 'Evidence' which enquire as to whether or not a response to the allegations has to be submitted in writing or orally – a score for 1 being given if evidence has to be submitted in writing and 0 if the evidence is oral only. In both this study and 'Law and Finance'[648] there is also a section on 'enforcement' and judicial efficiency which is an important dimension that this study will also give weight to. This study will adopt a similar approach based on the perceived availability of such rights through the examination of the instruments.

Before examining the individual provisions, as discussed, a macro perspective of the respect for rights generally to determine that there is at least a culture of following the rule of law in these jurisdictions is necessary. This is important because whilst a jurisdiction could have the most sophisticated legal regime, the rules as stated lack serious credibility if it cannot be shown that there is at least some evidence that the rules are capable of being enforced. The Organisation for Economic Co-operation and Development helpfully gives an overview of the enforcement of individual employment rights within different jurisdictions[649] whilst the World Justice Project may assist in giving a general overview of the application of the rule of law generally within the jurisdictions studied via the 'Rule of Law' index[650]. More localised studies would also be of assistance as and when available, an example being the work of Muravyev, A. '*Evolution of Employment Protection in the USSR, CIS and Baltic States, 1985 – 2009*'[651]. This would be one potential avenue for future legal research.

As also stated, an examination of the overall dispute resolution machinery will also be conducted. Such information will be sourced from the International Labour Organisation in addition to OECD country profiles and reliable information sources from within the states themselves.

3.6 Variables

To successfully execute this studies research objectives, this study will compare a range of data points within the chosen jurisdictions which reflect

[647] Ibid, 463.
[648] N106.
[649] Website of the Organisation for Economic Co-operation and Development <https://stats.oecd.org/Index.aspx?DataSetCode=EPL_OV>. Accessed 18 April 2023.
[650] The World Justice Project, < https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020.> Accessed 18 April 2023.
[651]Muravyev, A., IZA Discussion Paper, No. 5365, December 2010.

the issues and dimensions of workplace disciplinary proceedings in England and Wales as identified and outlined in the literature review. As identified above, these will be:

- Are such procedural rules codified?
- Is the status of different types of 'warning' provided for by law?
- Is there a legal duty for employers to communicate workplace rules to their employees?
- Does the employee have the right to be physically present during the disciplinary hearing?
- Do employees in the jurisdiction concerned have the right to receive notice of the charged misconduct? If so, how much notice is given?
- Do employees in the jurisdiction concerned have the right to make representations regarding the alleged misconduct?
- Do employees in the jurisdiction concerned have the right to be accompanied to disciplinary hearings?
- What categories of individual can such a companion be chosen from?
- What are the rights of such a companion?
- Is the employee or their companion entitled to cross-examine witnesses at such a hearing?
- Does the employee have the right to be legally represented at a disciplinary hearing?
- Are there any rules on whether or not the decision maker should be independent of the case?

Regarding the numerical component of the study, the Jurisdictions will score 1 point for every data point they hit and 0 where they do not. A score of 0.5 will be allowed for where difficulties arise with classification in order for some flexibility to be recognised. This process will assist with the formulation of models later in the thesis.

This thesis will not be limited to the numerical approach, however. There will also be a textual examination and discussion of the available rules. The below table is an example of how the numerical approach would work in practice. A number of former Eastern Bloc countries has been compared alongside England and Wales:

Requirements	Timeframe for application of disciplinary sanction specified	Right to answer the charges in person	Right to representation from Union / Employee Representative at hearing	Unqualified Right to Legal Representation	Levels of Disciplinary Sanctions Specified	Factors the decision maker must take into account stipulated in legislation
England and Wales	No	Yes (1)	Yes (1)	No (0)	No (0)	No

Azerbaijan[652]	Yes (1)	No (0)	No (0)	No (0)	Yes (1)	Yes (1)
Bulgaria[653]	Yes (1)	Yes (1)	No (0)	No (0)	Yes (1)	Yes (1)
Kazakhstan[654]	Yes (1)	No (0)	No (0)	No (0)	Yes (1)	Yes (1)
Lithuania[655]	Yes (1)	No (0)	No (0)	No (0)	Yes (1)	Yes (1)
Moldova[656]	Yes (1)	Yes (1)	No (0)	No (0)	Yes (1)	Yes (1)
Romania[657]	Yes (1)	Yes (1)	Yes (1)	No (0)	Yes (1)	Yes (1)
Tajikistan[658]	Yes (1)	No (0)	No (0)	No (0)	Yes (1)	Yes (1)

Results:

Romania 5
Bulgaria 4
Moldova 4
Tajikistan 3
Azerbaijan 3
Kazakhstan 3
Lithuania 3
England & Wales 2

The overall findings in this example show that this sample of Civil Law jurisdictions from the former Eastern Bloc have legislated more rules relating to fairness or those facilitating natural justice or enabling procedural fairness within their systems. They also appear to provide more guidance as to what an employer must do to ensure a fair hearing in the workplace. Providing such instruments and decisions can be located effectively, evidence can be gleaned in this study through a similar method and which allows for various regional and taxonomic comparisons to be drawn. This will have the

[652]Labour Code (Azerbaijan), 1 February 1999. <www.ilo.org/aids/legislation/WCMS_127413/lang--en/index.htm> accessed 27 March 2017.
[653]Labour Code (Bulgaria) of 23 March 1986, Art 194 (1), unofficial English translation <https://www.ilo.org/aids/legislation/WCMS_127451/lang--en/index.htm> accessed 20 July 2019.
[654] Labour Code No. 251 of 15 May 2007 (Kazakhstan), unofficial English translation <www.ilo.org/aids/legislation/WCMS_127887/lang--en/index.htm> accessed 27 March 2017.
[655] Labour Code, No. IX-926 of 4 June 2002 (Lithuania) unofficial English translation<www.ilo.org/aids/legislation/WCMS_127926/lang--en/index.htm> accessed 27 March 2017.
[656] Labour Code No. 154-XV 28 March 2003 (Moldova), unofficial English translation<www.ilo.org/aids/legislation/WCMS_127944/lang--en/index.htm> accessed 27 March 2017.
[657] Labour Code No. 53/2003 of 24 January 2003 (Romania), unofficial English translation.<www.ilo.org/aids/legislation/WCMS_127992/lang--en/index.htm>accessed 27 March 2017.
[658] Labour Code of 15 May 1997 (Tajikistan) (Text No. 417). <www.ilo.org/aids/legislation/WCMS_129383/lang--en/index.htm> accessed 27 March 2017.

potential to form the basis of an independent finding in its own regard and build on previous work[659].

This is a similar method to that employed in the 'Law and Finance' study[660] which examined the differences in laws established to protect investors across a total of 49 countries. A similar method was established whereby jurisdictions were awarded points in respect of whether certain rules were present or not. This was followed by an assessment of the 'Efficiency of Judicial System' whereby enforcement mechanisms were also considered[661]. Scores are then calculated according to the total of each country[662]. Following the initial numerical assessments, a qualitative examination will follow to determine the content of such rules and to engage in a deeper assessment.

Selecting the Jurisdictions

As Otto Kahn-Freund wrote '*the gods have bestowed the most dangerous of all their gifts, the gift of freedom'*[663] upon comparatists to choose which jurisdictions they wish to compare. As has been pointed out by Mundlak and Finklin[664], there are 'no strict rules and the question of what and who to compare is strongly related to the purpose of comparison'. The purpose of comparison in this study is to identify whether the rules and practices of other jurisdictions may serve to inform the law of England and Wales in respect of ensuring procedural fairness at workplace disciplinary hearings. Logically, therefore, it would appear to make the most sense to select jurisdictions which could be regarded as 'comparable' to England and Wales – or, at any rate, be regarded as the most similar.

As discussed, selecting jurisdictions that are very similar may not necessarily produce the best findings. As Mundlak and Firkin have written, studying different systems may 'amplify' the contrasts more effectively[665]. Comparative Labour Law studies do not necessarily always need to compare similar systems to be effective. The study '*Building BRICS of success?'*[666] for example, compares China, India, Brazil and South Africa[667]. As the authors note: "Undoubtedly their economies are very differently structured; their political trajectories vary enormously; and their legal

[659] N78.
[660] N106, 1113-1155.
[661] Ibid, 1122.
[662] Ibid, 1128.
[663] Otto Kahn-Freund, 'Comparative Law as an Academic Subject', Law Quarterly Review, (1966) vol. 82, 41.
[664] Guy Mundlak and Matthew Finklin *Comparative Labor Law*, (Edward Elgar, Cheltenham 2015) 7.
[665] Ibid 8.
[666] Sean Cooney, Darcy du Troit, Roberto Fragale, Roger Ronnie and Kamala Sankaran, '*Building BRICs of success?'*, in Matthew Firkin and Guy Mundlak (eds.) *Comparative Labour Law* (Edward Elgar 2015), 441.
[667] Ibid.

frameworks have evolved from very different origins"[668]. Yet these jurisdictions make for an interesting and effective study due to "their growing importance in a globalized environment"[669] in respect of whether they adopt similar or divergent strategies to questions of labour regulation. These jurisdictions have been grouped together based on the fact that they are, or at least at the time of writing, were, the most powerful emerging economies in the world. As the authors admit, there are no significant factors other than this that would make such a comparison interesting or useful.

The rationale for the choice of jurisdictions in this study, however, as has been alluded to, will be that these jurisdictions represent, as far as can reasonably be acknowledged, the state of the art in the context of jurisdictions which have a comparable respect to England and Wales for the rule of law and share a similar culture as regards the means for enforcing individual labour rights. The study '*Job Loss*'[670] shared a similar rationale. The study sought to compare dismissal law in 10 varying jurisdictions 'for reasons of convenience'[671] and the fact that the jurisdictions "*afford a representation of unfair dismissal laws in developed economies that are spread across four different continents*"[672]. These 10 jurisdictions were Australia, Chile, France, Germany, Israel, Japan, Spain, Sweden, the United Kingdom and the United States. This is a useful precedent for the justification behind the methodology in this study.

Looking back to the previously mentioned theoretical issues that may arise when comparing different states, Danneman has stated that:

> "*…too much similarity will nevertheless mean that there is not that much to analysis. There must be a minimum of difference between the systems under consideration to make a comparative enquiry worthwhile."*[673]

Regarding England and Wales, in particular Danneman has also stated that:

> "*…English Courts have for long given preference to other common law systems when looking abroad for persuasive authority. The disadvantage of that approach is that it may be unduly restrictive for*

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668 Ibid.
669 Ibid 440.
670 Joanna Howe, Esther Sanchez and Andrew Stewart, *Job Loss*, in Matthew Firkin and Guy Mundlak (eds.) *Comparative Labour Law,* (Edward Elgar 2015) 268.
671 Ibid 275.
672 Ibid.
673 Gerhard Dannemann,'*Comparative Law: Study of Similarities or Differences*?'in Reinmann and Reinhard Zimmerman (eds.) The Oxford Handbook of Comparative Law, (OUP 2019) 409.

the purpose of finding new solutions, as in the case of the common law doctrine of privity of contract"[674].

It follows, therefore, that the proposed 'broad' approach as opposed to a 'narrower' examination of a smaller number of more similar jurisdictions is a sensible path to follow.

However, Danneman has also stated that:

"The more common ground the researcher covers for the legal systems under consideration, the more numerous and richer will be the issues which lend themselves to a comparative analysis."[675]

In line with this school of thought and for the other reasons outlined- the desire for evidence of enforceability and the credibility this brings, it is determined that the jurisdictions chosen should be similar to England and Wales, insofar as:

1) There is evidence that the jurisdiction, like England and Wales, has at least a degree of protection for unjust or unfair dismissal or termination. Jurisdictions without this will be too different to compare and, also, will lack materials to compare.

2) There is evidence that the rules in the jurisdiction are enforced in practice. Certain rules may appear to be excellent on paper but there must be at least some evidence that they can be enforced for reasons of credibility. If they are not, this may be what Gutteridge called an 'illusory comparison'[676]

3) There is evidence that the way in which individual labour disputes are resolved broadly reflects the approach taken in England and Wales, for example by adopting similar labour law architecture – a 'tribunal' or 'specialist labour Court' system for example. This would appear too drastically different to the means by which disputes are resolved locally. Moreover, there may not be any such comparable instruments.

Jurisdictions which are largely covered by collective bargaining arrangements may also be excluded as disciplinary and dismissal matters are

[674] Ibid 410.
[675] Ibid 403.
[676] Organisation for Economic Co-Operation and Development, *Collective Bargaining*, online at https://www.oecd.org/employment/collective-bargaining.htm accessed 18th April 2023.

often resolved under such arrangements and there is no statutory interference. According to the OECD, England and Wales have a relatively low level of collective bargaining coverage[677]

In applying these criteria to the jurisdictions, it is anticipated that many different types of system will still be made available for examination. As written above, this study will not shy away from examining the rules of a certain legal system based on it not being a common law system or being from a drastically different cultural background, since even textual comparisons can be valuable exercises when comparing systems. Therefore, the jurisdictions chosen will be grouped along the lines of existing definitions and findings will be presented on an individual and group level to enable deeper analysis.

3.7 Categories of legal system/Family Legal Families and Traditions

A common theme throughout this methodology section has been that of 'difference'. It is important to define exactly what this term means before looking towards the jurisdictions themselves. There are myriad ways in which legal systems can be categorized. The work Jaako Husa is instructive on where to start looking for jurisdictions to compare. According to Husa, René David took a 'Grands Systémes' approach in which he theorised that there were 4 legal 'families'- Roman-German, Common Law, Socialist Law and Philosophical or Religious Systems. [678] The motivation of David, however, was said to stem from a desire to find common ground between different states during the Cold War.[679]

Further, Konrad Zweigart and Hein Kötz (1998) categorised systems by 'style' on the basis that a system's determinative attributes should be the basis for classification and that a comparatist "must grasp the legal style of a system and use its distinctive features as a basis for classifying legal systems into groups"[680]. According to Husa, 'Style' includes 'historical development', 'distinctive mode of legal thinking', 'characteristic legal institutions', 'sources of law' and 'ideology'. They also identified 'hybrid' systems which did not fall into any particular category.[681]. Husa writes that it has been found that "*mixed legal systems such as Scotland, Quebec, Israel and South Africa, are a separate legal family with common characteristics alongside civil law and common law systems.*"[682] Moreover, Husa gives the examples of Hong Kong –

[677] Ibid.
[678] N635, 418.
[679] Ibid, 419.
[680] Ibid.
[681] Ibid.
[682] Ibid. 420.

situated between English Common Law and Chinese Law due to its history[683] and Dutch Law. Dutch Law traditionally "embraces the principle of discretion rather than the principe of legality…. (leading to) … a non-legalistic and pragmatic legal culture which is different from the German legal culture". He concludes that the 'legal family' approach is not appropriate regarding these legal systems. [684]

An alternative approach is to classify jurisdictions within 'legal cultures' by viewing them in the context of their social and political backgrounds,[685] while Patrick Glenn developed the idea of 'Legal Traditions', identifying Jewish, civil law, Islamic, common law, Hindu and other Asian legal traditions, in addition to oral traditions of indigenous peoples (which he called chtonic legal traditions)"[686] Husa suggests that:

"*The legal family approach is typical for a doctrinally oriented (Western) comparative study of law that focuses on legislation and case law" but "The legal cultural approach takes positive law and doctrine into account, but does not blindly rely on legislation and case law (i.e. official law); rather, it seeks to take into account interrelationships between official law and un-official law, which has to do with the actual behavior of legal actors within a legal culture*."[687]

It has further been written that "legal families approaches focus on 'law in books' whereas legal cultural approaches look more at the 'law in action'. As Wibo Van Rossum explains, the legal cultural approach 'requires more than a historical analysis of what qualifies as "law" or part of "the legal system" in a legal positivistic sense'."[688]

Husa also presents a striking example of why examining social and political backgrounds of jurisdictions may not be particularly helpful:

> "*Twentieth-century Germany, to use but one example, has seen five political regimes with radically different ideologies, while core legal rules, institutions, and education remained remarkably similar. If we have learned anything in comparative law, it is that legal rules alone are compatible with a wide variety of ideologies, and that law reform must go much farther than just the adoption of rules*"[689].

[683] Ibid. 442.
[684] Ibid.
[685] Ibid.
[686] Ibid. 421.
[687] Ibid. 452.
[688] Ibid. 452.
[689] N635, 777.

In the *Courts* study[690] referred to previously, the systems were divided into 'English Legal Origin', 'Socialist Legal Origin', 'French Legal Origin', 'German Legal Origin' and 'Scandinavian Legal Origin'. The 'Legal Origins' or "LLSV" model has been used by various- mainly economic- studies. The thesis originally dated back to the 'Law and Finance' study[691] and the model has been widely used, including fairly recently[692].

The 'Juriglobe' project also divides countries into different categories, 'Civil Law', 'Common Law', 'Muslim Law', 'Customary Law' and 'Mixed System'.[693] Mattias Siems has also proposed that many existing studies are unsatisfactory in terms of classifying these different legal families[694], and is highly critical of attempts to generalise certain legal systems, for example, Juriglobe's classification of 'Muslim law' has been criticised as being too subjective[695]. Siems is also critical of the "legal origins" taxonomy referred to above[696] and has also pointed out that the literature presents at least some consensus regarding criteria for classifying legal systems. Common features of legal systems can be said to be the level of codification, differences in legal style and mentality, how effective the law is and the reasoning behind the law.[697] Siems also presents a classification system that could assist future researchers- a dataset of157 countries grouped by variables such as the 'democracy index' and 'rule of law' / abolition of the death penalty and paid annual leave.[698] Siems seeks to provide a classification system that could be used by future researchers such as myself – dataset of 157 countries grouped by variables such as the 'democracy index' and 'rule of law' / abolition of the death penalty and paid annual leave. Siems also proposes a new set of paradigms: 1) Global Anglosphere, 2) Modern European Legal Culture, 3) Rule by Law or Religion, 4) Weak Law in Transition[699]. Siems proposes that "it may be said that the networks and clusters show which legal systems are compatible, say, in which country relationships it may be acceptable to use legal transplants with a low risk of rejection."[700]

Legal families and categories are helpful for this study in many ways. Firstly, to ensure that there is some empirical balance and to address any concerns about diversity of sources, it is to be hoped that models relating to

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[690] N. 405, above.
[691] N646, 1113.
[692] See Comparative Law and the Legal Origins Thesis: "[N]on scholae sed vitae discimus" (2009) Vivian Grosswald-Curran. Source: The American Journal of Comparative Law (2009) Vol. 57, No. 4 (Fall, 2009), pp. 863-876, esp. at p. 866.
[693]The University of Ottawa, 'Juriglobe', http://www.juriglobe.ca/eng/?i=1 accessed 18 April 2023.
[694]N645.
[695] Ibid 3.
[696] N692 above.
[697] N694 6-7.
[698] Ibid, 8.
[699] Ibid, 20.
[700] Ibid, 26.

disciplinary matters can be organized around these definitions. This will both enable future research and help with determining any adequately objective standard which could be formulated in the international arena; if there are enough common threads running through enough of the models it should be easier to formulate general standards that will apply to all or a significant number of others falling within the same or similar groupings. Secondly, any contrasts drawn will assist with formulating any conclusions and with drawing conclusions about regional approaches. Thirdly, providing there are some jurisdictions in the same category as England and Wales, it will address concerns about comparing jurisdictions that are too different to a certain extent.

3.8 Rationale for selection

It has been written that one should "…*always be very careful when attempting to compare quite similar labor law regimes because labor laws operate in accordance with the values of the society that they are designed to serve*"[701] for example, "*employment-at-will is a peculiarity that strikes observers from other common-law countries, such as Australia and the United Kingdom, because it does not operate in these nations*"[702]. 'Similarity' based on Common Law heritage therefore could be a false idol, and some diversity should be introduced.

Some systems will, however, be too different to make a valuable comparison. In Iran, for example the Islamic Labour Council have extensive involvement in dismissal related matters[703] Looking at the procedural rules in such jurisdictions may not be beneficial when considering the question of legal transplants. Other jurisdictions neither lay down nor enforce any procedural rules at all with regard to internal disciplinary matters, Bangladesh, Brazil and Chile for example[704]. The first stage will be to sift through the possible jurisdictions to remove any state which lays down no procedural rules for such matters. The second stage will be to sift through the remaining jurisdictions to remove those which rely heavily on the government or a council of sorts to oversee the question of dismissal. The materials will be sourced from a range of repositories. Where possible, the official repositories of the jurisdictions in question will be preferred, ie websites akin to the UK's 'legislation.gov.uk'[705]which, it can be reasonably assumed, will be likely to

[701] Ron McCallum, 'American and Australian Labor Law and Differing Approaches to Employee Choice' ABA Journal of Labor & Employment Law, Winter 2011, Vol. 26, No. 2, 181-182.
[702] Ibid, 183.
[703] See, for instance, The Iranian Labour Code 1990, Division 3, <https://www.ilo.org/dyn/natlex/docs/WEBTEXT/21843/64830/E90IRN01.htm> accessed 18 April 2023.
[704] N 78.
[705] The Official UK Repository of Legislation, The National Archives on behalf of HM Government, <https://www.legislation.gov.uk/> accessed 9 November 2023.

hold the most accurate legal documents. Where such materials cannot be sourced, 'unofficial translations' of the law will be sought as an alternative measure. Websites such as that of the International Labour Organisation have some of these available for download, particularly as regards Civil Law jurisdictions. From this, the first round of comparators will be selected.

It is important to note, at this stage, the language barrier. This study will rely on a mixture of official and unofficial translations where an English language version of the relevant instrument is not available. Several jurisdictions will not require any translation[706] and it is known that others have official English Language translations available[707]. Where unofficial translations have to be relied upon, account will be taken of the fact that the precise legislative language may not be reflected in the instrument, particularly as regards the area of 'dismissal' as opposed to 'disciplinary' matters. A broader account will be taken of the legislative provisions as a whole by way of determining whether, indeed, such relevant rules are available here. Moreover, it is likely that some 'case law' decisions from jurisdictions adopting a civil mode of legal inquiry may be difficult to locate. This be the case, this should not be a severely limiting factor since, as stated from the outset, this study is concerned with whether there are legislative measures in place across other jurisdictions as opposed to whether or not the Courts themselves there have wrestled with the issues. Moreover, it is anticipated that judicial decisions will be more crucial as regards Common Law jurisdictions which are mainly English-speaking countries and, therefore, may be easier to locate. This being said, an effort will be made to source all and any relevant materials, judicial or otherwise for all the jurisdictions examined.

One factor to consider at this juncture is the potential for future research on account of this. At the very least, this study will examine the broad-strokes provisions of the laws of various jurisdictions as they relate to disciplinary matters. A future study may be successful in examining the precise legal language used in each case following an exact translation.

Another important dimension to consider is whether or not the jurisdictions enforce their rules in practice. If they do not, the validity of such rules may be undermined. Although any given set of rules should be textually sound, there should also be some evidence that they have been used successfully. To determine this, the jurisdiction's level of respect for and attitude towards the rule of law along with the extent to which Labour rights are protected in the jurisdictions will also have to be investigated. For practical purposes alone, it is at least desirable that there should be at least

[706] These are Australia, Canada, Ireland, New Zealand and Singapore.
[707] The French Code Du Travail is available in both English and French.

some legal culture of employee protection; without such a culture it may be that rules are difficult to come by or that they do not exist. It should be clarified that because a rule has not been enforced in the past that it lacks the potential to ever be enforced in the future or that because a jurisdiction has a poor record on enforcement that it's rules can never be enforced. It is decided, however, that a more persuasive approach is to firstly look at rules which are at least demonstrably effective rather than those which could be doubtful. Further research could be undertaken into such rules at a future date.

The first stage of this investigation will be to sift through the possible jurisdictions to remove any state which lays down no procedural rules for dismissal. It is to be assumed that, where a state makes no guarantee of rights in such circumstances, it will certainly make no guarantee in terms of individual disciplinary matters. The second stage will be to sift through the remaining jurisdictions with respect to the World Justice Project's 'Rule of Law Index' to remove those which make no effective guarantee of Labour Rights and those where there is evidence of weak enforcement. For the sake of triangulation and to cover any gaps, alternative data will then be sought from the World Bank's Rule of Law project and the results adjusted accordingly. Thereafter, a state-by-state assessment will be undertaken to investigate various matters relating to the way in which these jurisdictions approach the question of individual labour relations. For example, is there a wide-spread usage of works councils? Is there strong reliance on collective agreements? Following this exercise, the comparative jurisdictions will be selected.

3.10 Sampling Outcomes

The jurisdictions will now be sampled according to the overarching objectives previously outlined. Essentially, these objectives can be distilled, as follows:

1) The jurisdictions must have demonstrable respect for the rule of law in general and labour rights in particular;
2) The jurisdictions must share similar labour law architecture to England and Wales, ie. specialist labour Courts, no extensive state involvement in the process; and,
3) The jurisdictions must have at least some ascertainable labour regulation as regards matters of dismissal and disciplinary matters.

The overall starting point for this investigation will be the existing work of Cambridge University in the field of Labour Regulation, specifically, the work of Adams, Bishop and Deakin on the Labour Regulation Index of 117

countries[708]. This is a recent project which has multiple citations originating from a prestigious research institution which makes it an authoritative starting point.

This thesis relates to processes which could ultimately result in dismissal and, therefore, it makes no sense to perform an investigation of jurisdictions which have no laws in respect of this. On the Labour Regulation Index, one factor which jurisdictions are appraised in respect of, is 'procedural constraints on dismissal'[709]. On an initial review of the jurisdictions under this heading, it was found that 22 countries were listed as having '0' procedural constraints. These jurisdictions were removed from the available pool[710].

The remaining jurisdictions are in the table below:

Selected States
Afghanistan
Algeria
Angola
Argentina
Armenia
Australia
Azerbaijan
Belarus
Belgium
Bolivia
Botswana
Bulgaria
Cambodia
Cameroon

[708] N 78.
[709] Ibid, at p. 13.
[710] Austria, Bangladesh, Brazil, Chile, Colombia, Costa Rica, Ethiopia, Georgia, Honduras, Ivory Coast, Macedonia, Mali, Myanmar, Paraguay, Serbia, Sri Lanka, Switzerland, Taiwan, Thailand, USA, Uruguay, Venezuela.

Canada
China
Croatia
Cuba
Cyprus
Czech Republic
Democratic Republic of Congo
Denmark
Dominican Republic
Ecuador
Egypt
Estonia
Finland
France
Gabon
Germany
Ghana
Greece
Hungary
Iceland
India
Indonesia
Iran
Ireland
Israel
Italy
Japan
Jordan
Kazakhstan
Kenya

Korea
Kyrgyzstan
Latvia
Lesotho
Lithuania
Luxembourg
Malaysia
Malta
Mexico
Moldova
Mongolia
Montenegro
Morocco
Namibia
Netherlands
New Zealand
Nicaragua
Nigeria
Norway
Pakistan
Panama
Peru
Philippines
Poland
Portugal
Qatar
Romania
Russia
Rwanda
Saudi Arabia

Senegal
Singapore
Slovakia
Slovenia
South Africa
Spain
St Lucia
Sudan
Sweden
Syria
Tanzania
Tunisia
Turkey
Uganda
Ukraine
United Arab Emirates
Vietnam
Yemen
Zambia
Zimbabwe

Thereafter, it was then decided that the jurisdictions would be filtered further with reference to the *World Justice Project's Rule of Law Index* from 2020, in particular, the jurisdictions score on factors 4.8 – guarantee of Labour Rights[711] and 6.1[712] – effective regulatory enforcement including enforcement of labour rights.

The United Kingdom scored 0.65 for guarantee of Labour Rights and 0.76 for effective regulatory enforcement. It was decided that any

[711] World Justice Project, 'Fundamental Rights' < https://worldjusticeproject.org/rule-of-law-index/factors/2021/Fundamental%20Rights/. >Accessed 19 April 2023.
[712] World Justice Project, 'Regulatory Enforcement' <https://worldjusticeproject.org/rule-of-law-index/factors/2021/Regulatory%20Enforcement/. >Accessed 19 April 2023.

jurisdiction scoring within the range of less than 0.10 of these scores would be removed. Jurisdictions which are within 0.10 of the United Kingdom's score are arguably within the same range.

The jurisdictions within both of these parameters were found to be:

Australia, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Japan, the Netherlands, New Zealand, Norway, Portugal, Singapore, Slovenia, Sweden and Spain.

The jurisdictions within the Labour Rights parameter, but not Regulatory enforcement were:

Algeria, Argentina, Botswana, Croatia, Dominican Republic, Ecuador, Ghana, Greece, Hungary, Indonesia, Italy, Kenya, South Korea, Kyrgyrstan, Malaysia, Morocco, Namibia, Panama, Poland, Romania, Russia, Rwanda, Senegal, South Africa, Tanzania, Ukraine, Vietnam.

Therefore, the jurisdictions that fell within neither of these categories were Afghanistan, Angola, Bolivia, Cambodia, Cameroon, China, Democratic Republic of Congo, Egypt, India, Iran, Jordan, Kazakhstan, Mexico, Moldova, Mongolia, Nicaragua, Nigeria, Pakistan, Peru, The Philipines, Tunisia, Turkey, Uganda, Zambia and Zimbabwe.

Data was not available for Armenia, Azerbaijan, Cuba, Cyprus, Gabon, Iceland, the Republic of Ireland, Israel, Latvia, Lesotho, Lithuania, Luxembourg, Montenegro, Qatar, Saudi Arabia, Slovakia, Sudan, Syria and Yemen.

For purposes of triangulation, and to plug the gaps in the data the World Justice Project did not cover, it was decided to inspect the World Bank Worldwide Governance Indicators for the Rule of Law and Regulatory Quality. The United Kingdom had a percentile rank of 93.75 for Regulatory Quality and 91.35 for the Rule of Law[713]. This was based on the available data from the 2019 Report.

As with the World Justice Project, it was decided that jurisdictions that come within 10 points of the UK's percentile would make valid comparators for the same reason as before.

Following the cross-referencing procedure, it was found that all of the jurisdictions which came within 10 points of the UK for the World Justice

[713] The World Bank, 'Worldwide Governance Indicators', <https://info.worldbank.org/governance/wgi/Home/Reports- > accessed 19 April 2023.

Project factors also came within 10 points of the UK's percentile in respect of the most relevant World Bank Governance Indicators. The only exception was Spain – narrowly missing out by 2 percentage points in the Rule of Law percentile Rank. This was not considered a significant enough deviation to drop it from the list of comparators, however, given its standings in the other areas.

Furthermore, the World Bank indicators provided data on all of the states that were not covered by the World Justice Project. Of these, Iceland, Ireland, Israel and Luxembourg scored close to the UK and, for this reason, are considered valid comparators at this stage in proceedings. The overall outcomes of this exercise can be seen in the table below:

State	**WJP Rule of Law Index** Score for 4.8 - Labour Rights	**WJP Rule of Law Index** Score for 6.1 – Effective Regulatory Enforcement	**World Bank Worldwide Governance Indicator** – Rule of Law Percentile Rank	**World Bank Worldwide Governance Indicator-** Regulatory Quality Percentile Rank
United Kingdom	0.65	0.76	91.35	93.75
Afghanistan	0.41	0.34	4.33	10.10
Algeria	0.58	0.42	20.67	7.69
Angola	0.41	0.41	13.46	16.35
Argentina	0.65	0.47	37.02	33.65
Armenia	N/A	N/A	49.04	63.46
Australia	0.72	0.71	93.27	98.56
Azerbaijan	N/A	N/A	30.29	43.75
Belarus	0.46	0.64	21.63	32.21
Belgium	0.81	0.74	88.46	87.50
Bolivia	0.53	0.46	11.06	12.50
Botswana	0.58	0.56	69.23	65.87
Bulgaria	0.63	0.66	54.81	71.15

Cambodia	0.49	0.24	17.79	30.29
Cameroon	0.46	0.42	11.54	19.23
Canada	0.73	0.76	94.71	95.67
China	0.31	0.51	45.19	42.79
Croatia	0.69	0.61	64.90	72.12
Cuba	N/A	N/A	43.27	5.77
Cyprus	N/A	N/A	76.44	80.77
Czech Republic	0.74	0.73	81.73	86.54
Democratic Republic of Congo	0.50	0.34	2.40	5.29
Denmark	0.95	0.86	98.08	92.31
Dominican Republic	0.59	0.40	41.83	52.40
Ecuador	0.57	0.52	29.81	19.71
Egypt	0.42	0.46	37.98	18.75
Estonia	0.67	0.83	87.02	92.79
Finland	0.87	0.83	100.00	97.60
France	0.79	0.71	89.42	90.87
Gabon	N/A	N/A	24.52	14.42
Germany	0.85	0.78	92.31	96.15
Ghana	0.53	0.47	55.29	50.48
Greece	0.55	0.63	60.58	70.67
Hungary	0.64	0.54	68.27	72.60
Iceland	N/A	N/A	95.19	89.90
India	0.50	0.41	52.40	48.56
Indonesia	0.61	0.56	42.31	51.44
Iran	0.24	0.35	24.04	6.73
Ireland	N/A	N/A	88.84	93.27
Israel	N/A	N/A	82.21	87.02

Italy	0.58	0.61	61.54	76.92
Japan	0.77	0.72	90.38	88.46
Jordan	0.50	0.46	58.17	57.21
Kazakhstan	0.51	0.60	36.06	61.06
Kenya	0.55	0.44	35.58	41.35
Korea	0.60	0.57	86.06	82.21
Kyrgyzstan	0.55	0.51	19.23	38.46
Latvia	N/A	N/A	80.77	83.65
Lesotho	N/A	N/A	40.38	33.17
Lithuania	N/A	N/A	81.25	83.17
Luxembourg	N/A	N/A	95.67	95.19
Malaysia	0.63	0.52	73.08	73.56
Malta	N/A	N/A	79.81	77.40
Mexico	0.50	0.53	27.40	59.62
Moldova	0.48	0.54	40.87	55.77
Mongolia	0.53	0.57	45.67	53.85
Montenegro	N/A	N/A	57.21	65.38
Morocco	0.58	0.54	48.56	46.15
Namibia	0.62	0.48	62.50	50.96
Netherlands	0.82	0.77	96.15	98.08
New Zealand	0.75	0.78	97.50	99.04
Nicaragua	0.48	0.43	9.62	25.00
Nigeria	0.51	0.40	18.75	17.79
Norway	0.92	0.84	99.52	97.12
Pakistan	0.31	0.41	26.44	27.40
Panama	0.68	0.48	50.48	64.90
Peru	0.49	0.51	33.17	71.63
Philippines	0.43	0.48	34.13	55.29
Poland	0.68	0.63	66.35	81.25

Portugal	0.69	0.63	84.62	77.88
Qatar	N/A	N/A	75.48	74.04
Romania	0.75	0.59	64.42	67.31
Russia	0.57	0.55	25.00	36.06
Rwanda	0.76	0.57	56.25	58.17
Saudi Arabia	N/A	N/A	58.65	51.92
Senegal	0.66	0.54	47.12	50.00
Singapore	0.73	0.83	96.63	100.00
Slovakia	N/A	N/A	71.15	79.81
Slovenia	0.77	0.71	84.13	80.29
South Africa	0.66	0.44	50.96	61.54
Spain	0.74	0.67	80.29	81.73
St Lucia	0.69	0.51	71.63	62.98
Sudan	N/A	N/A	10.58	3.85
Sweden	0.77	0.78	98.56	96.63
Syria	N/A	N/A	0.96	3.37
Tanzania	0.55	0.57	29.33	27.88
Tunisia	0.52	0.52	55.77	35.58
Turkey	0.39	0.40	44.71	54.81
Uganda	0.39	0.38	43.75	37.98
Ukraine	0.66	0.43	25.48	42.31
United Arab Emirates	0.45	0.65	77.88	78.37
Vietnam	0.61	0.59	53.37	41.83
Yemen	N/A	N/A	2.88	4.33
Zambia	0.46	0.49	35.10	31.25
Zimbabwe	0.47	0.43	8.17	6.25

Following this exercise, the selected and validated 23 States for comparison at this stage are:

Australia, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Japan, Iceland, Ireland, Israel, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Singapore, Slovenia, Sweden and Spain.

It was then decided to group these remaining jurisdictions with reference to their classification of legal system:

Jurisdiction	**Legal Origin (La Porta, et al 1998)**	**Legal Grouping (Siems, 2014)**
United Kingdom	English Legal Origin	Modern European Legal Culture
Australia	English Legal Origin	Global Anglosphere
Belgium	French Legal Origin	Modern European Legal Culture
Bulgaria	*Socialist Legal Origin*	Modern European Legal Culture
Canada	English Legal Origin	Global Anglosphere
Czech Republic	*Socialist Legal Origin*	Modern European Legal Culture
Denmark	Scandinavian Legal Origin	Modern European Legal Culture
Estonia	*Socialist Legal Origin*	Modern European Legal Culture
Finland	Scandinavian Legal Origin	Modern European Legal Culture
France	French Legal Origin	Modern European Legal Culture
Germany	German Legal Origin	Modern European Legal Culture
Japan	German Legal Origin	Modern European Legal Culture

Iceland	Scandinavian?	Modern European Legal Culture
Ireland	English Legal Origin	Modern European Legal Culture
Israel	English Legal Origin	N/A
Luxembourg	French?	Modern European Legal Culture
The Netherlands	French Legal Origin	Modern European Legal Culture
New Zealand	English Legal Origin	Global Anglosphere
Norway	Scandinavian Legal Origin	Modern European Legal Culture
Portugal	French Legal Origin	Modern European Legal Culture
Singapore	English Legal Origin	Global Anglosphere
Slovenia	*Socialist Legal Origin*	Modern European Legal Culture
Sweden	Scandinavian Legal Origin	Modern European Legal Culture
Spain	French Legal Origin	Modern European Legal Culture

4.4 Sampling outcomes

Consequently, the results for this sampling are and the jurisdictions can be grouped as follows following the 'La Porta' model:

English Legal Origin
Australia
Canada
Ireland
Israel
New Zealand
Singapore

French Legal Origin
Belgium
France
Luxembourg
The Netherlands
Portugal
Spain

German Legal Origin
Germany

Japan

Socialist Legal Origin
Bulgaria
Czech Republic
Estonia
Slovenia

Scandinavian Legal Origin
Denmark
Finland
Iceland
Norway
Sweden

Following the Siems model:

Global Anglosphere
Australia
Canada
New Zealand
Singapore

Modern European Legal Culture

Belgium
Bulgaria
Czech Republic
Denmark
Estonia
Finland
France
Germany
Japan
Iceland
Ireland
Luxembourg
Netherlands
Norway
Portugal
Slovenia
Sweden
Spain

Of the initial states selected, a more in-depth examination of each jurisdiction's internal Employment Law mechanisms will be undertaken. Following this a decision will be reached on the final jurisdictions to be compared. This decision will be on the merits of each jurisdiction, with the overriding concern being whether or not the comparison would be meaningful within the scope of this thesis and whether or not domestic legislators could take inspiration. Questions will be framed as to ensure a significant degree of similarity with English Law and will be drawn from. Going back to the overall objectives for the comparative exercise, the key question at this stage was:

How other comparable jurisdictions approach this problem?

Whilst this study is comfortable with inter-typal comparisons, the jurisdictions compared should be similar to some extent – at least in terms of the overall

labour law enforcement structure and, to a certain degree, their attitude towards employee protection. The next phase of the sampling exercise, therefore, will examine the above jurisdictions in more detail to find whether or not there are any significant differences which make them unsuitable for comparison, regardless of typology or classification.

Questions to be evaluated are:

1) **Does the jurisdiction have specialist labour Courts akin to the Employment Tribunals in the UK?**

If the answer to this question is 'yes', findings from this jurisdiction may be more transferrable to the domestic situation given the similarity of overall structure and the inherent dynamic between the legal and commercial architecture.

2) **Does the jurisdiction make provisions for 'Works Councils' or other bodies and, if so, are these bodies involved in assessing the fairness of any dismissal or ensuring that procedural safeguards are upheld?**

Jurisdictions with heavy works council involvement may use different procedures for investigating misconduct and disciplinary dismissal. This being said, any procedural rules may be of interest regardless of the entity responsible for their establishment.

3) **Does the jurisdiction have a high level of collective bargaining coverage amongst workers?**

Jurisdictions whereby labour relationships are governed under the terms of a collective bargaining agreement may not have any codified or otherwise substantive rules on disciplinary matters as these may be contained within collective agreements - unless it can be shown otherwise.

4) **Does the jurisdiction have specific unfair dismissal legislation?**

This question may have already been answered with respect to the Cambridge formula, however, it is still prudent to check this before beginning a comparison.

5) **Does the jurisdiction allow for accompaniment at disciplinary and investigatory hearings?**

If the answer to this question is 'yes' it may indicate at least a similar level of development in terms of the investigatory and disciplinary processes of the jurisdiction.

Final Filtration

Following the more in-depth assessment of the jurisdictions (See Appendix 1) it was decided that the following jurisdictions would be retained for the following reasons:

Australia

Legal instruments available for study on right to be accompanied in the form of the Fair Work Act and case law provisions.

Canada

Legal instruments available including specific labour legislation and case law provisions available.

Estonia

Legal instruments available and disciplinary matters are specifically legislated for.

Finland

Legal instruments available for study.

France

Legal instruments available for study including the comprehensive Code du Travail.

Germany

Legal instruments available for study.

Ireland

Legal Instruments available for study and specific provision made for disciplinary cases.

New Zealand

Legal instruments and case law available for study.

Portugal

Legal instruments available for study.

Singapore

Legal instruments and case law available.

Slovenia

Legal instruments available for study.

Spain

Legal instruments available for study.

It was decided that the jurisdictions of Belgium, Denmark, Iceland, Israel, Luxembourg, Netherlands, Norway, Sweden, Bulgaria, Czech Republic and Japan would be rejected. Firstly, the jurisdictions already selected represent a fair cross-section of the range of legal systems and models as previously discussed. Secondly, it is preferable that a smaller number of jurisdictions are examined in more depth as opposed to a larger number in a more superficial style. Whilst it is not the prerogative of this thesis to examine all available jurisdictions, merely enough to constitute a representative sample of the different legal classifications explored, a much larger study could be undertaken in future to look at a wider range of jurisdictions similar to the

Cambridge study[714]. Thirdly, during the course of this research, it has transpired that the rules in some jurisdictions have presented as more difficult to locate than others. For the sake of convenience it was felt that this was a justified step.

Retained Jurisdictions Under Models

The remaining jurisdictions are presented below under the following models:

Siems model

Modern European Legal Culture
Estonia
Finland
France
Germany
Ireland
Portugal
Slovenia
Spain

Global Anglosphere
Australia
Canada
New Zealand
Singapore

[714] N 78.

Following the 'La Porta' model

English Legal Origin
Australia
Canada
Ireland
New Zealand
Singapore

French Legal Origin
France
Portugal
Spain

German Legal Origin
Germany

Socialist Legal Origin
Estonia
Slovenia

Scandinavian Legal Origin
Finland

Civil versus Common Law

Civil Law
Estonia
Finland
France
Germany
Portugal
Slovenia
Spain

Common Law
Australia
Canada
Ireland
New Zealand
Singapore

Following the final filtration exercise underpinned by the workings as shown in Appendix 1, the above jurisdictions remain. On the basis of the comparative models referenced above, there appears to be a balanced and representative sample of jurisdictions from across the world. This will be valuable for formulating conclusions on a model of best practice.

3.12 Summary

In this chapter, the justification for the jurisdictions chosen was put forward and a filtration exercise carried out on the basis of these objectives. Beginning with the overall respect for the rule of law and presence of enforceable labour rules, jurisdictions were chosen which approximated the United Kingdom to a close degree. This was followed by further reducing the amount of jurisdictions again with reference to the presence of appropriate legislation and overarching labour law architecture. This was followed by a further examination of the jurisdictions to determine both the overarching legal culture as regards the provision of individual labour rights. Those heavily reliant on collective bargaining at this stage were identified and removed at this stage, being unlikely to disclose any meaningful statutory employment rights as were those where no comparable instruments were available.

The jurisdictions were then grouped into various sub-classifications to determine the extent to which a fair representation of the different legal-sub groups as defined by various theorists was present. At this stage it was felt that the jurisdictions which remain following this process present a robust and diverse collection of comparators from which sensible observations can be drawn. Some of the jurisdictions are quite different whereas others are quite similar. All share commonalities insofar as that they have been chosen on the basis of the preceding factors. The diversity of this selection is also a key strength as regards the arguments for and against the comparison of similar / different systems along the lines of the Ancel / Gutteridge debate. Those who argue against comparing similar or different jurisdictions will find both in this study.

Alongside the diversity of systems selected, another strength of this sampling exercise is the relative geographic diversity of systems chosen with a range of jurisdictions across the world being examined. As mentioned previously it was a priority from the outset to choose jurisdictions which had strong enforcement records and a demonstrable respect for the rule of law so as to lend credibility to the results. As a result of this, it is regrettable that this excluded some jurisdictions from South America and Africa which could have made for an interesting study but this was not possible if research integrity was to be maintained. However, in the interests of expediency and practicalities, an examination of all the world's legal systems would be

excessively time-consuming and cumbersome. Such a study would be more properly within the remit of the International Labour Organisation or a related NGO.

Chapter 4 – Findings

In this chapter the rules in the different jurisdictions will be extrapolated, compared and contrasted with each other. Once the rules have been extrapolated and examined, they will be compared by respective groupings – the Siems model, followed by the La Porta Model and the Legal Families model to inspect the emerging themes, if any, from these groupings. From these findings, a 'best practice' model will be drawn up with respect to disciplinary matters for the UK Legislator to examine and draw upon. This will initially take the form of a 'state-by-state' examination following which general themes will be identified from the groupings followed by a modelling exercise.

Firstly, the legislation and any available case law /precedents will be recorded and laid out on a state-by-state basis. Similar to the Cambridge Regulatory Index[715], the degrees of protection / overall perceived strength of the rule will be afforded a numerical value of between 1 and 9. This will assist with formulating a general overview and for determining the existence- if any- of patterns between the jurisdictions.

The thesis will now score the jurisdictions based on the perceived provision of procedural fairness rights at hearings so that the groupings can be compared with each other in terms of overall strength of the rules in each grouping. Following this, the thesis will look at the rules individually within each jurisdiction. After this, the overall findings will be considered.

4.1 Scoring and Country Overview

The selected jurisdictions were interrogated along the lines of the research questions previously outlined. Common Law jurisdictions appeared to follow a 'standards' based approach- often with no explicit provision to disciplinary matters themselves and more substantial as regards dismissal- whilst Civil Law jurisdictions maintained a more prominent 'rules based' approach. Some jurisdicitons were a notable exception – Germany, for example, was one

[715] N 78.

such jurisdiction which did not provide any or any extensive rules for disciplinary matters.

Each jurisdiction was scored between 0 and 1 by means of whether or not they completely fulfilled, partially fulfilled or did not fulfil at all the requirements of the particular question asked. This was accompanied by an explanation as to why the jurisdiction received such a score. Below, the findings from each jurisdiction in turn will be discussed in addition to these findings being presented in tabular format. There will be a summary presented of the overall picture for each jurisdicition followed by an assessment of each of the data points in turn as they were used in interrogation.

What follows is an overview of the legal positions as regards key dimensions of the research questions as posed. The precise legal instruments referred to will be set out in a table on the following pages.

Australia

In Australia procedural rules were codified insofar as they were required for dismissal hearings – and, in particular, a specific right to be heard was conferred upon employees in this regard- but nothing was apparent as regards disciplinary matters which fell short of a possible sanction of dismissal. There were found to be case law provisions in respect of disciplinary matters, however. It was also found that there was a right to be notified of charged misconduct in relation to dismissal matters in particular. There was, as in UK Law, an established 'right to accompaniment' at hearings with a 'support person' being authorised although the rights of such an individual were not overly clear as borne out by the case law. There was also no general right to legal representation either, similar to UK Law. Overall, the position in Australia was similar to that of the UK in many respects.

Canada

In Canada, there did not seem to be any codified procedural rules relating to dismissal or disciplinary matters but there was extensive public sector guidance on best practice for such matters. There were no provisions regarding notice of misconduct but there was a clear right to accompaniment present in the case law owing to the practice of following the US Law in this area. Similar to other common law jurisdictions, the rights of a companion did not extend to a 'full representation'. Similar to the UK and Australian experiences, there were significant discrepancies between the rights of public sector and private sector workers at disciplinary hearings. The position in Canada was in line with other Common Law jurisdictions overall,

with emphasis placed on accompaniment rather than any rules or standards concerning the hearing itself being propagated.

Ireland

Ireland appeared to offer the most protective regime amongst the common law jurisdictions examined. There was explicit codification of procedural rules set forth by statutory instrument which covered various dimensions of natural justice or procedural fairness rights as outlined, with the right to be heard and the right to representation both being protected. Moreover, the levels of penalty that can be levied are also specified. Significantly, it also seems that these rules apply to both private and public sector employees. Of all the Common Law jurisdictions examined, Ireland was the one that appeared to take the most 'rules- based' as opposed to 'standards based' approach to the problem. Whether or not such an approach would fare well across all the other common law jurisdictions is questionable as outlined later on in the thesis. However, it is interesting to see that an intensely protective regime operates among countries of a Common Law disposition. Moreover, it is the only Common Law regime which explicitly offers rights over and above that of accompaniment at hearings other than those where dismissal could be the ultimate sanction.

Estonia

Like many other former 'Eastern Bloc' jurisdictions, Estonia has some evidence of protection for employees which goes beyond dismissal hearings; the employee is given the right to be heard under the provision of a specific Act. Other areas of protection are weaker, however - there is no specific right to accompaniment provided for. However, there are other provisions which could offer significant safeguards for employees, such as the requirement that sanctions for disciplinary offences be 'proportionate' and, further, that time limits regarding expiry of any warnings given are also laid down in statute. Regarding the public/private sector divide, there is an additional Act which covers public sector workers but this appears to be in addition to the minimum baseline protections offered to all employees as detailed above.

Finland

Similar to the Common Law jurisdictions referred to, Finland provides rights in respect of hearings relating to dismissal but appears silent as regards disciplinary matters more generally. The right to accompaniment extends to dismissal hearings but is not present, at least on a statutory footing, as regards disciplinary matters. Moreover, there are no provisions regarding the

form of warnings, the level of sanction to be imposed and the rights of a companion at dismissal hearings is not specified. There may also be a difference between private and public sector employees as Civil Servants are provided for under a separate regime. Overall, the picture in Finland was not consistent with the received image of Civil Law systems providing a prescriptive rules-based approach for such matters, appearing more in a similar guise to Germany where there appears to be no legislated provisions in respect of such matters. In theory, this may be due to higher incidences of collective bargaining within these jurisdictions whereby collective agreements may be assumed to cover the details of disciplinary procedures and investigations as is often the case in domestic agreements of this nature.

France

France presented a very strong picture overall of employee protection with procedural rules codified for disciplinary matters and employees being availed of the raft of rights outlined previously such as accompaniment and the right to be notified of the misconduct charged. There is also the requirement that any sanction imposed be not disproportionate leaving it open to challenge should the employee feel any 'punishment' was too harsh. There is also the presence of time-limits on warnings making the reliance on those over 3 years old effectively 'statute barred' as regards future proceedings. Moreover, such rules appeared to apply without discrimination between both public and private sector employees with these provisions forming a minimum baseline for all rather than catering for one class of employee over another.

Germany

There was no codification in respect of procedural rules on dismissal in Germany, in spite of being a jurisdiction known for strong Employment Laws. Unlike the common law jurisdictions there was no prescribed right to accompaniment except in the vaguest sense as regards 'administrative decisions' generally, which could mean decisions other than those pertaining to a disciplinary sanction or dismissal scenario. It should be borne in mind that although Germany has specialist labour Courts like the UK, there are some significant differences which may make it a less attractive jurisdiction for comparison, in particular, there is the fact that there is judicial involvement in dismissals and they operate a Works Council system. There is also extensive collective bargaining coverage of Germany unlike the UK. This being written, it is interesting from a research perspective to observe the absence of rules in certain jurisdictions as this could be a potentially serious lacunae which the ILO should consider as regards future recommendations.

New Zealand

New Zealand's position was similar to that of Australia insofar as there is a right to be heard in dismissal situations granted by statute but nothing explicit provided as regards hearings short of dismissal. The position is laid down by both statute and case law with the right to be accompanied being more strongly catered for -as appears typical in Common Law jurisdictions – than other individual procedural rights. Unlike other jurisdictions, however, rules regarding companions are much more flexible in their scope with arguably stronger rights of representation. The public/private divide seems evident here as elsewhere in the common law world too. On the continuum of Common Law Jurisdictions, it would appear that New Zealand would rank below Ireland but ahead of the others in respect of the degree of employee protection offered.

Portugal

Portuguese legislation respects the right to be heard in disciplinary matters and also prescribes limitations on the levels of penalty that can be levied at the conclusion of a given hearing but does not include any provisions regarding the right to be accompanied to such hearings. This absence of accompaniment rights is a common theme emerging from Civil Jurisdictions and may be of some significance.

Singapore

It is unclear as to the extent to which Singapore's procedural rules apply to disciplinary matters, but it is crucial that an employer undertake what is referred to in the legislation as 'due inquiry' before a decision to dismiss is taken. This rule implicitly applies to disciplinary matters since the legislation also prescribes penalties for breaches of the rules. The existing case law in the area refers only to dismissal matters rather than disciplinary hearings in any express sense but there is 'soft' guidance on the Ministry of Manpower website which states that employees should have the right to be notified. There is a difference here between Singapore and the other Common Law jurisdictions insofar as penalties are prescribed and there is, apparently, no express right to be accompanied. This would place Singapore in an outlying position along with the Republic of Ireland in so far as neither jurisdiction follows the apparent orthodoxy within this system.

Slovenia

As with other states of the former Soviet Union- and in common with other civil law jurisdictions generally – there are codified procedural rules on the right to be heard in disciplinary matters along with a codified right to notification of disciplinary charges. As with other jurisdictions of this type there is no express right to accompaniment but the trade union has the right to give an opinion on matters decided *ante*. There is also a partial codification of the levels of penalty that can be levied following disciplinary decisions.

Spain

In keeping with other civil jurisdictions, Spain has some codified rules in this area with written notification being a requirement for 'serious' offences but the law is largely silent on a range of other matters such as the right to accompaniment. It may be the case that the rest of these measures are assumed to be covered by collective agreement.

Instrumental Breakdown by Jurisdiction

Australia

Are procedural rules codified? 0.5

Partially.

Procedural factors are set out in relation to dismissal hearings under s387 of the Fair Work Act[716]. The Right to be heard in dismissal hearings is guaranteed by s387 (c) "whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person" can be taken into account when determining whether or not the dismissal process was fair or not.

There are no equivalent statutory provisions regarding disciplinary processes /workplace investigations although, similar to England and Wales, there are provisions within case law.

Do Employees have the right to notice of the charged misconduct? 0.5

[716] Fair Work Act 2009 (Australia) online at https://www.legislation.gov.au/Details/C2009A00028 accessed 19 April 2023.

For dismissal hearings under s387(b) Fair Work Act there is a right to be notified. No guidance is given on how much notice is deemed sufficient.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used? 0.5.

Fair Work Commission Bench Book on Unfair Dismissal[717] contains limited guidance on workplace investigations which contains guidance on procedural fairness at such hearings.

Is there a right to accompaniment? 1

Yes.

s. 387(d) of the Fair Work Act of 2009 gives the right to a 'support person'.

What are the rights of a companion at hearings? 0.5.

Partial representation.

As regards the role of the support person, the case of Gomes v Qantas Airways Ltd[718] is instructive:

> *'The Act allows a person the subject of investigation and interview to have a support person to "assist in any discussion". A support person cannot assist if they are refused permission to speak. Although there is a fine line between assisting a colleague and advocating for a colleague which must be considered, a support person must, at the very least, be able to speak for and on behalf of the person they are supporting when providing assistance.'*

There exists no general right to legal representation[719] at investigatory meetings.

Do workplace rules have to be brought to the attention of the employee? 0.5.

No.

[717] Fair Work Commission, 'Unfair Dismissals Benchbook' online at <https://www.fwc.gov.au/benchbook/unfair-dismissals-benchbook> accessed 19 April 2023.
[718] [2014] FWC 3432, 72.
[719] (2015) 80 AIAL Forum, 82.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction? 0.

No.

Are there any time limits specified for the expiration of warnings or penalties levied? 0.

No.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters? 0.

Yes [720].

Canada

Are procedural rules codified? 0.

No.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used? 0.5.

Yes[721] - states that all sides should be heard. Useful guidance including flow-charts and plain-language suggestions.

Do Employees have the right to notice of the charged misconduct? 0.

Not clear.

Is there a right to accompaniment? 1.

Follows US case of *Weingarten*[722].

[720] Adriana Orifici "Unsystematic and Unsettled: A Map of the Legal Dimensions of Workplace Investigations in Australia" [2019] UNSWLawJl 38; in vol. 42(3), UNSW Law Journal, 1075.
[721]Government of Canada, 'Labour Standards- 'Progressive Discipline', <https://www.canada.ca/content/dam/esdc-edsc/documents/services/labour-standards/reports/discipline/Progressive_Discipline.pdf > 19 April 2023.
[722] William Johnson QC 'Labour and Employment Law: Be Careful What You Wish For', an examination of practical workplace issues commissioned by the Canadian Bar Association at the 12th Annual National Administrative Law and Labour and Employment Law Conference November 25 – 26 2011, Part 2, 1 <http://www.cba.org/cba/cle/PDF/ADM11_johnson_paper.pdf> accessed 27 February 2022.

A failure to allow Union Representation can lead to disciplinary findings being rendered void[723] .

What are the rights of a companion at hearings? 0.5.

Does not extend to full representation[724].

Do workplace rules have to be brought to the attention of the employee?

No.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction?

No.

Are there any time limits specified for the expiration of warnings or penalties levied?

No.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

Yes[725].

Ireland

Are procedural rules codified? 1.

In the form of guidelines propagated by Statutory Instrument- The Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000[726]

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used?

[723] *Flamboro Downs Ltd*. (2010) 194 L.A.C. (4th) 416.
[724] N 738.
[725] Government of Canada, 'Guidelines for Discipline', <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=22370>
Accessed 19 April 2023.

[726] Government of the Republic of Ireland, Irish Statute Book, <https://www.irishstatutebook.ie/eli/2000/si/146/made/en/print > accessed 19 April 2023.

N/A.

Do Employees have the right to notice of the charged misconduct? 1.

Yes under the guidelines which are supported by statute- "6 That the employee concerned is given the opportunity to respond fully to any such allegations or complaints;".

Is there a right to accompaniment? 1.

Yes under the SI guidance: "That the employee concerned is given the opportunity to avail of the right to be represented during the procedure".

What are the rights of a companion at hearings? 1.

'Representation' as stated in the Order.

Do workplace rules have to be brought to the attention of the employee? 0.5.

The Order states at para 9 that consequences of departure from the rules should be brought to the employee's attention but there appears to be no requirement that workplace rules are brought to the attention of the employee.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction? 1.
Yes – paragraph 10.

Are there any time limits specified for the expiration of warnings or penalties levied? 0.

No.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters? 0.

Unknown.

Estonia

Are procedural rules codified? 1.

Yes – s. 7 of the Employee Disciplinary Liability Act 1993[727] gives the right to be heard.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used?

N/A.

Do Employees have the right to notice of the charged misconduct? 0.5.

Implied within the Act but not explicit.

Is there a right to accompaniment?

Not specified.

What are the rights of a companion at hearings?

Not specified.

Do workplace rules have to be brought to the attention of the employee? 0.5.

Partially – s. 5(11) Employment Contracts Act 1992[728]- employment contract must contain 'a reference to the rules of work organisation established by the employer' and s. 28(7).

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction? 0.5.

Partially- required to be proportionate under s8 and provision made for level of 'fines' under s. 17.

Are there any time limits specified for the expiration of warnings or penalties levied? 1.

Yes – s. 13.

[727] Employees Disciplinary Liability Act 1993 (Estonia), Riigi Teataja (Government of Estonia) website https://www.riigiteataja.ee/en/eli/510122013008/consolide accessed 19 April 2023.
[728] Employment Contracts Act 2008 (Estonia), Riigi Teataja (Government of Estonia), <https://www.riigiteataja.ee/en/eli/ee/509012015006/consolide/current > accessed 19 April 2023.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

Disciplinary Liability Act applies to both private and public sector employees.

Finland

Are procedural rules codified? 0.5.

Not for disciplinary matters but in respect of dismissal hearings there is a right to be heard Finnish Employment Contracts Act[729] Chapter 9 Section 2.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used? 0.

N/A.

Do Employees have the right to notice of the charged misconduct? 0.5.

Implied in respect of dismissal under Chapter 9. S.2.

Is there a right to accompaniment? 0.5.

Yes - in respect of dismissal hearings - Chapter 9, S. 2.

What are the rights of a companion at hearings?

Not prescribed.

Do workplace rules have to be brought to the attention of the employee?

No.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction?

No.

[729] Finnish Employment Contracts Act (Finland), Finlex English Translation, <https://www.finlex.fi/en/laki/kaannokset/2001/en20010055.pdf > accessed 19 April 2023.

Are there any time limits specified for the expiration of warnings or penalties levied?

No.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

Yes - State Civil Servants Act 1994[730] has different rules for Civil Servants.

France

Are procedural rules codified? 1.

Yes- Code du Travail L1332-2[731].

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used? 0.

N/A.

Do Employees have the right to notice of the charged misconduct? 1.

Yes - Code du Travail L1332-2[732].

Is there a right to accompaniment? 1.

Yes - Code du Travail L1332-2[733].

What are the rights of a companion at hearings?

Not prescribed.

Do workplace rules have to be brought to the attention of the employee?

No.

[730] Finnish Civil Service Act 1994/750 (Finland), Finlex Translation <https://www.finlex.fi/fi/laki/ajantasa/1994/19940750> accessed 19 April 2023.
[731] Government of France, 'Code Du Travail', <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000025560074/2022-03-02 >accessed 19 April 2023.
[732] Ibid.
[733] Ibid.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction? 1.

Sanctions must not be disproportionate under L1333-2[734].

Are there any time limits specified for the expiration of warnings or penalties levied? 1.

Yes, under Article L1332-5[735]- 'No sanction older than three years prior to the initiation of disciplinary proceedings may be invoked in support of a new sanction.'

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

Not apparent.

Germany

Are procedural rules codified?

No.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used? 0.

Not apparent.

Do Employees have the right to notice of the charged misconduct?

Not specified.

Is there a right to accompaniment? 0.5.

No but see Works Council / Judicial involvement in respect of dismissals -s102 Works Constitution Act[736] in respect of Employers with Works Councils / principle of co-determination in dismissal cases.

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[734] Government of France, 'Code Du Travail' <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072050/LEGISCTA000006177887/ > accessed 19 April 2023.
[735] N747 Above.
[736] Works Constitution Act (Germany), online at https://www.gesetze-im-internet.de/englisch_betrvg/ accessed 19 April 2023.

What are the rights of a companion at hearings?

Not specified in legislation but see s102 above.

Do workplace rules have to be brought to the attention of the employee?

Not specified.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction?

No.

Are there any time limits specified for the expiration of warnings or penalties levied?

No.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

Yes, in some instances Federal public service governed by arifvertrag für den öffentlichen Dienst der Länder, TV-L – the *'Collective Agreement for the Public Service of the Federal States'*[737]

New Zealand

Are procedural rules codified? 0.5.

No – Right to be heard implied through Employment Relations Act 2000[738] s236, also in respect of determining unfair dismissal under s103A (c) and case law: Food Processing IUOW v Unilever New Zealand Ltd.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used?

N/A.

Do Employees have the right to notice of the charged misconduct? 0.5.

[737] TDL, 'Collective Agreement for the Public Service of the Federal States' https://www.tdl-online.de/fileadmin/downloads/rechte_Navigation/A._TV-L__2011_/01_Tarifvertrag/TV-L__i.d.F._des_%C3%84TV_Nr._12_VT.pdf accessed 19 April 2023.
[738] Employment Relations Act 2000 (New Zealand), New Zealand Legislation <https://www.legislation.govt.nz/act/public/2000/0024/112.0/DLM58317.html> accessed 19 April 2023.

Implied but not statutory.

Is there a right to accompaniment? 1.

Yes, in matters of dismissal – but possibly also in respect of disciplinary matters Employment Relations Act 2000[739] s. 236:

(2) Where any Act to which this section applies confers on an employer the right to do anything or take any action—
(a)in respect of an employee; or
(b)in the Authority or the Court, that employer may choose any other person to represent that employer for the purpose.
(3) Any person purporting to represent any employee or employer must establish that person's authority for that representation."

What are the rights of a companion at hearings? 0.5.

As stated in *Air New Zealand Ltd v Hudson*[740]:

"*Such a person must be able to speak on behalf of an employee, to intervene in the process and to give explanations where necessary.*"

Do workplace rules have to be brought to the attention of the employee?

No.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction?

No.

Are there any time limits specified for the expiration of warnings or penalties levied?

No.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

Similar to UK / Australia.

[739] Ibid.
[740] [2006] ERNZ 415 (Emp C), 161.

Portugal

Are procedural rules codified? 1.

Yes – right to be heard contained in Article 329 (6) Labour Code[741] specifically referring to disciplinaries.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used?

N/A.

Do Employees have the right to notice of the charged misconduct? 0.5.

Not explicitly but implied.

Is there a right to accompaniment?

Not specified.

What are the rights of a companion at hearings?

Not Specified.

Do workplace rules have to be brought to the attention of the employee? 0.5.

Partially - Article 99.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction? 1.

Yes – Article 328.

Are there any time limits specified for the expiration of warnings or penalties levied?

Not clearly.

[741] Labour Code (Portugal) <https://files.dre.pt/diplomastraduzidos/7_2009_CodigoTrabalho_EN_publ.pdf > accessed 20 April 2023.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

Not specified.

Not specified.

Singapore

Are procedural rules codified? 0.5.

No – s.14(1) Employment Act 1968[742] states 'due inquiry' which has been the subject of interpretation in the case law.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used? 0.5.

General guidance given on website including the right to be notified but nothing statutory[743] – case law is the main source[744] but this is specifically concerned with dismissal rather than disciplinary matters more generally.

Do Employees have the right to notice of the charged misconduct?0.5

As part of 'due inquiry' and in line with the guidelines as above, yes.

Is there a right to accompaniment?

Not specified.

What are the rights of a companion at hearings?

Not specified.

Do workplace rules have to be brought to the attention of the employee?

No statutory provisions on this.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction? 0.5.

[742] Employment Act 1968 (Singapore), Singapore Statutes Online <https://sso.agc.gov.sg/Act/EmA1968> accessed 20 April 2023.
[743] Singapore Ministry of Manpower, 'Conducting an Inquiry' <https://www.mom.gov.sg/employment-practices/termination-of-employment/termination-due-to-misconduct#conducting-an-inquiry.> Accessed 20 April 2023.
[744] Long Kim Wing v LTX-Credence Singapore Pte Ltd [2017] SGHC 151.

Partially – after due inquiry-14(a) downgrade employee, 14(b) 1 weeks' suspension.

Are there any time limits specified for the expiration of warnings or penalties levied?

No.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

No indication

Slovenia

Are procedural rules codified? 1.

Yes – Article 177 of the Employment Relationships Act 2003[745] (1) – (3) gives the right to be heard in disciplinary hearings.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used?

Unknown.

Do Employees have the right to notice of the charged misconduct?1.

Yes – Article 177(1).

Is there a right to accompaniment? 0.5.

Not explicitly stated but trade unions must be permitted to give an opinion on the matter within 8 days if the worker requires under Article 179.

What are the rights of a companion at hearings?

N/A.

Do workplace rules have to be brought to the attention of the employee?

[745] Employment Relationships Act 2003 (Slovenia), Website of the International Court of Justice, online at https://www.icj.org/wp-content/uploads/2013/05/Slovenia-Employment-Relationships-Act-2003-eng.pdf accessed 20 April 2023.

No.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction? 0.5.

Partially – Article 178.

Are there any time limits specified for the expiration of warnings or penalties levied?

No.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

Not apparent.

Spain

Are procedural rules codified? 0.5.

To a degree - Article 58 of the Workers Statute 1980[746] on Faults and Sanctions of Workers requires written notification for serious offences. Seems reliant on collective agreements.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used?

Unknown.

Do Employees have the right to notice of the charged misconduct? 0.5.

Article 58(2) requires the notification of employees of serious misconduct but seemingly allows the rest to be dealt with via collective agreement.

Is there a right to accompaniment?

Not specified.

What are the rights of a companion at hearings?

[746] Workers Statute 1980 (Spain) Global Regulation <https://www.global-regulation.com/translation/spain/1490005/law-8-1980-of-10-march%252c-of-the-statute-of-workers.html> accessed 20 April 2023.

Not specified.

Do workplace rules have to be brought to the attention of the employee?

No.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction?

This is linked to the collective agreement in place.

Are there any time limits specified for the expiration of warnings or penalties levied? 1.

Yes – Article 60.

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters?

Not apparent.

England and Wales

Are procedural rules codified? 0.5.

No- non-binding ACAS Code of Conduct exists though.

Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used? 1

ACAS

Do Employees have the right to notice of the charged misconduct? 0.5

In case law this is expressed in respect of dismissal hearings but not specifically in respect of disciplinary hearings

Is there a right to accompaniment? 1

Yes – s10 Employment Relations Act 1999 provides for this right in respect of disciplinary and grievance matters

What are the rights of a companion at hearings? 1

The companion must be able to:

"(a)address the hearing in order to do any or all of the following—
(i)put the worker's case;
(ii)sum up that case;
(iii)respond on the worker's behalf to any view expressed at the hearing;
(b)confer with the worker during the hearing."

But the companion does not have the right to:

"(a)answer questions on behalf of the worker;
(b)address the hearing if the worker indicates at it that he does not wish his companion to do so;"

Do workplace rules have to be brought to the attention of the employee? 1

S1 of the1996 Employment Rights Act states that employment particulars must be given to the employee which must contain reference to disciplinary rules or indicate where such rules can be found.

Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction? 0

No

Are there any time limits specified for the expiration of warnings or penalties levied? 0

No

Are there significant differences as regards the rights of private and public sector employees in respect of disciplinary matters? 0

Yes- public authorities must follow rules of natural justice and procedural fairness at all times whereas private sector employers do not.

4.2 Tabular Representation of initial core findings

Jurisdiction	Right to Be Heard	Right to be Accompanied	Penalties Specified	Rules Specified	Public / Private Sector division
England and Wales	**Not codified in respect of disciplinary matters but set out in part in relation to dismissal**	**Yes, s10 1996 Employment Rights Act**	**No**	**Partially**	**Yes**
Australia	Procedural factors set out in relation to dismissal hearings under s387 Fair Work Act	At dismissal hearings under s387(d)	No	No	Yes- Orifici, Adriana "Unsystematic and Unsettled: A Map of the Legal Dimensions of Workplace Investigations in Australia" [2019] UNSWLawJl 38;

					(2019) 42(3) UNSW Law Journal 1075
Canada	No specific legislation	Follows US case of *Weingarten*	No	No	Yes- https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=22370
Estonia	Yes – s7 of the Employee Disciplinary Liability Act 1993	Not specified	Partially - required to be proportionate under s8 and provision made for level of 'fines' under s17	Partially – s5(11) Employment Contracts Act 1992- employment contract must contain 'a reference to the rules of work organisation established by the employer' and s28(7)	Republic of Estonia Employment Contracts Act 1992 s7 in relation to certain classes of government worker states that different Act applies in relation to dismissal. Disciplinary Liability Act applies to both private and public sector employees
Finland	In respect of dismissal hearings there is a right to be heard Finnish Employment Contracts Act Chapter 9 Section 2	Yes- in respect of dismissal hearings- Chapter 9 Section 2	No	No	State Civil Servants Act 1994 has different rules for Civil Servants
France	Yes – Code du Travail L1332-2	Yes – Code du Travail L1332-2	Sanctions must not be disproportionate under L1333-2	No	Not apparent
Germany	No specific legislation	Works Council / Judicial involvement in respect of dismissals -s102 Works Constitution Act	No	No	Federal public service governed by arifvertrag für den öffentlichen Dienst der Länder, TV-L – collective agreement
Ireland	Not in legislation but see The	Yes – Code of Practice	In code of practice	No	Both appear to benefit from Code of

	Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000				Practice
New Zealand	Implied through Employment Relations Act 2000 s236, also in respect of determining unfair dismissal under s103A (c) and case law: Food Processing IUOW v Unilever New Zealand Ltd	Yes – Employment Relations Act 2000 s236	No	No	Similar to UK / Australia
Portugal	Yes – Article 329 (6) Labour Code	Not specified	Yes – Article 328	Not Mandatory – Art 99	Not Specified
Singapore	'due inquiry' as defined in case law- Long Kim Wing v LTX-Credence Singapore Pte Ltd [2017] SGHC 151- deriving from s14(1) of the Employment Act 1968 includes a right to be heard (para 139)	Not specified	Partially – after due inquiry-14(a) downgrade employee, 14(b) 1 weeks suspension	No	Unclear
Slovenia	Yes- Article 177 (1) – (3)	Partially – Trade Union must be notified of sanction and given the right to present a written opinon	Partially	No	Not specified
Spain	Article 58 of the Workers Statute 1980 on Faults and Sanctions of	Partially – Article 55(1) specifies that Trade Union must have	Limitation periods stipulated under Article 60	Article 94 (5) lists 'Not to inform the worker in writing	Not specified

	Workers requires written notification for serious offences. Also embodies	'prior hearing'		about the essential elements of the contract and the main conditions of execution of the labor service, in the terms and deadlines establishe d by regulation. ' As a 'minor infraction' on the part of the employer	

Final Scoring

On the basis of the above interrogation of the legal systems selected, the final scores can be revealed, as follows:

- Australia 3
- Canada 2
- Ireland 5.5
- Estonia 3.5
- Finland 1.5
- France 5
- Germany 0.5
- New Zealand 2.5

- Portugal 3
- Singapore 2
- Slovenia 3
- Spain 2
- England and Wales 5

Discussion

These numerical results show that the overall position in England and Wales does not appear to be particularly weak when compared to these other jurisdictions. This is an interesting finding at this stage since the thesis is predicated on the assumption that the England and Wales system is deficient in some regards. However, on the central question of a codified right to be heard it can be seen that other jurisdictions appear to have stronger provisions in this regard which is consistent with the initial assumption of this thesis.

4.4 Tabular Comparisons

On the basis of the initial scoring, the totals will now be displayed in the original groupings as previously discussed and examined in the context of their classifications. *Following the Siems Model:*

Modern European Legal Culture	***Score***
Estonia	*3.5*
Finland	*1.5*
France	*5*
Germany	*0.5*
Ireland	*5.5*
Portugal	*3*
Slovenia	*3*
Spain	*2*

Average= 3

Global Anglosphere	***Score***
Australia	*3*
Canada	*2*

New Zealand	*2.5*
Singapore	*2*

Average = 2.4

Following the 'La Porta' model:

English Legal Origin	***Score***
Australia	*3*
Canada	*2*
Ireland	*5.5*
New Zealand	*2.5*
Singapore	*2*

England and Wales *5*
Average = 3

French Legal Origin	***Score***
France	*5*
Portugal	3
Spain	2

Average = 3

German Legal Origin	***Score***
Germany	0.5

Average = 0.5

Socialist Legal Origin	***Score***
Estonia	3.5
Slovenia	*3*

Average = 3

Scandinavian Legal Origin	***Score***
Finland	1.5

Average = 1.5

What can be seen from the above is that where jurisdictions appear to rely more on collective bargaining their overall scores are lower. This makes logical sense as the well-founded assumption would be that disciplinary and investigatory matters would be covered by collective and operating agreements and, therefore, legislation would not need to cover such matters reflecting the legal culture of such jurisdictions.

Civil Law versus Common Law:

'Common Law' Tradition	**Score**
Australia	*3*
Canada	*2*
New Zealand	*2.5*
Singapore	*2*
Ireland	*5.5*
Average	**3**

England and Wales 5

'Civil Law' Tradition	**Score**
Estonia	3.5
Slovenia	*3*
Finland	1.5
Germany	0.5
France	*5*
Portugal	3
Spain	2
Average	**2.64**

England and Wales averaged at 5, which put it above most jurisdictions on the broader aspects of fairness. This is largely due to scoring consistently well

across the questions asked of the jurisdictions initially but as will be seen in later findings and modelling this is at the expense of the right to be heard itself which receives very poor legislative support in England and Wales with the right to be accompanied receiving more protection.

Siems Classification

As may have been anticipated, 'Modern European Legal Culture' jurisdictions- tending to lean more towards a codified 'civil law' approach scored higher overall in terms of the legislative rights in respect of such matters.

La Porta Classification

Under the La Porta model it was surprising to see French Legal Origin and English Legal Origin coming out at the same score but this is due to the strong rules in Ireland skewing the mark towards a higher overall one.

Another interesting observation under the La Porta Classification is that English, French and Socialist Legal Origin average out the same at '3', although it should be stressed that this is largely due to the high scores of France and Ireland pulling the averages up for both of these groups. Scandinavian Legal Origin and German Legal Origin are the lowest scoring but it should be noted that these have the least jurisdictions selected. The paucity of instruments available is likely to be due to the fact that many such rules in these jurisdictions are covered by collective agreements as opposed to legislation. For instance, in Finland 91% of the population in 2015 was covered by collective bargaining agreements and there was a 74% Trade Union membership[747]. In Germany in 2015 there was 62% Collective Bargaining Coverage and 16% Trade Union Membership[748] and works councils are heavily involved in matters relating to dismissal[749]. This can be contrasted with Estonia whereby only 33% of employees were covered by Collective Bargaining arrangements in 2015[750] but the position is similar to Slovenia which had 90% collective bargaining coverage and 27% Union membership in 2015[751]. This could explain why, out of the two Socialist Origin systems reviewed, that Estonia has a standalone specific enactment on disciplinary matters- the Employee Disciplinary Liability Act 1993- rather than

[747] Workerparticipation.eu, 'National Industrial Relations, Countries, Finland' <https://www.worker-participation.eu/national-industrial-relations/countries/finland> accessed 20 April 2023.
[748]Workerparticipation.eu, 'National Industrial Relations, Countries, Germany'<https://www.worker-participation.eu/national-industrial-relations/countries/germany> accessed 20 April 2023.
[749] Ibid.
[750] Workerparticipation.eu, 'National Industrial Relations, Countries, Estonia' <https://www.worker-participation.eu/national-industrial-relations/countries/estonia> accessed 20 April 2023.
[751] Workerparticipation.eu, 'National Industrial Relations, Countries, Slovenia' <https://www.worker-participation.eu/national-industrial-relations/countries/slovenia> accessed 20 April 2023.

leaving such matters to be determined by collective agreement. This may possibly explain the position of Ireland which had 44% collective bargaining coverage and 31% of employees unionised as of 2015[752]. France cuts against the grain in this respect, however, since as of 2015 it had a 98% collective bargaining coverage[753] and has some of the strongest rules on disciplinary matters out of all the jurisdictions observed.

Common Law versus Civil Law

Surprisingly, the Common Law jurisdictions scored higher on average than Civil Law but, as previously discussed, this is because Ireland's score skews the results significantly. If Ireland were to be given the average score of the other 4 jurisdictions – 2.5 – this would bring the overall score of Common Law jurisdiction down to 2.4 overall which would be slightly lower than the average for Civil Law jurisdictions.

4.5 Summary

All jurisdictions examined appeared to respect the right to be heard but this was only explicitly stated in respect of disciplinary procedures and placed on a true statutory footing in the cases of Estonia, France, Portugal and Slovenia whilst Ireland has also made provision for strong guidance through Statutory Instrument. Other jurisdictions appeared to respect the right to be heard but this was only legislated for in matters of dismissal, such as Australia, Finland, New Zealand, Singapore and Spain. Whilst the mirroring of such an approach in disciplinary matters in these jurisdictions may be a sensible assumption to make, this is by no means substantiated by the legislative material.

It is interesting to note that codification of disciplinary rules was not unique to one particular system or model as set out above and that there were examples of different legal systems approaching this particular problem in similar ways. This could be taken as evidence for the proposition that a codification exercise could indeed be capable of transference across different legal systems and families and hence, transplantable.

Another interesting point to note is that in jurisdictions where there are extensive uses of Works Councils / Collective Bargaining and high Union Membership, codified rules were less likely to be in prevalence[754]. The assumption here is that the majority of workers would have adequate protection of procedural fairness in disciplinary matters vis-à-vis their

[752] Workerparticipation.eu, 'National Industrial Relations, Countries, Ireland' <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Ireland> accessed 20 April 2023.
[753] Workerparticipation.eu, 'National Industrial Relations, Countries, France' <https://www.worker-participation.eu/National-Industrial-Relations/Countries/France> accessed 20 April 2023.
[754] For examples, see Germany and Finland.

collective agreements between trade unions and employers or via the works council agreements. Whilst this may work very well for the majority of workers within the jurisdiction, the absence of strong guidance, statutory or otherwise in such matters, may mean that, at the same time, a significant number of workers cannot avail themselves of procedural fairness rights at disciplinary hearings. However, the example of France is interesting to note in this regard since it has some of the strongest rules on disciplinary matters, not only in respect of the codification of natural justice rights and procedural fairness but regarding the placement of such rights on a firm statutory footing within the Code du Travail, and yet also has a 98% collective bargaining coverage as of 2015[755]. This could be taken as evidence that the approach of having strong and clear rules set out for disciplinary matters is not inconsistent with having a high collective bargaining coverage of the population as is the case with the Scandinavian countries and Germany who do not have clear rules in these areas on a statutory footing.

Other pertinent observations are that some systems[756] explicitly provide for the judicial review of 'punishments' given at disciplinary hearings which is in direct contrast to the situation vis a vis the United Kingdom. This approach would necessitate the creation of a statutory cause of action as opposed to the present situation whereby a claim may lie in respect of breach of contract for the failure to comply with a contractually agreed disciplinary procedure[757], a position itself which, unless the parties to the contract of employment have so specified is to sound in damages in the event of a failure to be followed, may not find favour with the Courts[758].

4.6 Assessment of Data Points

Now, the thesis will compare the differences between the jurisdictions in respect of each data point investigated and will summarise findings, accordingly. There will then follow a presentation in tabular form, a summary and related discussion before the overall conclusions are reached.

1. Codification of Procedural Fairness: Are Procedural Rules Codified in relation to Disciplinary Matters?

Australia: Partially.

[755] N753.
[756] Labour Code (Portugal) Article 331(7) <https://files.dre.pt/diplomastraduzidos/7_2009_CodigoTrabalho_EN_publ.pdf> accessed 20 April 2023.
[757] N289.
[758] Ibid, para 39. See also *Johnson v Unisys Ltd* [2001] 2 WLR 1076.

Procedural factors are set out in relation to dismissal hearings under s387 of the Fair Work Act. The Right to be heard in dismissal hearings is guaranteed by s387 (c) "whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person" can be taken into account when determining whether or not the dismissal process was fair or not.

There are no equivalent statutory provisions regarding disciplinary processes /workplace investigations although, similar to England and Wales, there are provisions within case law.

Canada: No.

Ireland: Yes.

In the form of guidelines propagated by Statutory Instrument- The Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000.

Estonia Yes.

Section 7 of the Employee Disciplinary Liability Act 1993 gives the right to be heard in Disciplinary proceedings.

Finland: Partially.

Not for disciplinary matters but in respect of dismissal hearings there is a right to be heard Finnish Employment Contracts Act, Chapter 9, Section 2.

France: Yes.

The Code du Travail L1332-2 lays down strong rules in respect of disciplinary matters.

Germany: No.

New Zealand: No.

Right to be heard implied through Employment Relations Act 2000 s236, also in respect of determining unfair dismissal under s103A (c) and case law: Food Processing IUOW v Unilever New Zealand Ltd.

Portugal: Yes.

Right to be heard contained in Article 329 (6) Labour Code specifically referring to disciplinaries.

Singapore: Partially.

S.14(1) Employment Act 1968 states 'due inquiry' must be conducted in relation to dismissal matters, which, as stated, has been the subject of interpretation in the case law. 'Due inquiry' implies a right to be heard and other procedural safeguards but it does not appear to apply in respect of matters falling short of a sanction of dismissal.

Slovenia: Yes.

Article 177 (1) – (3) of the Employment code gives the right to be heard in disciplinary hearings of all levels.

Spain: Partially.

Article 58 of the Workers Statute 1980 on Faults and Sanctions of Workers requires written notification for serious offences. Seems reliant on collective agreements.

1. Right to be heard in Disciplinary Matters Expressed Positively

Jurisdiction	**Grouping- Siems**	**Grouping – La Porta**	**Civil/Common Law**	**Codification of Procedural Rules**
England and Wales	**Global Anglosphere**	**English Legal Origin**	**Common Law**	**No**
Australia	Global Anglosphere	English Legal Origin	Common Law	In relation to the assessment of fair dismissal but not explicitly stated in relation to disciplinary / investigatory meetings. Limited guidance offered in Benchbook on Unfair dismissal
Canada	Global Anglosphere	English Legal Origin	Common Law	In relation to unfair dismissal but not explicitly stated in relation to disciplinary and investigatory matters, principles appear mainly in case law
Ireland	Modern European Legal Culture	English Legal Origin	Common Law	Guidance published under Statutory Instrument
New Zealand	Global Anglosphere	English Legal Origin	Common Law	In relation to unfair dismissal but not explicitly stated in

				relation to disciplinary and investigatory matters, principles appear mainly in case law. Soft guidance published and duty of 'good faith' required for disciplinary matters and investigations.
Singapore	Global Anglosphere	English Legal Origin	Common Law	In relation to unfair dismissal there is a requirement of 'due inquiry'. There is some guidance published by the Manpower Services Commission
Estonia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Yes, procedural rules for disciplinary matters is codified- right to be heard protected to an extent
Finland	Modern European Legal Culture	Scandinavian Legal Origin	Civil Law	Not in respect of disciplinary matters but in respect of unfair dismissal
France	Modern European Legal Culture	French Legal Origin	Civil Law	Yes- Code Du Travail has extensive provisions on procedural fairness
Germany	Modern European Legal Culture	German Legal Origin	Civil Law	No but there is a general right to be heard in respect of 'operational matters'
Portugal	Modern European Legal Culture	French Legal Origin	Civil Law	Yes- Labour Code has specific codification in respect of procedural fairness
Slovenia	Modern European	Socialist Legal	Civil Law	Yes – Right to be heard in disciplinary

	Legal Culture	Origin		matters codified
Spain	Modern European Legal Culture	French Legal Origin	Civil Law	Partially in the labour code

Of the jurisdictions which specifically codified the right to be heard in disciplinary matters, the right was expressed as follows:

Ireland

In the common law jurisdiction of Ireland, the rule was propagated by statutory instrument in the form of The Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000. In particular, Regulation 6 states that:

"6. The procedures for dealing with such issues reflecting the varying circumstances of enterprises/organisations, must comply with the general principles of natural justice and fair procedures which include…:

That the employee concerned is given the opportunity to respond fully to any such allegations or complaints…"

This is unusual among common law jurisdictions. The closest equivalent to these provisions can be found in the non-binding ACAS Code of Practice in England and Wales which lacks statutory force. The other common law jurisdictions examined placed more importance on protecting the right to accompaniment – in some cases, such as New Zealand, very comprehensively- whilst requiring fairness of procedure overall was not a priority for such hearings.

Estonia

In the civil law jurisdiction of Estonia, a jurisdiction which was formerly part of the Soviet Union, the Employee Disciplinary Liability Act 1993 under section 7 (1) – 'Demand for Explanation' states that

"An employer shall have the right to demand a written explanation concerning an offence from the offender. Refusal to provide an explanation or presentation of false information in the explanation shall not be an independent basis for imposition of a disciplinary penalty."

This is augmented by ss(3) which states that "…If an offence is proved by other evidence, a disciplinary penalty may be imposed without demanding an explanation."

The right to be heard in this context is nuanced as it appears to depend on, firstly, the employer specifically requesting an explantion and, secondly, on the employee being able to express themselves in writing to a significant enough degree in order for such an explanation to be effectively given.

France

The Code du Travail, in particular, Article L1332-2, from the civil law jurisdiction of France is among the most comprehensive of codifications of this particular right. There is the requirement that the employee is summoned to attend a meeting and give an explanation in the case of sanctions which may impact the employee's career. This would appear to cover most levels of warning. The exact wording of the section is:

"When the employer plans to take a sanction, he summons the employee, specifying the purpose of the summons, unless the sanction envisaged is a warning or a sanction of the same nature having no impact, immediate or not, on the presence in the company, the function, the career or the remuneration of the employee.

During the interview, the employer indicates the reason for the sanction envisaged and collects the employee's explanations."

The 'collection' of the employee's explanations is mandatory, importing the right to be heard explicitly into the legislation.

Portugal

In the civil law jurisdiction of Portugal the right to be heard is expressly imported under Article 329(6) of the Labour Code, which states that

"The disciplinary sanction cannot be applied without prior hearing of the worker."

Whilst basic, this provision strongly protects the right to be heard in such contexts.

Spain

In the civil law jurisdiction of Spain, the position does not appear as all-encompassing under the Workers Statute Article 58 (2), which implies that there is a right to notice of the charged misconduct but only in the cases of 'serious and very serious' offences:

"The assessment of faults and the corresponding sanctions imposed by the management of the company shall always be reviewable before the competent jurisdiction. The sanction of serious and very serious offenses will require written communication to the worker, stating the date and the facts that motivate it."

What constitutes a 'serious' offence is not specified. That there is a distinction drawn between 'serious' and 'very serious' may indicate that 'serious' offences may result in action short of dismissal whilst 'very serious' offences may result in dismissal itself. Either way, the right to be heard has at least been partially honoured.

Slovenia

In the former Soviet state of Solvenia, a civil law jurisdiction, Article 177(3) Employment Relationships Act on 'The Right to Defence of a Worker' states that

"In the disciplinary procedure, the employer must allow the worker a defence unless the worker explicitly refuses it or unjustifiably does not respond to the invitation to defence."

The form such a 'defence' takes is not specified. It may be that the defence is required in writing as per the situation in Estonia but what makes the rules in Slovenia different in an important regard, is that the Employer 'must' offer the worker the chance to avail themselves of a defence, unlike the situation in Estonia where such a provision appears to be at the Employee's discretion.

Summary

Ireland, France, Portugal and Slovenia all put forward the right to be heard in disciplinary matters in a very forthright and precise manner. Portugal and Slovenia expressly embody the right in such terms whilst France requires that an explanation be collected from the employee. The Irish guidance-propagated expressly by statutory instrument and lying on it's statute books uses the terms 'natural justice' and 'procedural fairness' and also forcefully articulates the right.

Estonia, however, whilst technically embracing this principle, provides instead that an employer shall have the right to demand a written explanation from the employee rather than the employee having the right to a defence. The right here is expressed in somewhat converse terms with the effect being that the employee has a right to be heard. This is undermined, however, by subsection 3 which states that a sanction can be imposed without the employee being heard should the charge be made out on other

evidence. This is contrary to the principles of procedural fairness and effectively abrogates the right to be heard as expressed conversely as noted above.

Therefore, of the jurisdictions examined, Ireland, Portugal, France and Slovenia express this right in the most positive sense.

1.1 Right to be heard expressed in relation to Dismissal Hearings

As above, although some jurisdictions did not express the right to be heard in relation to disciplinary matters specifically, they did express it in relation to 'dismissal hearings'. On one reading, a 'dismissal hearing' is a disciplinary hearing where the highest penalty the employee could suffer would be dismissal. In this sense, such a hearing is still a disciplinary hearing as, by implication, other disciplinary penalties would still be open to the employer should they consider the penalty to be too harsh. This being said, 'dismissal hearing' is still a hearing whereby dismissal is a possibility. A lot of disciplinary hearings – perhaps the great majority – will be of much lesser severity and the 'sanction' of dismissal will not always be a reasonable and/or proportionate option for the employer to take. In this sense 'dismissal hearings' can only really be taken to mean 'disciplinary hearings in which dismissal is a potential outcome'. It cannot, therefore, be said with certainty that such rules are intended to apply to hearings whereby dismissal is not a likely outcome. Nevertheless, the rules in these jurisdictions are important because, firstly, they demonstrate that the ideals of natural justice and procedural fairness are taken to operate on at least one level in the employment relationship across a range of jurisdictions and, secondly, because they give some idea of how such rules can be framed in respect of disciplinary proceedings generally.

Australia

The Right to be heard in dismissal hearings is guaranteed by s.387 (c) of the Fair Work Act. The question of "whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person" can be part of a test for whether the process was fair overall. In a legislative sense, this is a strong measure by the standards of the common law jurisdictions examined.

Finland

In the Civil Law jurisdiction of Finland, the Finnish Employment Contracts Act, Chapter 9 'Procedure for terminating an employment contract', Section 2 is devoted to 'Hearing the employee and the employer'. It states that:

"Before the employer terminates an employment contract on the grounds referred to in chapter 7, section 2, or cancels it for a reason referred to in chapter 1, section 4, or chapter 8, section 1, the employer shall provide the employee with an opportunity to be heard concerning the grounds for termination.

Before the employee cancels an employment contract on the grounds referred to in chapter 8, section 1, the employee must provide the employer with an opportunity to be heard concerning the grounds for cancellation."

Unusually, the right to be heard appears to be symmetrical in Finnish labour law. The right to due process is also strengthened under Chapter 7 Section 2 (4) on 'resort to means of legal protection available to employees' which states that:

'Employees who have neglected their duties arising from the employment relationship or committed a breach thereof shall not be given notice, however, before they have been warned and given a chance to amend their conduct.'

This implies that there must be at least some forum for discussion regarding disciplinary offences thus committed.

Germany

In the civil law jurisdiction of Germany, the most relevant provision located was Section 82 of the Works Constitution Act concerning the 'Employee's right to be heard and request explanations'. The provision is very broad and does not seem to appear specifically to disciplinary issues. This being said, it would be hard to argue that this provision does not encompass such matters on the wording of Section 82:

"*(1) The employee is entitled to obtain a hearing from the persons who are competent according to the organisational structure of the establishment on any operational matter concerning his or her own person. He or she is entitled to state his or her case on any measure taken by the employer concerning him or her and to make suggestions on the design of his or her workplace and the organization of operations."*

As stated, in the absence of any information to the contrary and subject to the usual dismissal procedures involving works council members and judicial review as discussed later, a dismissal logically stands as "any operational matter concerning his or her own person". It would also logically follow that

such a principle would apply in disciplinary matters since the levying of a warning or penalty against an individual is surely an operational matter which concerns an individual.

New Zealand

There are rights provided in respect of dismissal-related hearings in the common law jurisdiction of New Zealand under the Employment Relations Act 2000. The legislation puts forth a broad test which would appear to encompass elements of both substantive and procedural fairness, including the right to be heard. These provisions could potentially apply to disciplinary matters given that 'dismissal or action' is the term of art used across the different sections:

"103A Test of justification (for dismissal):

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
(3) In applying the test in subsection (2), the Authority or the Court must consider—
© whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee."

Spain

The civil law jurisdiction of Spain has very limited protections for employees in instances of 'disciplinary dismissal' under Article 55(1) of the Workers Statute.

'1. The dismissal shall be notified in writing to the worker, stating the facts that motivate it and the date on which it will take effect.

Other formal requirements for dismissal may be established by collective agreement.

When the worker is the legal representative of the workers or union delegate, the opening of an adversarial file will proceed, in which the remaining members of the representation to which he belongs, if any, will be heard, in addition to the interested party.'

The very bare legislative provisions of Spain, as can be seen, are expected to be supported or built upon by collective agreement. The question of how such matters are contracted for in the absence of such a collective agreement is a significant one and one which should attract further academic inquiry.

Slovenia

In the former Soviet state and civil law jurisdiction of Slovenia Article 83(1), Employment Relationships Act 2003 on 'Procedure Prior to Termination by the Employer', an employee is given the right to be heard – or at least – to be put on notice- regarding any 'fault' on their part which could lead to an individual dismissal should performance or conduct not improve.

'Prior to the ordinary termination of the employment contract for a fault reason, the employer must in writing call the worker's attention to the fulfilment of obligations and to the possibility of termination in the case of repeating the violation.'

Moreover, 88(2) explicitly imports a right to be heard in respect of dismissal:

(2) Prior to the ordinary termination for the reason of incapacity or for a fault reason and prior to the extraordinary termination of the employment contract, the employer must provide the worker an opportunity to defend himself, by mutatis mutandis taking into account Paragraphs 1 and 2 of Article 177 of this Act, unless the circumstances exist due to which it would be unjustified to expect from the employer to provide the worker an opportunity of the defence, or if the worker explicitly rejects it or if he without a justified reason does not respond to the invitation to defence'.

It is interesting to note the caveat, that this right should only be granted if it would not, otherwise, be considered unjustified to allow the employee to so avail themselves of it, hence not being an absolute right in this sense.

Singapore

As previously discussed, there is a notion of 'due inquiry' within the unfair dismissal legislation in Singapore. This is to be found in the Employment Act 1968 at s. 14:

"14.—(1) An employer may after due inquiry dismiss without notice an employee employed by the employer on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of the employee's service…"

The concept of "due inquiry" has been taken to embody the principles of natural justice and procedural fairness in subsequent case law- See *Velayutham M v Port of Singapore Authority* [1974–1976] SLR(R) but it does not appear to be explicitly required in disciplinary matters.

2. *Are there any well-publicised 'soft law' provisions such as the ACAS Code of Conduct that can be used?*

Jurisdiction	Grouping - Siems	Grouping – La Porta	Civil/Common Law	Soft Law Provisions
England and Wales	Global Anglosphere	English Legal Origin	Common Law	ACAS Code of Conduct – Non Binding
Australia	Global Anglosphere	English Legal Origin	Common Law	Limited guidance from Fair Work Commission
Canada	Global Anglosphere	English Legal Origin	Common Law	Extensive guidance for public sector employees
Ireland	Modern European Legal Culture	English Legal Origin	Common Law	Guidance from Statutory Instrument
New Zealand	Global Anglosphere	English Legal Origin	Common Law	Yes- 'Solving Problems at Work' guidance issued by New Zealand Government
Singapore	Global Anglosphere	English Legal Origin	Common Law	General guidance issued by Ministry of Manpower
Estonia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Implied but not explicitly stated
Finland	Modern	Scandi	Civil Law	Not

	European Legal Culture	navian Legal Origin		apparent
France	Modern European Legal Culture	French Legal Origin	Civil Law	Not apparent
Germany	Modern European Legal Culture	Germa n Legal Origin	Civil Law	Not apparent
Portugal	Modern European Legal Culture	French Legal Origin	Civil Law	Not apparent
Slovenia	Modern European Legal Culture	Socialis t Legal Origin	Civil Law	Not apparent
Spain	Modern European Legal Culture	French Legal Origin	Civil Law	Not apparent

Australia

The Fair Work Commission Bench Book on Unfair Dismissal[759] contains limited guidance on workplace investigations and guidance on procedural fairness

[759] N717.

at such hearings although this is in the context of hearings that could lead to dismissal[760].

Canada

Extensive guidance is evident for the Public Sector[761] and standards of procedural fairness are expected but no guidance such as the ACAS Code or other such materials found in other Common Law jurisdictions could be found.

New Zealand

New Zealand has the Solving Problems at Work[762] resource.

This comments upon the notion of 'Good Faith' in employer /employee relationships with parties being obliged to deal with each other at all times fairly and reasonably.

It further states that, to be lawful, disciplinary action or dismissal must be fair and reasonable in all the circumstances (with some limited exceptions). There are two aspects to this: 1. the employer must have good reason for the dismissal or disciplinary action, and 2. the employer must follow a fair process in reaching and implementing its decision[763]. For a common law jurisdiction this is a very strong pronouncement. Importantly, it is stated that employees should be given an opportunity to comment on information produced by the employer in the course of any such hearing, and also be given an opportunity to provide any other information that might be relevant.

Sufficient time to consider the information provided must be granted and also to prepare a response. The employee should also be given an opportunity to comment on the outcome of any investigation before any decision is made.[764]

Overall, the 'soft' rules put forward by New Zealand are very comprehensive as regards protecting rules of procedural fairness in disciplinary matters.

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[760] Ibid, 112.
[761] N721.
[762] Government of New Zealand, 'Solving Problems at Work', <https://www.employment.govt.nz/assets/Uploads/tools-and-resources/publications/17ac6cbb3e/solving-problems-at-work.pdf > accessed 20 April 2023.
[763] Ibid, 3.
[764] Ibid, 4.

Singapore

General guidance is given on the Ministry of Manpower website including the right to be notified but nothing on a statutory footing[765] – case law is the main source[766]. As elsewhere, this appears more concerned with dismissal rather than disciplinary matters.

England and Wales

As previously outlined, the non-binding ACAS Code gives some guidance as regards disciplinary matters.

3. *Do Employees have the right to notice of the charged misconduct?*

Jurisdiction	Grouping- Siems	Grouping – La Porta	Civil/Common Law	Right to notice of Charged Misconduct
England and Wales	Global Anglosphere	English Legal Origin	Common Law	Not in statute but case law indicates this in respect of

[765] Singapore Ministry of Manpower, 'Termination Due to Employee Misconduct' <https://www.mom.gov.sg/employment-practices/termination-of-employment/termination-due-to-misconduct#conducting-an-inquiry > accessed 20 April 2023.
[766] Long Kim Wing v LTX-Credence Singapore Pte Ltd [2017] SGHC 151.

				dismissal hearings. Disciplinary matters not covered.
Australia	Global Anglosphere	English Legal Origin	Common Law	For dismissal hearings the right is protected but not for disciplinary or investigatory matters
Canada	Global Anglosphere	English Legal Origin	Common Law	No
Ireland	Modern European Legal Culture	English Legal Origin	Common Law	Yes – in the guidance as put forward by statutory instrument
New Zealand	Global Anglosphere	English Legal Origin	Common Law	Not in relation to disciplinary or investigatory matters but protected in respect of dismissal
Singapore	Global Anglosphere	English Legal Origin	Common Law	Recognised as part of 'due inquiry' under the Employment Protection Act but nothing in respect of disciplinary / investigatory matters
Estonia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Implied but not explicitly stated
Finland	Modern European Legal Culture	Scandinavian Legal Origin	Civil Law	Implied in respect of dismissals but not explicitly stated
France	Modern European Legal Culture	French Legal Origin	Civil Law	Yes under Code Du Travail
Germany	Modern European Legal Culture	German Legal Origin	Civil Law	Nothing specifically stated
Portugal	Modern European Legal Culture	French Legal Origin	Civil Law	Yes but no timeframe specialised
Slovenia	Modern	Socialist	Civil Law	Regarding hearings

	European Legal Culture	Legal Origin		where dismissal is a possibility this is protected but not in respect of disciplinary or investigations generally
Spain	Modern European Legal Culture	French Legal Origin	Civil Law	No

Australia

For dismissal hearings under s. 387(b) Fair Work Act there is a right to be notified. No guidance is given on how much notice is deemed sufficient and there is no explicit statutory provision for disciplinary measures. This is consistent with the other legislation in this area, ie. there are specific protections for dismissal but not for disciplinary matters.

Canada

There does not appear to be any codified right to notification – it may be the subject of case law but there no significant decisions were discovered short of those showing deference to the US case of *Weingarten.*

Ireland

As previously established, Ireland has comprehensive rules on disciplinary matters put forward in the form of the *The Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000*: Regulation 6 states that "the employee concerned is given the opportunity to respond fully to any such allegations or complaints;" thus enshrining a right to be notified in certain terms.

New Zealand

In common with many similar jurisdictions there is nothing specific written in respect of disciplinary matters. The right to have notice of the charged misconduct in respect of dismissals is implied in the Employment Relations Act 2000, s. 103A(c) regarding the test of justification for whether or not a dismissal has been handled fairly:

"…whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee…"

Singapore

Singapore has limited rules in this area but a requirement for notification could potentially by implied through the requirement for 'due inquiry' under s. 14(1) of the Employment Act 1968. This is not specifically provided for in respect of disciplinary matters where dismissal is not a potential outcome.

Estonia

Although tenuous, such a right could be implied through s. 7 (1) of the Disciplinary Liability Act 1993 insofar as an employer can demand an explanation regarding allegations of misconduct from an employee- notice may have to be given before an explanation can be provided. This being said, there is no direct codification of such a matter.

Finland

The right could be implied through Chapter 9, Section 2 of the Employment Contracts Act in respect of dismissals but nothing specified in respect of disciplinary matters.

France

In respect of dismissal, Article L1232-2 of the Code du Travail states that a minimum of 5 working days' notice of inviting an employee to a dismissal meeting but the reasons for dismissal seemingly do not have to be put to the employee until the meeting itself under L1232-3. In respect of disciplinary matters, Article L1331-1 states that "No sanction can be taken against the employee without the latter being informed, at the same time and in writing, of the grievances held against him". Once again, there is a requirement to give notice but the extent of the amount of information to be given to the employee as part of this notice is not apparent. There is also an exception for this requirement under Article L1332-2 that this procedure does not have to be followed if "the sanction envisaged is a warning or a sanction of the same nature having no impact, immediate or not, on the presence in the company, the function, the career or the remuneration of the employee". This would appear to mark the difference between what is known in some workplaces in England and Wales as a 'recorded conversation' and an actual 'warning' that would be formally placed on the employee's record.

Germany

Section 82 of the Works Constitution Act states that an employee is entitled to obtain a hearing from competent individuals whereby they are due to be subjected to 'an operational matter concerning his or her own person' but nothing specifically stated in respect of disciplinary or investigatory matters.

Portugal

Article 329 Section 6 of the Labour Code states that a 'disciplinary sanction cannot be applied without prior hearing of the worker' but there is no set timeframe for notice to be given or any indication of what form such notice should take.

Slovenia

Article 83 (2) states that: "Prior to the ordinary termination for the reason of incapacity or for a fault reason and prior to the extraordinary termination of the employment contract, the employer must provide the worker an opportunity to defend himself" but this only appears in respect of hearings where dismissal is a possibility and no details of the form the notice should take or how much should be given are disclosed.

England and Wales

No specific right to be heard exists in respect of disciplinary matters although aspects of case law as discussed in the literature review reveal that it exists at least as far as dismissal hearings occur.

4. *Is there a right to accompaniment / what are the rights of a companion at hearings?*

Jurisdiction	**Grouping-Siems**	**Grouping – La Porta**	**Civil/Common Law**	**Right to Accompaniment**
England and Wales	Global Anglosphere	English Legal Origin	Common Law	S99 ERA 1996 Gives Right to Accompaniment
Australia	Global Anglosphere	English Legal Origin	Common Law	s387(d) of the Fair Work Act of 2009 gives the right to a 'support person' for hearings that could result in dismissal
Canada	Global Anglosphere	English Legal Origin	Common Law	In relation to dismissal hearings the United States *Weingarten* principles are followed
Ireland	Modern European Legal Culture	English Legal Origin	Common Law	Yes as stated in the order. Legal representation potentially allowed for dismissal matters (*Iarnród Éireann/ Irish Rail v. Barry McKelvey)*
New Zealand	Global Anglosphere	English Legal Origin	Common Law	Employment Relations Act 2000 s236 confers a broad right
Singapore	Global Anglosphere	English Legal Origin	Common Law	Possibly in respect of dismissal rights through 'due inquiry' provision of Employment Act
Estonia	Modern European	Socialist Legal	Civil Law	Not clear

	Legal Culture	Origin		
Finland	Modern European Legal Culture	Scandinavian Legal Origin	Civil Law	In respect of dismissals under Employment Contracts Act
France	Modern European Legal Culture	French Legal Origin	Civil Law	Yes under Code du Travail L1332-2
Germany	Modern European Legal Culture	German Legal Origin	Civil Law	No but involvement of Works Council / Judicial involvement in respect of dismissals- see s102 Works Constitution Act in respect of Employers with Works Councils
Portugal	Modern European Legal Culture	French Legal Origin	Civil Law	Not specified
Slovenia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Not explicitly stated but trade union involvement required under Art 179
Spain	Modern European Legal Culture	French Legal Origin	Civil Law	Not specified

Australia

Section 387(d) of the Fair Work Act of 2009 gives the right to a 'support person'. The case of *Gomes v Qantas Airways Ltd*[767] is authoritative on the role of such a support person.

> *'The Act allows a person the subject of investigation and interview to have a support person to "assist in any discussion". A support person cannot assist if they are refused permission to speak. Although there is a fine line between assisting a colleague and advocating for a colleague which must be considered, a support person must, at the very least, be able to speak for and on behalf of the person they are supporting when providing assistance.'*

There is no unfettered right to legal representation[768] at investigatory meetings.

Canada

Practice regarding Trade Union accompaniment follows the United States case of *Weingarten*[769]. Key dicta from within this case comes from the Mobil Oil Corp[770] case as stated by Brennan J[771]:

"An employee's right to union representation upon request is based on Section 7 of the Act, which guarantees the right of employees to act in concert for mutual aid and protection… it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy."

And further:

> *"…only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative"*[772]

Likewise, the right is limited to:

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[767] [2014] FWC 3432, 72.
[768] N719.
[769] N722.
[770] *Mobil Oil Corp*., 196 NLRB 1052.
[771] Ibid, 257.
[772] Ibid.

"… situations where the employee reasonably believes the investigation will result in disciplinary action"[773]

Failing to allow Union Representation can lead to the voiding of any findings[774].

Ireland

There is a right to accompaniment under the SI guidance: "That the employee concerned is given the opportunity to avail of the right to be represented during the procedure". 'Representation' is as stated in the Order, there are no further details on the extent of the companion's duty. It is interesting to note that legal representation at disciplinary hearings may be permitted based on the decision of *Iarnród Éireann/ Irish Rail v. Barry McKelvey*[775] which stated the relevant factors are to be taken from the English Prison Law case of *R v Secretary of State for the Home Department ex parte Tarrant*[776].

Finland

Unusually for a civil jurisdiction there is a right to accompaniment in respect of dismissal hearings under Chapter 9, Section 2 of the Finnish Employment Contracts Act but in keeping with many jurisdictions the specific rights of the companion at any such meeting are not outlined.

France

The right to accompaniment is specifically legislated for under Code du Travail L1332-2 but the rights of the companion are not prescribed. This is unusual given the comprehensive nature of the rules elsewhere regarding such procedures.

Germany

There is nothing specifically codified as regards disciplinary matters but there is Works Council / Judicial involvement in respect of dismissals- see s102 Works

[773] Ibid.
[774] N723.
[775] [2018] IECA 346, 38.
[776] [1985] Q.B. 251

Constitution Act in respect of Employers with Works Councils. The ambit of any given companion's duties is not legislated for.

New Zealand

In matters of dismissal and possibly in respect of disciplinary matters following the Employment Relations Act 2000 s. 236 which states:

(2) Where any Act to which this section applies confers on an employer the right to do anything or take any action—
(a)in respect of an employee; or
(b)in the Authority or the Court, that employer may choose any other person to represent that employer for the purpose.
(3) Any person purporting to represent any employee or employer must establish that person's authority for that representation."

As stated in *Air New Zealand Ltd v Hudson*[777] a companion:

"…*must be able to speak on behalf of an employee, to intervene in the process and to give explanations where necessary.*"

Slovenia

A right to accompaniment is not explicitly stated but trade unions are permitted to give an opinion on the matter within 8 days if the worker requires under Article 179 - the employer must allow this.

England and Wales

England and Wales have quite comprehensive rules on this, stating that a companion must be allowed to attend in respect of disciplinary and grievance hearings but they do not have unfettered rights of participation.

5 *Do workplace rules have to be brought to the attention of the employee?*

Jurisdiction	Grouping- Siems	Grouping – La Porta	Civil/Common Law	Workplace Rules?

[777] [2006] ERNZ 415 (EmpC), 161.

England and Wales	Global Anglosphere	English Legal Origin	Common Law	Particulars of Employment should be given to Employee
Australia	Global Anglosphere	English Legal Origin	Common Law	No requirement
Canada	Global Anglosphere	English Legal Origin	Common Law	No requirement
Ireland	Modern European Legal Culture	English Legal Origin	Common Law	Consequences for breaking the rules should be explained
New Zealand	Global Anglosphere	English Legal Origin	Common Law	No requirement
Singapore	Global Anglosphere	English Legal Origin	Common Law	No requirement
Estonia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Yes for large employers under s45 Employment Contracts Act
Finland	Modern European Legal Culture	Scandinavian Legal Origin	Civil Law	No requirement
France	Modern European Legal Culture	French Legal Origin	Civil Law	Yes for large employers
Germany	Modern European Legal Culture	German Legal Origin	Civil Law	No
Portugal	Modern European Legal Culture	French Legal Origin	Civil Law	Article 99 of the Labour Code seems to make this optional rather than compulsory
Slovenia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Not specified
Spain	Modern European Legal Culture	French Legal Origin	Civil Law	Not specified

In the context of natural justice/procedural fairness rights, the availability of workplace rules is a peripheral matter as it does not directly impact the right to be heard or such associated rights. Nevertheless, it can be argued that knowledge of the rules – and, just as importantly, knowledge of the consequences of breaking such rules, are an important adjacent matter since knowledge of such matters could inform, motivate or focus the employee's attention as regards formulating a defence in such instances.

Ireland

The previously mentioned extensive Order on Disciplinary and Grievances states at para 9 that the consequences for breaking the rules should be explained but no indication that the rules must specifically be brought to the attention of the employee is given elsewhere within the Order itself.

Estonia

Under s. 5(11) of the Employment Contracts Act 1992 the employment contract must include 'a reference to the rules of work organisation established by the employer'. Also, s. 40 provides that employers with at least 5 employees need to approve workplace rules with the local labour inspectorate whilst s. 45 provides that employers must ensure that access is available to all employees. This mirrors the practice of many other former-Soviet states and a number of other jurisdictions such as India and Iran which require approval of an external government body such as a labour inspectorate.

Portugal

This is a requirement under Article 99 where (1) specifies that the employer "can draw up internal company regulations on work organisation and discipline" and (3) states that "*The rules of procedure shall take effect after the publication of their content, in particular by posting at the company's head office and at workplaces, so as to enable them to be fully acquainted at all times with the employees*.". These provisions appear

permissive rather than mandatory however, unless the meaning of the word 'can' is lost in translation.

France

In line with its comprehensive rules in related matters, France provides for the availability of workplace rules under Article L1311-2, which states 'The establishment of internal regulations is mandatory in companies or establishments employing at least fifty employees'. Article L1321-1 goes on to state that 'The internal regulations are a written document by which the employer fixes exclusively: …(3) The general and permanent rules relating to discipline, in particular the nature and scale of the sanctions that the employer may impose.' This also includes 'The provisions relating to the rights of defence of employees defined in Articles L. 1332-1 to L. 1332-3 or by the applicable collective agreement'.

England and Wales

Particulars of employment must contain disciplinary rules or direct the employee to where these can be found under s3(1)(a) of the Employment Rights Act 1996.

Overall, the explicit publication of workplace rules does not appear to be a particular priority in respect of the jurisdictions examined. As previously mentioned this is more of a peripheral concern in the context of this thesis but is nevertheless potentially significant.

6. Is there any statutory guidance on the level of penalty that can be levied as part of a disciplinary sanction / Are there any time limits specified for the expiration of warnings or penalties levied?

Jurisdiction	Grouping- Siems	Grouping – La Porta	Civil/Common Law	Guidance on disciplinary penalties?
United Kingdom	Global Anglosphere	English Legal	Common Law	No

		Origin		
Australia	Global Anglosphere	English Legal Origin	Common Law	No
Canada	Global Anglosphere	English Legal Origin	Common Law	No
Ireland	Modern European Legal Culture	English Legal Origin	Common Law	Some under the statutory guidance at para 10 regarding nature of penalties and para 14 regarding timeframe
New Zealand	Global Anglosphere	English Legal Origin	Common Law	No
Singapore	Global Anglosphere	English Legal Origin	Common Law	No
Estonia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Proportionality required under s8(1)
Finland	Modern European Legal Culture	Scandinavian Legal Origin	Civil Law	No
France	Modern European Legal Culture	French Legal Origin	Civil Law	Penalty should be proportionate under L1333-2 and limitation set out under L1332-5
Germany	Modern European Legal Culture	German Legal Origin	Civil Law	No
Portugal	Modern European Legal Culture	French Legal Origin	Civil Law	Yes – Art 328 and Art 330(1)
Slovenia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Art 178 prescribes proportionality

Spain	Modern European Legal Culture	French Legal Origin	Civil Law	

Ireland

Rules in Ireland are relatively comprehensive. Paragraph 10 of The Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 states that -

"*Disciplinary action* may include:

- An oral warning.
- A written warning.
- A final written warning.
- Suspension without pay.
- Transfer to another task, or section of the enterprise.
- Demotion.
- Some other appropriate disciplinary action short of dismissal.
- Dismissal".

Regarding the timeframes for 'live' penalties, paragraph 14 states that "*Warnings should be removed from an employee's record after a specified period and the employee advised accordingly*."

Estonia

Under Estonian Law, any penalty is required to be 'proportionate' under s. 8(1):

"A disciplinary penalty shall not be in apparent conflict with the gravity of the offence, the circumstances of its commission or the prior conduct of the employee."

Provision is made for the level of 'fines' under s. 17(1) of the Employment Contracts Act 1992:

"An employer shall have the right to impose fines which do not exceed ten times the average daily wages of the employee. The sum of fines imposed in a calendar year shall not exceed twenty times the average daily wages of the employee."

A limitation period for penalties is stipulated under s. 13(1):

"*A disciplinary penalty shall expire if no new disciplinary penalty is imposed on the employee within one year from the date on which the penalty was imposed*."

Section 15 importantly provides that:

"*Upon imposing a disciplinary penalty on an employee or providing references for an employee, an employer shall not refer to any expired disciplinary penalty or disciplinary penalty cancelled before the prescribed time.*"

This is a very comprehensive regime but it is worth noting that there is no indication of the extent to which disciplinary rulings which contradict these terms can be either challenged or the relative success of any such challenges. This matter could be the subject of future research into this area.

France

The regime in France is not as prescriptive per se but In the Code du Travail, sanctions must not be disproportionate under L1333-2. Moreover, under Article L1332-5- 'No sanction older than three years prior to the initiation of disciplinary proceedings may be invoked in support of a new sanction.' which imports a limitation period of sorts.

Portugal

Similar to the Estonian experience and in common with Ireland, Portugal has a comprehensive regime in respect of the levels of sanction available to an employer. Article 328(1) of the Labour Code states:

"In the exercise of disciplinary power, the employer may apply the following sanctions:
a) Reprimand;
b) Recorded rebuke;
c) Penalty payment;
d) Loss of holidays days;
e) Suspension of work with loss of remuneration and seniority;
f) Dismissal without compensation or compensation."

Article 330(1) likewise states:

"The disciplinary sanction must be proportional to the gravity of the offense and to the culpability of the offender and may not apply more than one for the same offense."

Although there are no specific rules on time periods, Article 331 gives a cause of action to employees in respect of 'Abusive Sanctions' which lends credibility to the notion of enforcement, at least as far as this jurisdiction is concerned.

Slovenia

In Slovenia, Article 178 of the Labour Code on Selection of a Disciplinary Sanction states that:

"*When selecting a disciplinary sanction, the employer must take into account the level of fault, important subjective and objective circumstances, under which the violation has been committed, and individual characteristics of the worker*".

Not unlike some other jurisdictions, Article 181 prescribes rigid timeframes that disciplinary processes should be executed within. As with some other jurisdictions, there is no express indication of how a breach of such a rule could be rectified internally, but it is safe to assume that it could at least be challenged by way of a curative appeal process.

England and Wales

No guidance is given in legislative provisions but the option for a 'curative' appeal is given under s1 of the 1996 Employment Rights Act.

Enforcement Model of the Rights – What are the Consequences of Failure to Follow the Law on Disciplinary Matters in each of the jurisdictions?

Jurisdiction	Grouping- Siems	Grouping – La Porta	Civil/Common Law	Enforcement Model
England and Wales	Global Anglosphere	English Legal Origin	Common Law	Damages / Injunctive relief
Australia	Global Anglosphere	English Legal Origin	Common Law	Damages /injunctive relief
Canada	Global Anglosphere	English Legal Origin	Common Law	Damages
Ireland	Modern European Legal Culture	English Legal Origin	Common Law	Not specified
New Zealand	Global Anglosphere	English Legal Origin	Common Law	Damages
Singapore	Global Anglosphere	English Legal Origin	Common Law	Not specified
Estonia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Labour Inspectorate can deal with transgressions
Finland	Modern European Legal Culture	Scandinavian Legal Origin	Civil Law	Possible compensation
France	Modern European Legal Culture	French Legal Origin	Civil Law	Industrial tribunal can rule on disputes plus workplace rules must be confirmed by labour inspectorate
Germany	Modern European Legal Culture	German Legal Origin	Civil Law	Labour Court for Unfair Dismissal matters but nothing specified relating to breach of disciplinary

				procedure, presumably breach of contract
Portugal	Modern European Legal Culture	French Legal Origin	Civil Law	Breach is considered an 'Administrative Offence' and is specifically actionable
Slovenia	Modern European Legal Culture	Socialist Legal Origin	Civil Law	Fine imposed for failure to offer right to be heard.
Spain	Modern European Legal Culture	French Legal Origin	Civil Law	Not specified

Viewing the enforcement models for failure to allow the right to be heard in the numerous jurisdictions is instructive. Firstly, this shows varying degrees of clarity across the systems as to the availability of specific legal rights, in particular the core right central to this thesis. From the perspective of both employers and employees it seems more desirable to have the consequences of breaching specific rules cast in legislation. Presently, there is no guidance as to what can be claimed or what the consequences for failing to follow such procedures are. It has even been disputed as to whether or not there is a need to follow a contractual disciplinary procedure at all and any such action would probably fall to be decided as a breach of contract matter. Secondly, the fact that there are prescribed consequences delineated for the failure to follow this particular rule show that the rule is to be regarded seriously which, therefore, can be taken at least at face value as evidence of effectiveness in practice.

Australia

In Australia there are no statutory provisions which establish a cause of action specifically in respect of a failure to follow disciplinary measures. In the case of Bartlett[778] it was held that an employer must conduct workplace investigations in a way which is reasonable 'at least in the *Wednesbury* sense'[779].

As Orifici has written, however, it is not clear:

[778] *Bartlett* [2016] NSWCA 30.
[779] Ibid, 49.

"…whether an employee has any legal redress where an organisation fails to comply with an investigation process set out in a policy that is not deemed to be contractual or promissory."[780]

And, further, that:

"…in the decision of Romero v Farstad Shipping (Indian Pacific) Pty Ltd, a Full Court of the Federal Court observed that even if a policy is not contractually binding, it might constitute 'actionable representations' where there is express reliance on its terms. According to this reasoning, if an employer makes a statement about the process it will follow to conduct a workplace investigation, and this is relied on by employees to their detriment, those employees may have grounds to seek a remedy in contract. This type of claim has not, however, been successfully pursued in any decided case to date."[781]

It seems from this that the basis for enforcement here is theoretical and likely not well-known outside of legal or academic circles.

Another interesting development was also noted in Orifici's work:

"in a recent interlocutory decision of the Supreme Court of Victoria, an employee claimed that it was an 'implied term' of his employment contract that his employer, the State Revenue Office ('SRO'), would adhere to the process set out in its 'Managing Misconduct Policy May 2017' when conducting a workplace investigation into allegations that he had engaged in misconduct.[65] The SRO argued that this claim had no prospect of succeeding as the employment contract stated that the employer's policies and procedures were 'not incorporated as terms of [the] contract but [the employee] must nonetheless abide by them because they are lawful and reasonable directions'. Significantly, McDonald J, rejected this submission and observed that:

[a] failure by the plaintiff to comply with SRO policies and procedures arguably constitutes a breach of the contract. This conclusion is not altered by reason of the policies and procedures not being incorporated into the contract. If there is an express contractual obligation upon the plaintiff to comply with SRO policies and procedures, he has a real prospect of establishing an implied term that his employer is also subject to a contractual obligation to comply with all SRO policies and procedures."

[780] N720.
[781] Ibid.

This position seems similar to the position in England and Wales, whereby there is technically an injunctive cause of action in respect of a failure to follow a contractual disciplinary procedure and a potential claim for breach of contract. The practicality of this from an employee's perspective is, however, far from ideal and, further, would potentially be beyond the means/competence of a sizeable majority of the working population to whom such redress would be available. The mechanism for enforcement appears to be very indirect and unnecessarily legalistic – 'a real prospect' of 'establishing an implied term', in the words of McDonald J, will mean very little to many.

New Zealand

Likewise, in New Zealand, there is no direct statutory enforcement method available but based on the case law is possible to claim that a failure to undertake a fair investigation constitutes a breach of the 'good faith' requirement as was the case in *Waste Management NZ Limited v Bridget Jones*[782] although it is important to note that the claim in this case failed.

Canada

In Canada it appears that damages can be awarded on the basis of flawed investigations as in the case of *Elgert v. Home Hardware*[783] whereby punitive damages were awarded owing to an improperly conducted investigation. The enforcement machinery in Canada seems similar to that in the UK, that no specific penalty exists for breaching rules relating to disciplinaries and investigations, but a common law claim for breach of contract or other action may arise.

Estonia

Like many former Soviet states and many others which have more state-involvement in the administration of workplace rules, Estonia follows a model of State supervision – violations of the Employment Contracts Act are dealt with by the Labour Inspectorate. Under s145, the Labour Inspectorate has the power to impose financial penalties for infringement of any provisions including those relating to disciplinary matters.

Finland

[782] [2020] NZEmpC 73 [29 May 2020].
[783] 2011 ABCA 112.

In Finland, under Chapter 12 of the Employment Contracts Act, liability for derogations from the Act is specified under section 1 with financial penalties stipulated in certain cases. However, there isn't specific provision made for disciplinary matters and it can be presumed that this may come under general liability for breach of obligations intentionally or negligently.

Portugal

Article 549 of the 2009 Labor Code provides for a "regime of administrative offences" which includes under Article 331, 'Abusive Sanctions'. Effectively, what this section seeks to do is prevent an employee being subject to any detriment for seeking to assert legal rights. For example, Article 331 (1)(a) states that a disciplinary sanction could be considered abusive if an employee has legitimately claimed against working conditions or that they have refused to follow what, in English Law, may be considered an unreasonable management request under Art 331(1)(b). Article 331(2) – (7) sets out a range of other matters that would constitute 'abusive sanctions' including those relating to disciplinary sanctions. Furthermore, failure to follow certain aspects of Articles 330 and 329 on disciplinary sanctions is considered a 'serious administrative offence' and, importantly, a failure to offer an employee the right to be heard is also considered a 'serious administrative offence' under Article 329(8). Article 554 provides a range of financial sanctions for employers liable for serious administrative offences which are dependent on the resources of the employer.

France

The rules in France are also particularly exacting. A sanction is defined under L3331-1 of the Code du Travail as "Any measure, other than verbal observations, taken by the employer following an act of the employee considered by the employer to be at fault constitutes a sanction, whether or not this measure is likely to affect immediately or not the employee's presence in the company, his function, his career or his remuneration." Article L1331-2 prohibits fines and financial penalties and L1334-1 provides that breach of this is punishable by a fine of 3,750 Euros. Article L1333-1 grants jurisdiction to industrial tribunals to hear matters relating to procedural irregularities regarding disciplinary sanctions and Article L1333-2 gives power to the Industrial Tribunal to "annul an unlawful sanction in the form or unjustified or disproportionate to the fault committed."

Germany

As previously noted there are no specific legislative provisions for disciplinary matters. Section 102 (1) of the Works Constitution Act provides, however, that in cases of dismissal:

"The works council has to be consulted before every dismissal. The employer has to inform the works council about the reasons for dismissal. Any notice of dismissal that is given without consulting the works council is null and void."

Whilst the Labor Court has jurisdiction to hear matters relating to unfair dismissal under section 4 of the Protection Against Unfair Dismissal Act this appears to fall short of inquiring into the appropriateness of sanctions short of dismissal and does not provide any specific routes to address such matters.

Spain

The Workers Statute does not have means of redress for disciplinary sanctions and it is unclear whether or not any mechanism for enforcement is built into the legislation.

Slovenia

The position in Slovenia is very specific. Under Art 230(1) of the Employment Relationships Act.

' A fine of SIT 500,000 to SIT 1,000,000 shall be imposed on the employer - legal person if:

…12. he has not acted in accordance with Article 177 of this Act in a disciplinary procedure;
…
(2) A fine of SIT 100,000 to 500,000 shall be imposed on the employer - natural person, who has committed the offence referred to in the previous paragraph.
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(3) A fine of SIT 50,000 to 200,000 shall be imposed on the responsible person of the employer - legal person and on the responsible person in the state body, state organisation or local community, who has committed the offence referred to in Paragraph 1 of this Article.

The aforementioned Article 177 on the right to a defence of a worker directly relates to the right to be heard in disciplinary maters:

"(1) In the disciplinary procedure, the employer must serve the worker with a written charge and determine the time and place, where the worker may put up his defence.

(2) The employer must serve the worker with a written charge in a manner as stipulated in Article 180 of this Act.

(3) In the disciplinary procedure, the employer must allow the worker a defence unless the worker explicitly refuses it or unjustifiably does not respond to the invitation to defence."

Therefore, it is clear that enforcement mechanisms in Slovenia exist in direct proportion to actual disciplinary rules, making this one of the stronger jurisdictions.

4.6 Summary

Out of the jurisdictions examined, all appeared to honour the right to be heard in relation to dismissal hearings whilst a significant number of jurisdictions specifically legislated for disciplinary matters. These were Slovenia, Portugal, France, Ireland and Estonia. From the others, Spain appeared to partially respect the right to be heard in disciplinary matters by way of Article 58 of the Workers Statute which requires notice in writing to be given to employees in respect of serious offences. It could be assumed from the remaining jurisdictions that, since such rights were honoured in respect of dismissal hearings that they are also honoured by employers and enjoyed by employees in respect of disciplinary matters and investigations regarding matters short of dismissal but this is completely without legislative basis or authority.

From studying the above points, it is clear that the right to be heard is valued across a range of jurisdictions at least in relation to disciplinary matters that could result in dismissal. There are, however, different approaches to how this right is protected. In Australia and New Zealand the right is protected in a more 'reactive' and laissez-faire sense, it is for the decision making authorities to determine whether the employee being deprived of their right to be heard could be said to have been unfairly dismissed, whereas other jurisdictions tend to express the right in a more positive sense. For example, Article 83(2) of Slovenia's Employment Relationships Act requires the employer to give the employee a right to

defend themselves unless there are compelling reasons why this right should not be granted. This is similar to Finland's Employment Contracts Act under Paragraph 9 section 2. Whilst these may seem like disparate approaches, however, ultimately the ends are broadly the same. The so-called 'Global Anglosphere' jurisdictions appear to embody the breach of natural justice / procedural fairness rights in such matters as part of an overall test for the Courts, tribunal or other decision makers to ponder, as opposed to distinct, standalone rights. Similarly, in England and Wales, the precise parameters of the right itself can be found throughout the case law. The position in the formerly mentioned jurisdictions seems, presently, much clearer and easier to follow than the domestic one. The situation in Singapore is another instance whereby the initial position is unclear- 'due inquiry' is a vague term.

Whilst it has not been possible to track down all the potential soft-law guidance on these matters as may exist owing to linguistic limitations, all the guidance documents located express positively the requirement for natural justice rights and procedural fairness to be followed. Many of the jurisdictions specify that notice should be given- in some cases this is not explicitly spelled out but can be deduced from the requirements as written- an effective opportunity to respond to allegations cannot be said to be reasonable if it is not a sufficient amount of time. Notably, only France specifies an exact timeframe of at least 5 days in respect of dismissal matters.

The right to accompaniment seems much more pronounced in the Common Law /Global Anglosphere than appears so in the Civil jurisdictions. In respect of defining the role of any such companion this is not well developed in any of the instruments observed. And the explicit publication of workplace rules does not appear to be a particular priority in respect of the jurisdictions examined. The significance here is that the United Kingdom position appears to be much stronger- the right to accompaniment and the right to have notice of certain workplace rules is legislated for and, therefore, there would be no need to make any significant changes. A contrary interpretation here might be that accompaniment may be judged as not particularly important as regards the right to be heard in other jurisdictions, another still that other jurisdictions expect that such provisions would be catered for under the relevant local collective bargaining agreement. Either way, it is the author's judgement that the right to accompaniment is an important dimension of the right to be heard for reasons previously stated- that some employees will not be as articulate as others or as skilled in the formulation of oral arguments. If the reason for the absence of this provision in other jurisdictions is related to the likely presence of collective bargaining arrangements, further research may be able to ascertain any correlations between Common Law and Civil Law jurisdictions as regards any possible correlations.

Moreover, 5 of the jurisdictions examined set forth positive provisions on the nature of any penalty to be levied following a hearing and many of them also stipulated timeframes for the expiration of such penalties. It was not easy to discover exactly whether this was the case for all the jurisdictions observed, but this did seem to be the situation for a few of them. In Germany, Federal public service governed by arifvertrag für den öffentlichen Dienst der Länder, TV-L - a collective agreement, whilst in Finland it appeared that such matters relating to Civil Servants was covered under the State Civil Servants Act 1994. Likewise, with Estonia, s7 of the Republic of Estonia Employment Contracts Act 1992 states that a different regime applies in relation to dismissal for public sector employees whilst the Disciplinary Liability Act appears to apply to both private and public sector employees. It is also apparent that such a division exists in Australia[784]. In France the provisions relating to disciplinary matters appear to apply equally to both private and public sector employees as per Article L1311-1 of the Code Du Travail which states that: "The provisions of this book shall apply in the establishments of employers governed by private law". They also apply in public establishments of an industrial and commercial nature. There also appear to be differentiated measures relating to dismissal under Chapter 1 s1 of the Protection Against Unfair Dismissal Act under s2(2) which provides that "in public sector establishments and public administrations a) the termination violates a guideline regarding the selection of personnel for dismissal. b) the employee can continue to be employed in another position in the same office or in another office of the same administrative branch in the same locality or its commuting area"

The application of '*Wednesbury* principles'[785] wholesale to disciplinary and investigatory matters does not have a strong precedent in England and Wales but there is an emerging body of case law which appears to be moving the overall conception of an employment contract towards a 'relational contract' whereby decisions made at the discretion of contractual decision makers can be assessed in the *Wednesbury* context[786]. In theory, a test of *Wednesdbury* unreasonableness should be capable of applying to decisions made in disciplinary matters since these decisions should be made in respect of objective facts and the test of "irrationality" could clearly be marshalled in respect of circumstances where a decision of fact arrived at in a workplace investigation could be regarded, objectively, as absurd. The use of *Wednesbury* in contractual decision making-specifically employment contracts – is, for the time being at least, the exception rather than the rule[787]. This is significant for two reasons. Firstly, there is inconsistency as regards it's application and, secondly, the

[784] N720
[785] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[786] *Braganza v BP Shipping Ltd* [2015] 1 W.L.R. 1661, 42, (Hale LJ).
[787] Wayne Courtney, 'Reasonableness in Contractual Decision Making', LQR, 131 (Oct 2015), 552.

Wednesbury approach could, in many respects, be viewed as simply *Burchell* by another name. It is hard to envision much practical or conceptual difference between an employer acting 'unreasonably' as opposed to 'irrationally'. Moreover, another test or barometer of this nature does not square with the stronger examples of rules that have been gleaned from the inspection of other jurisdictions – these rules appear much clearer and readily contestible as a matter of practicality as opposed to being an open-ended yardstick only understood by a limited class of legal professionals. It is the position of this thesis, that whilst the green-shoots of a *Wednesbury-style* approach may be appearing, that, for the reasons stated, this should not be heeded so as to avoid further fragmentation and uncertainty.

Chapter 5 – Conclusions

In this concluding chapter, the findings of this thesis' study are drawn together and its central research questions are addressed on the effectiveness of the worker's voice, globally, in workplace disciplinaries.

5.1 The Worker's Voice

At the start of this thesis the author outlined the perceived deficiencies in the law of England and Wales as it pertains to workplace disciplinary procedures and investigations. The initial research came about as a result of curiosity which had arisen during the course of representing trade union members in an industrial setting and taking note of the extent to which natural justice rules and procedural fairness were observed. In the early days of the thesis an examination was carried out of the key requirements of procedural fairness and the existing laws on dismissal and legislative framework surrounding individual labour rights generally. Alarmingly, it came to be realised, that whilst there are limited rules guaranteeing procedural fairness, such rules were weak and often difficult to find. Accordingly, a dismissal based on a series of warnings which themselves were imposed on the basis of procedurally unfair disciplinary proceedings, could itself be regarded as unfair although such a position would be non-justiciable.

Thereafter, followed an investigation of the broader academic literature in this area and it was discovered that, although much had been written in respect of dismissals and investigations generally, there was an absence of significant treatment of this particular matter specifically. The overriding concerns from the investigation of the case law was that many of the purported ideals of procedural fairness did not match the picture discovered in the available precedents. Furthermore, there had been much

judicial reluctance to develop the law to any great extent with much deference paid to particular decisions.

From this starting point, it was determined that, given that individual rights pertaining to dismissal or investigation are a relatively new phenomenon, that a sensible approach may be to investigate a range of comparable jurisdictions to discover the extent to which these rights had been developed there. Jurisdictions were selected based on their reported respect for the rule of law, their reported regard for labour rights and their perceived similarities to England and Wales in terms of their overall judicial architecture and enforcement machinery. The final jurisdictions chosen were Estonia, Finland, France, Germany, Portugal, Slovenia, Spain from what could broadly be termed the Civil Law tradition and Australia, Canada, Ireland, New Zealand and Singapore from what could be called the Common Law Tradition.

The comparative exercise was then carried out with the jurisdictions being examined in respect of their treatment of rules of procedural fairness as they manifested themselves regarding disciplinary, investigatory and dismissal matters. The findings were interesting. It was found that most jurisdictions embodied the ideals of procedural fairness at least in respect of dismissal hearings and others went so far as to enshrine individual rules specifically relating to matters of procedural fairness in dismissal hearings. Methods of enforcement differed across the jurisdictions examined but all appeared respectful of the right to be heard. The evidence showed that there are other ways in which this problem can be approached and will hopefully provide some inspiration for a future legislature. The Labour Codes of France and Portugal for example guaranteed the right to be heard in disciplinary matters as did the Irish Statutory Instrument on disciplinary proceedings. All of these instruments appeared to offer the right on an unqualified basis without regard to whether or not the employee was private or public sector and, moreover, in many cases there were specific enforcement mechanisms which attached to the denial of such a right.

From the results it can be seen that the situation in England and Wales is lacking in respect of its levels of protection for employees in respect of disciplinary and investigatory matters. The recommendations made will be broadly in favour of the legislature adopting similar measures to some of the jurisdictions examined both in respect of individual rights on the statute book but, also, will favour changes relating to overall enforcement. The present enforcement model in England and Wales in terms of a disciplinary procedural breach is based on an action for breach of contract; although, the decision in *Edwards*[788] confirms that in the absence of express

[788] N289.

contractual disciplinary procedures there could be no potential action. Therefore, an employee could be deprived of any right to be heard *ab initio*. This is concerning for several reasons: Firstly, there is apparently no legal test which would determine the contractual nature – or not – of disciplinary proceedings. This could certainly be an avenue for exploration in future, as is well known, ordinary strict rules of contractual construction do not necessarily apply to employment contracts with more flexibility accorded[789]; Secondly, if there were such a test, this could have the effect of adding to the volume of litigation since this would be another legal question to be resolved within a given set of proceedings. This would no doubt prove to be costly and not necessarily an effective use of time; Thirdly, the peculiar position that *Edwards* leaves the law in is that, compounded by the decision in *R v BBC ex Parte Lavelle*[790], whilst rules of natural justice may be imported into employment contracts which have a certain level of sophistry as per the judgment of Lord Woolf. Essentially this means that those working under other employment contracts will, *prima facie*, not have the protection of these rules. This would mean yet another question to be resolved – that of 'sophistry' – and, moreover, seems patently unfair. Moreover, this could create a further loophole by which employers could deliberately 'dumb down' any contractual disciplinary matters to avoid being classified as 'sophisticated' and thus avoid the need to comply with rules of natural justice; And, fourthly – and perhaps, most importantly - *Edwards* doctrinally confirmed in the judgment of Lady Hale[791] that whilst a breach of contractual disciplinary rights – should they be held to be incorporated – would not sound in damages in any case, they may sound in injunctive relief only. Assuming this to be the correct reading of the law, this marks a profound deficiency which could be eradicated should the proposals within this thesis be taken into account by the legislator. Firstly, non-lawyers – that is, the majority of employees- are not likely to be aware of this. If they are aware of injunctions in a peripheral sense, they are not likely to know that they would apply in cases where disciplinary rules are not followed. Moreover, they would be even less likely to have any knowledge of the procedural steps necessary to obtain such an injunction without taking potentially costly advice from a legal professional. The proposed reforms would serve to marginalise the undesirable effect of *Edwards*. In the schemes later proposed, the failure to follow a contractual disciplinary procedure would clearly be a matter a tribunal would have jurisdiction to hear regardless of contractual status. The adoption of either set rules such as in some of the civil jurisdictions inspected or, more broadly, making disciplinary procedures short of dismissal subject to a determination of fairness should dismissal later result. The latter should go some way to offering comfort to all

[789] See *Autoclenz v Belcher* [2011] UKSC 41, [2010] IRLR 70.
[790] N66.
[791] N289, para 122

employees that a fair process will be followed as well as also introduces a degree of commercial certainty.

It is suggested that the UK Legislature should adopt an enforcement mechanism similar to France whereby a specific cause of action regarding a failure to allow an employee the right to be heard can be taken. Another suggestion would be to follow that of Portugal or Slovenia by creating a specific 'Administrative Offence' in respect of a denial of the right to be heard but, in light of the voluntarist tradition of UK Labour Regulation, this may not be a suitable fit and could come across as dictatorial. A further suggestion would be to follow the position in Estonia and allow a (as of yet non-existant) Labour Inspectorate to police any such breaches but of course, the arguments for establishing such an inspectorate and the relative merits fall beyond the scope of this thesis. However, one thought may be to expand the remit of an institution such as ACAS to make preliminary rulings on such matters in the guise of an inspectorate but much in the spirit of it's present role. It is submitted that any of these positions is preferable to the existing one whereby the only potential recourse would be a little-known - and potentially prohibitively costly for the majority of employees – application for injunctive relief prior to a claim for damages.

5.2 The Global Perspective

At the outset of this thesis, it was postulated that the present state of affairs regarding disciplinary and investigatory matters in England and Wales has the potential to result in serious injustice given the lack of substantive procedural guidelines and the unclear nature of the rules / complex nature of the common law system.

It was determined that a comparative investigation would be a suitable method by which to seek ideas for reform of this area and the decision was made to investigate a range of other jurisdictions to observe their rules.

These jurisdictions were initially selected from the CBR study of Employment Regulation and were filtered down with reference to a number of variables, chiefly whether the jurisdictions could be said to have the same degree of respect for the rule of law as England and Wales and whether the rules are enforced in practice. This ultimately led to a selection of jurisdictions which, by these standards, could be considered 'similar' enough to England and Wales in terms of their respect for the rule of law and commitment to Labour Rights, and, therefore, worthy of comparison. These jurisdictions were from a range of comparative classifications and did not all originate from the same 'legal family'.

For the reasons given in the methodology chapter, this was felt to be important since valuable comparisons can often be made from different types of system. It has also proven to be very productive and worthwhile to compare a range of systems since this has enabled the discovery of certain patterns with respect to the subject under investigation.

Following the literature review there were findings made in respect of the English Law position on the following questions:

1) What rules relating to procedural fairness have been recognised by the Courts as applying to disciplinary proceedings?
2) What is the effect of breaching such rights?
3) Are these rights universal to all employees?
4) Are there clear and sufficient substantive guidelines on these rights?
5) Has been sufficient development of such rights within the case law?

The overall findings in respect of English Law was that whilst there is no explicit statutory guidance – other than the non-binding ACAS Code of Practice – the Courts have recognised the existence of what could be termed 'natural justice' or 'procedural fairness' rights within the law as it pertains to disciplinary matters. Such standards, however, were variable and the enforceability of these standards inconsistent. It was also noted that whilst such rights were recognised in the context of case law, important aspects of the law were effectively beyond the reach of most people not familiar with how the law works. It was also found that certain public sector employees appeared to have more protection than those from the private sector which seemed to be at odds with the overall function of the law which, presumably, is to protect all people.

In addition to the law being, for the most part, inaccessible, it was also found that there had been very limited development of the law by the Courts which seemed, at least partly, to result from the, often deferred to and in some ways deferential position laid down by *British Home Stores v Burchell*[792] although it could also be attributable to a form of judicial obstruction if the exchange between Lord Denning and counsel at the conclusion of *Alidair v Taylor*[793] is taken on board whereby leave to appeal was refused in a related procedural matter, seemingly on the basis that it may lead to too many claims being put forward in the context of an over-stretched system.

The primary fault with *British Home Stores* is that it lays down a broad and sweeping standard by which an employer's decision-making is gauged,

[792] N26.
[793] N68.

that of 'reasonableness' whereas the preferred emerging model from the jurisdictions examined is one where the components of 'reasonableness' is actually spelled out clearly and can be readily understood by both sides.

The secondary fault with *British Home Stores* for the purposes of this study is that it is used for dismissal cases as opposed to claims brought in respect of unfair disciplinary hearings. As such, this dimension of the employment relationship has remained largely judicially un-examined, particularly at the senior levels of the Court hierarchy. Whilst this may have been the result of judicial obstruction – well-intentioned or not- it could also partially derive from the fact that many employees may not consider bringing such claims as they may feel that, unlike actions for unfair dismissal, such a motion could sour the employment relationship going forward and, moreover, they could hold not unreasonable levels of apprehension regarding future recriminations.

The overall position regarding the English Law position was, that although some of these rights clearly exist and that these are provided for to a certain extent, there is ultimately no absolute and unqualified right to a fair hearing in workplace disciplinary matters and, moreover, insufficient guidance regarding the importance of such matters and the correct procedural way in which they should be carried out. It was also noted that enforceability is also a problem given that an action for breach of contract or injunctive relief is, in the absence of an unfair disciplinary hearing resulting in a dismissal, the only remedy available to an employee.

From these findings, it was decided that the broad research questions to be answered would be as follows:

1) How do other comparable jurisdictions approach this problem.
2) Do certain types of legal system have stronger or clearer rules.
3) Is there any data relating to the enforcement of such rules.
4) Are certain procedural rules are given more protection than others across a range of jurisdictions.

These initial questions were supplemented with the following finer data points:

- Are such procedural rules codified?
- Is the status of different types of 'warning' provided for by law?
- Is there a legal duty for employers to communicate workplace rules to their employees?
- Does the employee have the right to be physically present during the disciplinary hearing?

- Do employees in the jurisdiction concerned have the right to receive notice of the charged misconduct? If so, how much notice is given?
- Do employees in the jurisdiction concerned have the right to make representations regarding the alleged misconduct?
- Do employees in the jurisdiction concerned have the right to be accompanied to disciplinary hearings?
- What categories of individual can such a companion be chosen from?
- What are the rights of such a companion?
- Is the employee or their companion entitled to cross-examine witnesses at such a hearing?
- Does the employee have the right to be legally represented at a disciplinary hearing?
- Are there any rules on whether or not the decision maker should be independent of the case?

The answers to the above questions can be given as followed:

Are procedural rules on disciplinary and investigatory matters codified?

The overall findings in respect of this question were mixed. There were a variety of approaches taken across the spectrum of jurisdictions observed.

Common Law Jurisdictions – Global Anglosphere /English Legal Origin

In Australia there were procedural factors set out in respect of dismissal hearings and in respect of disciplinary matters insofar as the right to be accompanied. It was noted that the rules on accompaniment were not particularly clear in this jurisdiction and that this was the source of some problems. Canada's legislative provisions appeared silent on these matters but New Zealand, similar to Australia, also laid down requirements in respect of dismissal hearings but nothing was set out specifically in relation to disciplinary matters. The Republic of Ireland was the jurisdiction which really bucked the trend in this respect having set out rules for disciplinary matters in a Statutory Code, the text of which is enshrined in statute for the benefit of all parties to such a dispute. Similar to Australia and New Zealand, Singapore set out a requirement for 'due inquiry' to be followed with case law substantiating the requirement for fairness in matters of dismissal, yet no provisions were explicitly made in respect of disciplinary or investigatory matters.

Civil Law Jurisdictions – Modern European Legal Culture / French / German / Scandinavian Legal Origin

Civil Law jurisdictions also presented a mixed picture in respect of codification but leaned further towards this position rather than away from it more sharply than the Common Law Jurisdictions. Estonia, France, Portugal and Slovenia all codified rights to procedural fairness in disciplinary matters and Spain and Finland at least partially advanced such an approach. There was no such approach taken by Germany but this could be due to high levels of works council involvement in such matters generally with agreements on such matters being left to be resolved internally as such.

Therefore, the final conclusions that can be drawn from this are that broadly all jurisdictions examined demonstrated an awareness of the need for procedural rules to be followed in respect of some workplace hearings. There appears to be a more 'voluntaristic' approach taken as regards the Common Law countries with the written contracts between the parties apparently being trusted to fill the gap regarding the agreed process to be followed in disciplinary matters. This seems to have been mirrored in respect of the Scandinavian jurisdictions and others throughout Europe, particularly where there appears to be a high level of collective bargaining and Trade Union membership. This is somewhat concerning since jurisdictions without such predispositions may be at a higher risk of unfairness in investigatory and procedural matters owing to the non-existence of a clear and decisive legal framework. This is broadly the case in the United Kingdom. Civil Law Jurisdictions overall were much more willing to codify such rules although this is arguably to be expected given the nature of Civil Systems. Some jurisdictions- such as France- were highly prescriptive whilst others were not so, such as Finland and Spain, both of which still prescribed certain minimum conditions for matters where dismissal could be a sanction.

It is important to note that all jurisdictions espoused the right to be heard in some form at least where dismissal was a possibility. It follows that in many cases perhaps this was also seen as 'best practice' as regards disciplinary and investigatory matters. It would appear non-sensical if informal industry standards or the majority of contractual agreements on such matters outlawed the right to be heard in any disciplinary matter other than one in which a dismissal could be a possible sanction.

As with the law in England and Wales, the Right to be Heard appears to form part of the collective consciousness of most other comparable jurisdictions. This observation is useful since it may lay the foundation for future agreed ILO standards on such matters. It is noteworthy that the right is expanded upon considerably in the majority of jurisdictions observed whereas the domestic scene is silent on this.

In relation to England and Wales, the majority of jurisdictions observed had more visible protection of such rights and in the majority of cases had put such rights on a statutory footing.

Is the status of different types of 'warning' provided for by law?

Although not universally prevalent, some jurisdictions provided for this explicitly.

Common Law Jurisdictions /Global Anglosphere

Across the Common Law jurisdictions, the Republic of Ireland provided for such levels of warning within the Statutory Code of Practice whilst Singapore also provided for sanctions following 'due inquiry' such as demotion or suspension. Like England and Wales, Canada, Australia and New Zealand did not provide for this.

Civil Law Jurisdictions / French Legal Origin / German Legal Origin / Scandinavian Legal Origin / Modern European Legal Culture

in Estonia, disciplinary penalties were required to be 'proportionate' as a matter of law and levels of 'fine' were specified. France, likewise, specified that disciplinary sanctions should not be disproportionate. Slovenia and Spain partially provided for this but did not specify the full range of penalties whilst Portugal did. Germany and Finland did not specify such matters. Under Siems modelling, Ireland would come into this category as being part of modern European Legal Culture as well.

Therefore, the final conclusions are that as has been discovered, the prescription of reasonable disciplinary penalties is to be found across a range of legal system including both Common Law and Civil systems. It should also be noted that, whilst a penalty may not be specified, it could be required to be 'proportionate' as is the situation in France. With this in mind, any future reform should consider importing this notion as a full transplant given its wide acceptance and the option for a 'light touch' approach in the form of required 'proportionality'.

Is there a legal duty for employers to communicate workplace rules to their employees?

This position was not widespread – only Estonia and Spain included specific requirements that this must be carried out.

Therefore, the final conclusions on this matter are that only a minor line of enquiry in its own right, this point is not overly essential as regards dimensions of procedural fairness.

Does the employee have the right to be physically present during the disciplinary hearing?

All jurisdictions examined which granted explicit rights to procedural fairness in respect of disciplinary matters appeared to grant this opportunity to the employee with the exception of Estonia which required a written explanation.

Therefore, the final conclusions are that any rules in respect of this area generally should be carefully considered – in the event of an employee who does not attend there may need to be a decision made *in absentia* in certain circumstances.

Do employees in the jurisdiction concerned have the right to receive notice of the charged misconduct? If so, how much notice is given?

A cornerstone of procedural fairness, this requirement was widespread across the jurisdictions examined where it was present to varying extents although it was more explicitly recognised in respect of dismissal hearings rather than disciplinary matters.

Common Law Jurisdictions /Global Anglosphere

Ireland's statutory code grants an employee the right to 'respond fully' to any allegations which embodies a right to notice. In Australia this is a requirement for dismissal hearings but there is no guidance as to what form such notice must take or the amount of notice which must be given. The right appears implied in respect of dismissal hearings in New Zealand whilst Canada is silent on the matter. Singapore embodies the right as part of 'due inquiry' and in the form of the guidelines as issued by the Ministry of Manpower.

Civil Law Jurisdictions / French Legal Origin / German Legal Origin / Scandinavian Legal Origin / Modern European Legal Culture

In Civil jurisdictions this right is implicit in respect of dismissal hearings and to a more limited extent it is legislated for in respect of disciplinary matters, specifically in France, Slovenia.

Therefore, the final conclusions are that this fundamental cornerstone of procedural fairness is acknowledged in a broad sense across the jurisdictions examined and explicitly legislated for in some instances. There is an absence of guidance on what a reasonable timeframe for such notice looks like across all jurisdictions and many appear to be concerned with dismissal rather than disciplinary matters.

Do employees in the jurisdiction concerned have the right to make representations regarding the alleged misconduct?

Central and fundamental to the right to be heard, if not, embodying the principle, the right to make representations was once again recognised to varying degrees across the jurisdictions examined. In some jurisdictions it was embodied more in respect of dismissal rather than disciplinary matters, however.

Common Law Jurisdictions /Global Anglosphere

In Australia the right is set out in relation to dismissal as is the case in New Zealand, whilst in Canada there is no specific legislation. Ireland, once again with its strong Statutory Code, provides for this in respect of disciplinary matters. In Singapore, it is recognised through 'due inquiry' and expanded upon in case law but as with Australia and New Zealand this relates to dismissal hearings.

Civil Law Jurisdictions / French Legal Origin / German Legal Origin / Scandinavian Legal Origin / Modern European Legal Culture

The right is more explicitly recognised across the Civil Jurisdictions with the right specifically set out in legislation. France, Portugal, Slovenia and Estonia specifically provide for this right in disciplinary matters.

Therefore, the final conclusions are that regarding perhaps the central tenet of procedural fairness, the right to be heard is present across the range of jurisdictions examined although it is not always specifically highlighted in respect of disciplinary matters which is of some concern. What is important, however, is that the right is explicitly recognised to some extent in some jurisdictions including a common law jurisdiction in the form of Ireland.

Do employees in the jurisdiction concerned have the right to be accompanied to disciplinary hearings?

The right to be accompanied was less clear across the jurisdictions examined. Where the right was codified this was largely in respect of dismissal hearings rather than those relating to dismissal with only a few jurisdictions providing for a right to be accompanied at disciplinary matters.

Common Law Jurisdictions /Global Anglosphere

Australia specifically provides for the right at dismissal hearings as does New Zealand whilst Canada follows the United States case of Weingarten. Singapore does not specify such a right.

Civil Law Jurisdictions / French Legal Origin / German Legal Origin / Scandinavian Legal Origin / Modern European Legal Culture

Trade Union consultation was specified in respect of Spain and Slovenia but this appeared concerned with dismissal rather than disciplinary matters, as the case also appeared to be in Germany with Works Council involvement. France provides explicitly for accompaniment in the Code du Travail.

Therefore, the final conclusions are that whilst this right was widely acknowledged in respect of dismissal matters it was not necessarily present for disciplinary and investigatory proceedings. Only a limited number of jurisdictions did so recognise this.

Accompaniment

What categories of individual can such a companion be chosen from?

Categories of individual were only prescribed in a few cases- France stipulated that only individuals from the Counsell du prud-hommes can be chosen and, as will be seen below, New Zealand was incredibly broad.

What are the rights of such a companion?

This was not broadly legislated for although in the Common Law jurisdictions some of these rights were highlighted. For example, in Australia, a 'support person' cannot speak if they are refused the right to do so. In Canada, the rights of such a companion are unclear whilst in New Zealand the companion's rights appear very broad – they must have the right to speak

on behalf of the employee and put forward explanations. Common Law jurisdictions appeared more expansive in this regard than Civil Law ones.

Is the employee or their companion entitled to cross-examine witnesses at such a hearing?

This right was not specifically legislated for in any jurisdiction examined.

Does the employee have the right to be legally represented at a disciplinary hearing?

In New Zealand there appears to be extremely wide discretion as to who can represent an individual in a disciplinary matter with the onus on the employee to establish the person's authority for the representation concerned. France specifies only certain individuals can appear in such matters but no automatic right to legal representation appears to exist across this, or any other jurisdiction.

Are there any rules on whether or not the decision maker should be independent of the case?

Across all the jurisdictions examined, no legislative provision expressed the requirement for the decision maker to be independent of the case although it's probable that this is given in respect of guidance.

Final Reflections on the Global Perspective

Whilst there was no uniform approach identified between the jurisdictions examined, there were, in most cases, commonly held ideals regarding the right to be heard, the right to have notice of the charges brought and, to a more limited extent, the right to a companion. The main overall distinction between the jurisdictions examined was those which specifically provided for rules relating disciplinary and/or dismissal matters and those which provided just for dismissal hearings. It was very difficult to ascertain whether the rights to be accompanied at dismissal hearings was reflected in the arrangements for disciplinary and investigatory matters. Nevertheless, the two groupings can be aligned as such:

Jurisdictions specifically legislating for Disciplinary Matters	Jurisdictions not specifically legislating for Disciplinary Matters
Ireland	Australia
France	New Zealand
Portugal	Canada
Estonia	Singapore
Slovenia	Finland
Spain	Germany

As can be seen, Global Anglosphere / Common Law countries tended not to specifically legislate for Disciplinary and Investigatory matters whereas Modern European Legal Culture / Civil Law Systems tended to. The outliers in each camp were Ireland in respect of the former and Finland in respect of the latter whilst it is important to note that the Republic of Ireland is classified as Modern European Legal Culture rather than Global Anglosphere and, whilst patently a 'civil' jurisdiction, Finland is categorized as 'Scandinavian Legal Origin'. As stated previously, it could be assumed that the procedures laid down for dismissal hearings are indeed followed at all times for disciplinary and investigatory matters in these jurisdictions as a course of best practice, but this is not guaranteed.

Further, considering the ways in which such rights are enforced, there were only a few jurisdictions which stipulated the method by which such rights could be asserted in a judicial arena:

Means of Enforcement for a Breach of Disciplinary Rights Specifically Outlined	Means of Enforcement for a Breach of Disciplinary Rights Not Specifically Outlined
Estonia – via Labour Inspectorate	Australia
France – Industrial Tribunal can rule on such disputes	New Zealand
Portugal – breach is considered an 'Administrative Offence' and is specifically actionable	Canada
Slovenia – fine can be imposed for failure to follow disciplinary procedures	Ireland
	Singapore
	Germany
	Finland

It is notable that the ruling regarding compensation for a failure to follow a disciplinary procedure in England and Wales is a case law decision and that this may only be available in certain circumstances, ie where a specific and detailed disciplinary procedure has been provided for by contract[794]. In other common law jurisdictions, it is likely that enforcement of particular procedural rights can only be enforced in a similar way, ie injunctive relief or a breach of contract claim. This means that, in such jurisdictions, it should theoretically be simpler for employers and employees to understand the consequences of breaching procedural rules in addition to making arrangements to enforce them. This has to be a more just position- under this model the law is much more accessible and transparent.

Another important factor was whether or not a scale was provided for the disciplinary penalty levied following a hearing. Predictably, this was absent where there was no specific legislation on disciplinary matters. This factor is important because it would place more of an onus on an employer to conduct such hearings in a fair manner and hence, an employee may be shielded from the cumulative effect of several irregular or otherwise tainted hearings when faced with a potential dismissal hearing.

Level of Disciplinary Penalty Specified	**Level of Disciplinary Penalty Unspecified**
Ireland	Australia
Estonia	Canada
France - partial	Finland
Portugal	Germany
Singapore - partial	New Zealand
Slovenia - partial	Spain – depends on collective agreement

As can be seen, the jurisdictions were split on this matter though not necessarily along the lines of Civil versus Common Law OR Global Anglosphere versus Modern European Legal Culture.

Rules and Standards

An important work regarding rules and standards is Louis Kaplow's influential 1992 article, 'Rules Versus Standards: An Economic Analysis'[795]. In it, he discusses the appropriate context for both rules and standards, drawing upon factual scenarios which may benefit from one approach as opposed

[794] N66.
[795] Louis Kaplow, 'Rules Versus Standards: An Economic Analysis', (1992) 42 Duke Law Journal, 557.

to the other. He uses the example of the use of potentially hazardous chemicals and states that, owing to the high number of individuals likely subject to these rules, combined with the fact that learning about a rule would be cheaper, a rule would be preferable in this context to a potentially complex standard.[796] As Kaplow further states,

'if the benefits of learning the law's content are substantial and the cost (whether of hiring legal experts or learning more on one's own) is not too great, individuals' behaviour under both rules and standards will tend to conform to the law's commands. The advantage of rules in this case would be that the cost of learning the law is reduced. If, however, the cost of predicting standards is high, individuals will not choose to become as well informed about how standards would apply to their behavior'[797].

Moreover, Kaplow further states that:

"Uninformed individuals act based on their best guess about how the law will apply to their contemplated conduct. Informed individuals act based -on actual knowledge of the law. Thus, informed individuals might be deterred from conduct they would have undertaken if they had remained uninformed,' which can occur when they learn that such conduct is illegal or subject to a higher sanction than they otherwise would have expected. Or, informed individuals might choose to undertake acts they would have been deterred from committing if they had remained uninformed. Both possibilities are of value to individuals." [798]

By way of contrast, Kaplow points out that in some situations standards may be preferable using the example of negligence due to *'myriad unique accident scenarios'*[799]. Moreover, standards may be preferable *'where a particular application will never arise'*[800].

As is evident, disciplinary and investigatory hearings routinely arise. The majority of parties to such proceedings cannot be assumed to have vast resources that could be expanded in pursuance of learning about the law. Large employers may have such resources but the vast majority of employees are likely not to have, particularly if they do not belong to a Trade Union. Such an approach would also apply to a vast number of people – potentially all those classified as 'employed' in the United Kingdom and their respective employers. The range of situations in which such rules may be engaged could also be assumed to be more limited than the sort of

[796] Ibid, 563.
[797] Ibid.
[798] Ibid, 569.
[799] Ibid, 573.
[800] Ibid, 571.

facts which give rise to negligence claims- such as the scenarios envisaged by Kaplow. In conclusion, it can be said that, given the foregoing, a rules-based approach may be more useful in this context than a standards-based one.

Modelling

From the foregoing research, it is possible to deduce three models for how disciplinary matters can be approached. These are the *Strong Rules-Based Approach,* the *Implied Standards Based Approach* and the *Rules and Standards Absence* approach.

Strong Rules-Based Approach

The Strong Rules-Based Approach is essentially characterised by a legislative specification of the rules that should apply in disciplinary matters which detail the Employers responsibilities as regards the rights that should be enjoyed by an employee in such settings.

This approach adopts legislation specifically in respect of disciplinary matters with no ambiguity as to whether or not such rules apply- ie. the rules must apply regardless of whether it is a first or final hearing. The aspects of procedural fairness as previously discussed – such as the right to be informed of the nature of the allegations prior to the hearing in addition, crucially, to the right to be heard specifically- are codified. There is also a specific enforcement mechanism built into the legislation that the employee can avail themselves of should these rights be denied. This cause of action may be very prescriptive, outlining the precise penalty the employer will face should the employee's case be upheld.

Strong Rules Based Approach
Rules of procedural fairness for Disciplinary matters Specified in Legislation, including the right to be heard
Rules apply in both Disciplinary and Dismissal matters
Specific cause of action present in respect of a failure to follow the rules
No distinction drawn between public sector and private sector employees in respect of the level of protection offered
Jurisdictions following such an approach include France, Portugal and, to a lesser extent, Spain and Ireland.

Implied Standards-Based Approach

In contrast to the Strong Rules-Based Approach, the Implied Standards Based Approach is essentially characterised by an absence of specific legislation in respect of disciplinary matters in particular, although certain dimensions of such hearings may have been delineated. This, however, stops short of ensuring that procedural fairness is guaranteed – for example, the right to be heard is not specifically catered for in legislation, at least not as far as disciplinary and investigatory matters are concerned. There is no specific enforcement method provided in respect of the breach of such rules. Moreover, in such cases, there may be provisions to the effect that a dismissal hearing should be carried out fairly but no specific direction to the effect that disciplinary and investigatory matters should be.

Implied Standards Based Approach
Rules of procedural fairness for Disciplinary matters not legislated for.
Standard of 'reasonableness' applies to dismissal hearings, judicial statements to the effect of 'natural justice' or 'procedural fairness' being followed in disciplinary matters
No specific cause of action present- remedy based on breach of contract
Public sector employees may have higher levels of protection than those in the private sector
Jurisdictions following such an approach include the United Kingdom, Australia, New Zealand and Singapore.

Rules and Standards Absent Approach

This model exists where there is no specific rules or standards referred to in any respect of the disciplinary structure. It can be theorized that this is due to the expectation within the jurisdiction concerned that such matters will be dealt with by either the Works Council or by Collective Bargaining agreement. Further research could uncover whether this is the exact reason for such an approach. In spite of no explicit rules or standards being laid down, there may, on the other hand, still be protections from unjustified dismissal as in the case of Germany. It was not possible to discover whether any such account of the fairness of previous disciplinary matters is taken into account at such hearings.

Exemplars of this approach are Germany and Finland.

Rules and Standards Absent Approach
Rules of procedural fairness for Disciplinary matters not legislated for.
Extensive collective bargaining arrangements may be presumed to exist

No specific cause of action present
Jurisdictions following such an approach include Germany and Finland

Following from this exercise, it can be determined that the model which offers employees the greatest protection is the Strong Rules-Based Approach, followed by the Implied Standards Approach and the Rules and Standards Absent Approach. As discussed elsewhere, it is interesting to note that the Common Law jurisdictions tend to lean more towards standards than Civil Law jurisdictions though not exclusively. This would seem to suggest that a rules-based approach may be more suitable within such jurisdictions and standards vice-versa. This does not necessarily mean, however, that such protections could not be enacted within a Common Law jurisdiction in a way that respects the standards-based environment as will be discussed later in the thesis.

Comparing England and Wales with the Comparative Jurisdictions- Overall Conclusions

Firstly, it should be emphasized, that the state of English employment law in respect of disciplinary matters is not, from a procedural fairness perspective, an unmitigated failure. Rules regarding, in particular, the right to be accompanied, are well-legislated for and clear. Furthermore, the non-binding ACAS code does give guidance on disciplinary matters which is praiseworthy. It is also worth noting that case law in England and Wales does allude to rules of procedural fairness applying in respect of dismissal hearings and, by-proxy it could be assumed, disciplinary matters. As shown through the case of *Edwards*[801], an employer can also be restrained from departing from the rules within contractual disciplinary procedures by means of injunctive relief.

The comparative evidence gathered shows that there are different ways in which this problem can be approached. Many jurisdictions codified rules specifically referring to disciplinary matters- France, Ireland and Portugal were strong examples here. A failure to follow these rules, at least in the cases of France and Portugal, could be met with a disciplinary sanction whereas the Irish Statutory Code has more legal force than the ACAS Code of Conduct. The major advantage of this approach would be that the rules are clearly defined and a knowledge of researching case law and an appreciation of the complex nature of judicial precedent are not required by lay people. This would assist both employees and employers, particularly those with no recourse to a vast Human Resources Department and no legal training. It should be noted further that many jurisdictions also published

[801] N289.

'guidance' in respect of such matters although it was not possible to find whether this was the case in many of the civil jurisdictions examined.

Many jurisdictions specified that notice should be given of charged misconduct but this was stronger in respect of dismissal rather than disciplinary matters. Ireland, in its statutory guidance propagated such a requirement as did France whereas the rest, where such information was available, only appeared to do so where dismissal was a possibility. England and Wales would also fall into this category since there is no requirement- outside of case law which is largely based on dismissal matters for this to be followed in respect of disciplinary and investigatory hearings. Although this requirement is often strongly articulated in English case law as shown at the beginning of the thesis, the requirement has yet to be put into legislation.

Many jurisdictions also followed the requirement to specify penalties for disciplinary offences or, in the case of France, to state that a disciplinary penalty should not be 'disproportionate'. England and Wales does not follow such a practice. An advantage of this may be that employers would be less inclined to impose penalties which are too high in the circumstances. This is preferable to no guidance being available at all for such matters, particularly whether the question of whether the guidance had been followed is not likely to be heard by a Court. A disadvantage of this may be that 'floodgates' may open in respect of such matters regularly coming before the Courts should the imposition of a disproportionate disciplinary penalty become a standalone cause of action. More will be written about this under 'Recommendations'.

It was also found that different enforcement models were employed across the different jurisdictions with some specifying exact 'punishments' for employers who fail to follow disciplinary standards as laid down by statute. In England and Wales, there are no statutory requirements but it may be possible for contractual disciplinary rules to be enforced by means of injunctive relief as the case of *Edwards*[802] has shown. It is also theoretically possible for standards of procedural fairness to be implied into disciplinary rules as stated in the case of *R v BBC ex parte Lavelle*[803]. To lawyers this may make perfect sense, but to the vast majority of stakeholders within this jurisdiction it very likely doesn't. For this reason, the advantage of specifying a cause of action for a specific failure to follow disciplinary matters is an attractive proposition within this context in the interests of transparency and fairness. Implementation as such will allow all parties to know the potential consequences of failures to follow an agreed procedure.

[802] Ibid.
[803] N66.

It was discovered that the right to be accompanied is, to an extent, well-catered for in England and Wales insofar as such a right is enshrined in statute and the rights of such a companion are established. Most Civil jurisdictions- with the exceptions of France for disciplinary matters and Finland for dismissal- did not so legislate for this. Other jurisdictions that specifically provided for this right were Australia, New Zealand, Ireland and Canada. Australia had a particularly wide definition of the class of individuals that could be chosen in such matters – a 'Support Person' is permitted under s.387(d) of the Fair Work Act of 2009 but there is confusion as to the full extent of their role- it is at the Employers discretion as to whether or not such a person can act as an 'advocate' in this role[804]. In New Zealand there is an even wider discretion as to who can accompany the employee and they have more complete rights to serve as an advocate[805]. Canada, following the *Weingarten* authority from the United States also gives this right but falls short of elaborating on the rights of the companion[806]. Ireland also protects the right but stops short of elaborating on the rights of the representative. Regarding the class of individual that an employee can choose to be represented by, the jurisdictions were all mostly silent on this. Only Ireland appeared to give the right to full legal representation in respect of all employees as was seen in the case of I*arnród Éireann/ Irish Rail v. Barry McKelvey*[807]. Whilst this is permitted only in the case of dismissal rather than disciplinary matters generally, this is nonetheless, a welcome contrast with the law as it stands in England and Wales and, it is submitted, in terms of fairness, overall equality and equity, also superior to the position in European Human Rights Law[808] which emphasizes such rights only in cases whereby the right to practice a chosen profession is at stake; a position which excludes a large class of employees from representation in a hearing which could have dramatic and far-reaching consequences as discussed at the outset of this thesis. Whilst these positions are noteworthy, it should also be stressed that nowhere was cross-examination listed as a specific right of companions although it is to be assumed that this would be a factor where an employee is legally represented.

5.3 The Future for Workplace Disciplinary Proceedings

In conclusion, whilst there is some protection of procedural fairness rights in English Law, it is, in line with other, mainly common-law jurisdictions, *de minimis*, and more protection is offered in respect of dismissal rather than disciplinary matters. On one hand, the reasoning for this could be construed as sound – an employee facing a dismissal should have a high level of

[804] N189.
[805] Ibid.
[806] N722, 1.
[807] N775, para. 38.
[808] N567, 170.

protection. On the other, as was stated at the outset of this thesis, if the reason the employee is facing dismissal is on the basis of having been subjected to previous unfairly conducted disciplinary matters and investigations resulting in potentially unfair warnings, with the best will in the world, the dismissal hearing could be, itself, heard on unsafe foundations. Furthermore, as strongly protected the employee may be in a dismissal hearing, evidence from Ireland shows that it is possible to grant legal representation in such a hearing without having to question whether the employee concerned is a) a 'professional' and b) at risk of being deprived of their chosen profession.

On a related point, the codification of the requirement that 'punishments' or 'corrective actions' taken as a result of disciplinary investigation be 'proportionate' as was seen in France and Slovenia- and to a more prescriptive extent in other jurisdictions such as Ireland and Portugal- may also assist decision makers in reaching fair decisions in such matters. They may also draw the attention of employees to a potential curative action under an appeal system which, if dealt with fairly, could mean that any ultimate dismissal hearing would be more likely to be safe being built on the solid substantive foundations of a preceding series of just corrective action should it be the end product of cumulative live warnings. Moreover, a requirement that time periods for warnings to be set would too be welcome as is the case in other comparative jurisdictions.

The comparative evidence also shows that codification of such rules and placing them on an adequate statutory footing attracting specific causes of action is also possible and, it would be argued, desirable. As revered as the common law is, the expectation that case law needs to be examined and interpreted to determine whether or not there is, indeed, the potential for launching a claim for either injunctive relief or damages is unsatisfactory when this could be codified and more easily accessed by both parties to such a dispute.

As outlined in the literature review, judicial reluctance and legislative failure have led to the present legal landscape regarding disciplinary matters in England and Wales. In respect of the findings gathered through this thesis, it is proposed that legislative change should be enacted at the next realistic juncture in order to help prevent injustice in respect of discipline and dismissal from arising.

The models of approach to disciplinary matters as highlighted above serve a useful purpose. It is submitted that the best model to exlplore initially would be the Strong Rules Based Approach. This model is the clearest one as regards delineating the aspects of procedural fairness as discussed throughout this thesis and, according to Kaplow, on a cost-based analysis,

this model would, overall, be the cheapest to implement. Additionally, it would be the clearest and simplest model to adopt and the most straight-forward in terms of all interested parties being able to understand. As discussed later in the thesis, should this approach be determined by the legislature to be at odds with the UK's legislative style or, for whatever reason, deemed an unsuitable transplant, it is submitted that a more targeted version of the Implied Standards approach would be a favourable measure. Adopting this approach would involve subjecting the procedures adopted by an employer at investigatory / disciplinary matters to a test of reasonableness and, in respect of live warnings, be admissible as evidence of unfairness in respect of dismissal decisions which stemmed from an unfairly administered warning. These approaches are discussed below under reforms.

5.4 Recommendations

On having carried out this study and having reflected upon the evidence obtained, 5 recommendations are made. These range from higher levels of protection for individual procedural rights through to minor shifts in admissibility of prior hearings to determine overall fairness.

1. **Clearly Establish the Right to be Heard in Workplace Disciplinary Proceedings in Law**

As disclosed in the initial literature review, procedural fairness and natural justice are fundamental concepts in the pursuit of justice. Decisions made in individual disciplinary matters can have the cumulative effect of dismissal. The review of the domestic law in respect of investigation, disciplinary and dismissal matters have disclosed that there is no general, unqualified right to be heard in respect of disciplinary matters. Case law decisions allude to this in respect of dismissal in some instances but firstly, it is often obscure in the context of accessibility and, secondly, often refers to a 'variable standard' of procedural fairness in this arena. This is a problem because, for the vast majority of working-age people, the loss of a job is a very serious matter and this absence of procedural safeguards is concerning. Partial visibility of the rules and partial protection is not a satisfactory state of affairs.

The review of comparable jurisdictions found that some of them do protect such rights and put it on a statutory footing. In France, the Code du Travail rule L1332-2 states that:

"When the employer plans to take a sanction, he summons the employee, specifying the purpose of the summons, unless the sanction envisaged is a warning or a sanction of the same nature having no impact, immediate or

not, on the presence in the company, the function, the career or the remuneration of the employee.

During the interview, the employer indicates the reason for the sanction envisaged and collects the employee's explanations."

Although framed in respect of the employers' power rather than the rights of the employee, there is clearly the requirement for the employee to be given the opportunity to be heard.

Similarly, in Portugal, Article 329(6) of the Labour Code states that:

"The disciplinary sanction cannot be applied without prior hearing of the worker".

In Slovenia, Article 177(3) of the Employment Relationships Act states

"…in the disciplinary procedure, the employer must allow the worker a defence unless the worker explicitly refuses it or unjustifiably does not respond to the invitation to defence."

Less desirably, Estonia's Employee Disciplinary Liability Act 1993 states that:

"An employer shall have the right to demand a written explanation concerning an offence from the offender. Refusal to provide an explanation or presentation of false information in the explanation shall not be an independent basis for imposition of a disciplinary penalty."

Whilst within the spirit of natural justice and procedural fairness, strict reliance on a 'written' explanation may not be fair on employees who are unable to articulate themselves effectively through this medium.

In Ireland, The Industrial Relations Act Code of Practice on Grievance and Disciplinary Procedures Order 2000[809] provides that:

"6. The procedures for dealing with such issues reflecting the varying circumstances of enterprises/organisations, must comply with the general principles of natural justice and fair procedures which include…:

…That the employee concerned is given the opportunity to respond fully to any such allegations or complaints…".

[809] S.I. No. 146/2000.

The position in the above jurisdictions is preferable to the domestic position for the reasons previously stated.

The key recommendation is to implement a similar statutory provision to the foregoing in UK Legislation. The positions in France and Ireland would be the most desirable since more detail is provided as to the desired procedure whilst others such as Portugal and Slovenia stipulate that the employee is simply granted the right to be heard. Confusion could arise as to the extent of such a provision under this type of rule. The Irish and French approaches offer more guidance. As indicated, the Estonian position would be undesirable for the reasons stated. If the legislature were minded to undertake a legal transplant, due to the linguistic form and it's shared legal heritage, the Irish provision would be the most suitable.

The effect of implementing this recommendation would be to close the gap in the law of England and Wales in respect of the right to be heard and ultimately ensure that the position is clearer for both employers and employees.

2. Ensure that <u>reasonable notice</u> is incorporated for disciplinary and investigations

Presently, there is no obvious requirement in the law that an employee should be given any or any reasonable notice in respect of the charged misconduct. The idea is articulated in case law in respect of dismissal matters and the non-binding ACAS Code may be of use in such matters before a tribunal. However, as with the previous recommendations, there is no clear right to this in respect of disciplinary matters. Without having reasonable notice, an employee will have less chance to prepare their case which is detrimental to a fair process, particularly where the cumulative effect could be dismissal.

This position was protected, albeit in a peripheral sense, in respect of dismissals across a range of jurisdictions – Australia, Finland, New Zealand, Singapore and Slovenia all recognizing the right as such. Ireland and France recognise the right in respect of disciplinary matters specifically.

In France, Article L1331-1 of the Code du Travail states that "No sanction can be taken against the employee without the latter being informed, at the same time and in writing, of the grievances held against him". It is noteworthy that no timeframe is laid down. Provisions in other jurisdictions were similar, with none apparently laying down set timeframes.

It is submitted that this may be a common legal 'blind-spot' across a range of jurisdictions. Henceforth, the UK legislature should take a trail-blazing stance in this regard and at least provide for the right in a minimalist sense. Employees should be guaranteed the right to 'reasonable notice' in respect of disciplinary complaints and the statutory language enacted would be wise to adopt this or similar wording to allow flexibility. 5 days notice would be reasonable for some matters but may not be adequate for others. This would go some way to supporting the overall right to be heard.

3 Import the requirement for <u>proportionality</u> in respect of corrective action taken at the culmination of a disciplinary hearing.

Presently, there is no requirement for a disciplinary sanction to be 'reasonable' or 'proportionate' in any sense. Whilst a disciplinary matter can be subject to a curative appeal, many employees may not feel they have grounds for doing so, being, effectively, at the mercy of company rules. This is a problem since it could lead to harsh disciplinary outcomes going unchecked.

In the jurisdictions examined, half had this requirement as part of the law. Under paragraph 10 of the Industrial Relations Act Code of Practice in Ireland, set penalties were given ranging from oral warnings through to demotion and dismissal. Estonia requires that:

"A disciplinary penalty shall not be in apparent conflict with the gravity of the offence, the circumstances of its commission or the prior conduct of the employee."

Similarly, in France, under the Code du Travail, sanctions must not be disproportionate under L1333-2. Similar to Ireland, Portugal lists a range of possible sanctions but also requires, similar to Estonia and France, Article 330(1) of its Labour Code provides that:

"The disciplinary sanction must be proportional to the gravity of the offense and to the culpability of the offender and may not apply more than one for the same offense."

In Slovenia, Article 178 of the Labour Code provides, quite comprehensively, that:

"When selecting a disciplinary sanction, the employer must take into account the level of fault, important subjective and objective circumstances, under which the violation has been committed, and individual characteristics of the worker".

It is submitted that a provision similar to that in Slovenia should be adopted so as to ensure that penalties levied are proportionate. Unlike other jurisdictions which require mere 'proportionality', Slovenia's position is both comprehensive and detailed. Failing this, 'proportionality' or 'reasonableness' should be incorporated as a standard should a list of potential penalties as disclosed in Portugal or Ireland may not be considered a good fit for England and Wales on the basis of over-prescriptiveness.

Regarding enforcement in each of these cases, an examination of whether such a disciplinary penalty was 'proportionate' or reasonable could be made the subject of a Court or Tribunal's jurisdiction. This would have the effect of ensuring that employers are aware of, and do so indeed act to implement standards of fairness at disciplinary hearings so as to avoid potential unfair dismissal claims arising out of a subsequent claim. A list of what may be regarded as 'proportionate' could also be outlined in statute which would help both employers and employees determine the likely seriousness of any warning given at the conclusion of the hearing and to enhance transparency.

4 Clarify the position regarding <u>legal representation</u> in dismissal hearings – Irish Approach

At the outset of this thesis, it was found that the legal position in the United Kingdom regarding legal representation in hearings which could potentially result in dismissal, was, at worst, unclear and at best, at risk of creating a two-tier system of representation regarding 'professional' status. There is judicial dicta backed up by decisions in the European Court of Human Rights which provides that, since the right to practice a profession is a 'civil' right, legal representation should be allowed at hearings whereby this right could be lost, Article 6 being activated accordingly. This is echoed in some cases where the possibility of cross-examination is mooted in certain circumstances. It is submitted that this is a problem on the grounds of basic fairness. Whether the right to practice a profession is a civil right or not, the effect of a dismissal hearing- should a dismissal result – will be broadly similar for 'professionals' and 'non-professionals' alike.

Of all the jurisdictions examined, the Republic of Ireland was the only jurisdiction purporting to take this approach. Conveniently, the Irish approach borrowed from English Law in respect of Prison rules. The Irish Court of Appeal[810] confirmed dicta from the English decision of *<u>R v Secretary of State for the Home Department ex parte Tarrant</u>*[811]. It was apparently

[810] N775, 38.
[811] [1985] Q.B. 251.

decided that this would cover workplace hearings generally rather than those where dismissal was a possibility. Geoghegan J[812] gave the following criteria for whether legal representation would be allowed:

1) *the seriousness of the charge;*
2) *Whether points of law would arise;*
3) *whether the individual can adequately present their own case;*
4) *Procedural considerations such as whether or not cross examination likely to be needed;*
5) *Factors relating to time; and,*
6) *The need for fairness.*

Geoghegan J. also provided the following as a Caveat:

'Whilst an employee facing a disciplinary in respect of alleged misconduct may be at risk of inter alia dismissal from their employment and significant damage to their good name, it should nonetheless generally be possible, save in exceptional circumstances, for such an employee to obtain a fair hearing in accordance with the principles of natural justice without the need for legal representation'[813].

It is recommended that the English Law adopt these provisions in respect of legal representation in disciplinary matters for all employees, regardless of their status, professional or otherwise. Arguments could be advanced regarding the additional costs this may burden small-businesses with should they need to frequently seek legal representation but smaller enterprises could be excluded from such provisions as is the case with the Law relating to Trade Unions[814] or, otherwise, be subject to a test similar to that under the Employment Relations Act 2000 103A(3)(a) whereby the justification for a dismissal can depend on whether the employer sufficiently investigated the allegations with reference to the resources available to them. Such a right to legal representation could be dependent on this. Moreover, should full legal representation seem costly, it is possible that this gap in the market could be filled with paralegal services.

5 Create a <u>specific cause of action</u> for failing to unreasonably offer an employee the right to be heard in a disciplinary matter.

As was found, outside a claim for breach of contract or injunctive relief, there is no way to challenge the failure to follow a contractual disciplinary or investigatory procedure where this occurs outside of a dismissal. Many lay

[812] N810.
[813] N810, para. 89.
[814] See TULR(C)A 1992, Sch1A and s. 7(1).

people will have little appreciation that such a cause of action exists and, more importantly, would possibly lack the means to seek assistance from a legal professional. Indeed, such a course of action may not be practical. Without any mechanism to enforce such rules – be they statutory or contractual – the rules are effectively impotent. The enforcement mechanisms of a number of jurisdictions were instructive in this regard.

Estonia takes the position of allowing such transgressions be dealt with by means of the Labour Inspectorate. This type of machinery does not presently exist in England and Wales so this approach would not be a sound one to adopt. France allows industrial tribunals to rule on such matters which, in a broad sense, would be similar to the position of England and Wales and other Common Law jurisdictions. In Portugal and Slovenia fines can be sought for a failure to allow an employee the right to be heard in disciplinary proceedings with Portugal in particular making this a specific 'Administrative Offence'.

It is recommended that such a course of action should be followed in England and Wales but, should this be seen as overly prescriptive, there is another way in which a similar effect could be sought. The legislature would be advised to amend s103A of the Employment Relations Act 2000 to allow the conduct of previous disciplinary and investigatory matters to be taken into account in determining whether a dismissal is justified or not. This would not mean 'spent' warnings necessarily, but where an employee is dismissed following a final warning, make admissible at Employment Tribunals, evidence of the conduct of previous disciplinary proceedings which resulted in a relevant warning being given to the employee in question to assess the fairness of the overall process. This would prove a strong incentive for employers to ensure that rules of procedural fairness are followed at all hearings. This could be done in a similar way to section 11 of the Employment Relations Act 1999 which provides a cause of action for failure to allow accompaniment and stipulates a maximum penalty of two weeks' pay[815]. This would allow for claims to be brought in respect of a failure to follow procedural rules such as the one brought in the case of *Skiggs v South West Trains*[816]. Furthermore, proportionate penalties could be considered and fixed by Parliament to ensure fairness as regards the liabilities placed upon employers for breaching such matters. It would be hoped that such measures would aid in protecting the overall integrity of the workplace disciplinary regime whilst serving as a cost-effective way to keep employers and employees educated on their rights and responsibilities as per the writings of Kaplow[817].

[815] S. 11(3).
[816] N343.
[817] N795.

The reasoning behind the above could be summarised as follows:

1) Natural Justice / Procedural fairness is a fundamental cornerstone of any legal system.

2) Protections against unfair dismissal are/ought to be enshrined in statute, in accordance with principles of natural justice and procedural fairness.

3) As this study has demonstrated, the procedural fairness rights of both private and public sector employees across many jurisdictions are protected without prejudice to their respective employment context.

4) Overall, most jurisdictions observed, tend to adopt a rules-based- as opposed to a standards-based approach which would be clearer, more effective and less costly to implement.

Therefore, arguably the UK Legislature should consider reform in this area by means of a partial legal transplant of some of the rules observed - in the form of the model standard.

<u>Model Instrument for the Domestic Legislator</u>

"1) *Disciplinary/Investigatory Meetings*

11. Where reasonably practicable, notice should be given to employees in writing in respect of:

12. any disciplinary allegations made against them;
ii) the time / date of any disciplinary / investigatory meetings;
iii) the employee's right to be accompanied at meetings which may lead to a disciplinary sanction;
iv) the outcome of any disciplinary / investigatory meetings and the employee's right to appeal.

b) Where notice of the above has not been given in writing, it is for the employer to show that this was for an objectively justifiable reason.

2)'*Reasonable Notice'*

a) An employee should be given reasonable notice of any meeting connected with the matters in s1(a).
b) What constitutes 'reasonable notice' will depend on the seriousness of the allegations and the seriousness of any likely penalty should the allegations be found to be true.

13. *Disciplinary Penalties*

a) At the conclusion of a disciplinary hearing, if a disciplinary penalty is to be imposed, the employer must consider:
i) The level of fault /blameworthiness of the employee;
ii) Any important subjective and objective circumstances of the infraction;
iii) Any individual characteristics of the worker.

b) The disciplinary penalty imposed must be proportionate to the infraction committed;

c) The employee must be given an automatic right of appeal in respect of the proportionality of the penalty imposed under s. 3(b).

14. Legal Representation in Disciplinary/Dismissal Hearings

a) An employee may make a reasonable request for legal representation at a disciplinary / investigatory hearing;

b) Whether such a request is accepted should depend on the following criteria:

i) the seriousness of the charge;
ii) Whether points of law would arise;
iii) Whether the individual can adequately present their own case;
iv) Procedural considerations such as whether or not cross examination likely to be needed;
v) Factors relating to time;
vi) The need for fairness.

c) Whilst such a request should not be unreasonably refused, this section does not confer an automatic right of legal representation on employees at all disciplinary meetings

d) An unreasonable refusal of legal representation in a disciplinary hearing that results in dismissal can be a factor taken into account by an Employment Tribunal when deciding on the overall fairness of an individual dismissal.

These rules protect the right to be heard in the following ways. Regarding ss.1 and 2, reasonable notice of allegations has been held to be a crucial factor in upholding principles of procedural fairness as a matter of due process generally and by the Courts as regards disciplinary/dismissal matters specifically in a number of decisions – see *Louies v Coventry Hood & Seating Co Ltd*[818] and *Spink v Express Foods Ltd*[819] for example. Enshrining them in law in a similar way to some of the jurisdictions observed, therefore, would be a positive move to ensure observance of standards of procedural fairness in these important matters. Section 3 seeks to ensure that any disciplinary penalty and, collaterally, any level of warning, is commensurate with the seriousness of the offence committed. This aligns with the clearest examples found within the comparative study and, moreover, would hopefully lead to a fairer decision-making process and avoid outcomes like that reported in the case of *Johnson Matthey Metals Ltd. v Harding*[820] whereby the employer was found to have apparently disregarded – or at least pay insufficient attention to – the fact that the employee had an unblemished 15 year service record. Although the comparative evidence did not disclose an automatic right to legal representation for employees, the insertion of s3 in the model code would, effectively, clarify this matter for all employees and provide for legal representation in certain circumstances subject to a number of conditions.

Should such a transplant, such as the one above, be considered a) likely to suffer from rejection and/or b) outside of the spirit of 'voluntarism' originating from the Donovan Report and/or at odds with the legal culture of the UK, then a specific statutory standard should be adopted in respect of disciplinary matters. Such a standard would place a statutory duty on employers to act fairly and reasonably in respect of disciplinary and investigatory proceedings. This could be done by amending s98(4) of the Employment Rights Act 1996 to establish that the question of whether a dismissal has been fair or unfair:

'in cases where the employee is already the subject of a live warning, whether or not the process by which that warning was administered complied with the rules of natural justice /procedural fairness'

[818] N36.
[819] [1990] IRLR 320.
[820] N429.

Or,

'in cases where the employee is already the subject of a live warning, whether or not the procedure in which that warning was administered was carried out as fairly as was reasonably practicable in the circumstances'

In the case of the latter, the following could be inserted as a schedule to amplify the concept of 'fairness':

'Questions of 'fairness' under s98(4) include, the extent to which an employee was given a sufficient opportunity to respond to any allegations put to them in any disciplinary or investigatory hearing, whether or not the employee was given reasonable time to prepare for any such hearing, whether or not the employee's prior work and conduct record was taken into account when determining the appropriate level of penalty at the conclusion of such a hearing'

5.6 Further research

Ideas for further research arose throughout this work include whether or not rules are as effective as standards in respect of disciplinary matters generally, and whether the *Wednesbury* standard of 'unreasonableness' would be a satisfactory way of approaching disciplinary matters for Common Law jurisdictions. Moreover, it was found that, with some exceptions, guidance in respect of disciplinary and investigatory matters was notably absent in jurisdictions which apparently had high levels of collective bargaining arrangements. Research into the contents of such agreements would be useful in order to find whether the level of protection contained therein is higher or lower than that found through this study to be present on the statutory level.

Regarding the impact of a failure to follow rules of procedural fairness on employees, psychological-legal research could perhaps be undertaken to determine this- how to what extent was Megarry J.'s statement in John v Rees, true when he said:

"…Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events".

In the absence of any knowledge or formal training in the law, would employees instinctively understand that fairness has been undermined by an employer in the context discussed?

Outside the legal discipline, economic research on the relative competitiveness of jurisdictions which have higher levels of regulation as regards disciplinary matters would also be of interest. If such reforms are accepted as being valid and necessary in a legal sense, an economic investigation could perhaps determine the compatibility of such regulation alongside the need to attract outside investment. Jurisdictions which appear to simulate the models outlined previously to varying degrees could be assessed according to the economic or perceived economic impact of having such rules in place on employers and, further, how such impact may be received or absorbed by potential investors. On the basis of such an assessment, forecasts could then be established in respect of the likely economic cost of implementing, for example, a strict rules-based approach to disciplinary matters as opposed to, for example, a flexible standard approach to such matters. The works of Kaplow should be a good reference point in such regards[821]. Collaterally, an overall economic assessment coupled with the best-practice points as highlighted by this study could form the basis for the development of a model standard in this area on the part of the International Labour Organisation by way of ensuring any such standard promulgated is sufficiently flexible enough to be relied upon by states seeking to attract outside investment or whose economies are largely dependent upon it.

5.6 Legal reform – Towards a new global minimum standard

The research undertaken will hopefully be of use to the UK Legislator as regards its own Labour Laws. It is also hoped that the findings can serve to inform a new ILO Standard. As was disclosed by the initial research into the jurisdictions to be examined under methodology, many jurisdictions appeared to have no, or no substantial legislative apparatus relating to disciplinary or investigatory matters. This was even evident within the final jurisdictions chosen. One theory for this, which correlates with some of the information available about these jurisdictions, is that such matters may be, not unreasonably, expected to be covered by collective agreements between trade unions and employees. However, of concern is that even in jurisdictions with high levels of collective bargaining this still does not represent 100% of the workforce. Moreover, smaller employers may be exempt from legal requirements to recognise Trade Unions in some of these jurisdictions as is the case in the United Kingdom[822]. If so, such matters will

[821] N795.

[822] See TULR(C)A 1992, Schedule1A and s.7(1)(a), regarding employers employing less than 21 people or b) an average of less than 21 people.

stand to be agreed by contract which may not stipulate the most fair and just procedures in such matters.

The International Labour Organisation was formed in 1919 to '*set labour standards, develop policies and devise programs promoting decent work for all women and men'*[823]. Since then, it has put forward standards on various aspects of employment to its member states including two important recommendations relating to dismissal[824] and a resulting convention[825]. There have not been any standards on 'Employment Security' proposed for 40 years at the time of writing. Given the gaps in the law that may exist across a range of jurisdictions as this thesis has uncovered an additional standard in this area could be adopted and proposed to member states.

Borrowing the preliminary language from ILO Recommendation 166, the Termination of Employment Recommendation from 1982, the below 'model standard' may be of use to the ILO should they be persuaded of the gravity of these matters and are in agreement that it has not been covered by any previous recommendation or convention.

Model ILO Standard

Methods of Implementation, Scope and Definitions

1. The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or Court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

2. This Recommendation applies to all branches of economic activity and to all employed persons.

15. A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:

[823] The International Labour Organisation, 'About the ILO', <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> accessed 12 July 2022.
[824] The International Labour Organisation, Reccommendation 166 on Termination of Employment, 1982, The International Labour Organisation, Reccomendation R119 - Termination of Employment Recommendation, 1963 (No. 119).
[825] C. 158 - Termination of Employment Convention, 1982 (No. 158).

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.
- (3) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, which as a whole provide protection that is at least equivalent to the protection afforded under the Recommendation

(4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them

Standards of General Application

Procedural Fairness in Investigatory Meetings and Disciplinary Matters

(5) Before the imposition of a disciplinary penalty an employer must give an employee the opportunity to give an explanation in respect of the conduct or allegations found to have warranted the imposition

(6) In investigatory meetings regarding disciplinary matters within the workplace, an employer must allow the employee the right to be accompanied by a co-worker or representative of a Trade Union

(7) An employee must be given reasonable notice of any investigatory or disciplinary meeting they are called to

(8) Where relevant, disciplinary and investigatory meetings should be carried out by individuals otherwise unconnected with the allegations

(9) If a disciplinary meeting is required following an investigatory meeting, the individual representing the employer at such a meeting should be a different individual to the one who conducted the investigatory meeting unless this is not reasonably practicable

Matters Relating to Disciplinary Penalties

10) Any disciplinary penalty imposed by an employer should only be imposed after consideration of the following:

a) The level of fault /blameworthiness of the employee;
b) Any Mitigating Circumstances;
c) Any relevant personal circumstances of the employee.

11) Any disciplinary penalty imposed on the employee must not be disproportionate to the gravity of the disciplinary infraction committed.

Rationale behind models

Under s.1(a) various factors are presented regarding matters the decision maker must take into account at a disciplinary hearing. This will hopefully effect a more transparent decision making process because the relevant factors to be taken into account will be known to both parties. This will assist decision makers in reaching objectively fair decisions and will facilitate the right to be heard insofar as employees will have an idea of what they should focus on when making statements in their own defence. Surely a right to be heard must be synonymous with the knowledge and ability to articulate ones case- s1(a) helps to facilitate this. If the list of factors appears prescriptive, it is worth recalling the dicta from *Johnson Matthey Metals v Harding*[826] where an employee's prior conduct was not taken into account during a decision to dismiss an employee for theft of a watch:

"Both members paid considerable attention to the fact that there had been here fifteen years of blameless service; and we would have thought that is plainly a matter to take into consideration when deciding whether or not the appropriate penalty is dismissal. That majority thought, too, that having regard to his fifteen years of blameless service a longer and more careful consideration of his conduct was perhaps called for. It is true that the whole matter was disposed of very quickly indeed"[827].

[826] N429.
[827] Ibid, (Phillips J).

Timely meetings are also necessary in order to ensure that memories have not faded with time in respect of any key events at the heart of the disciplinary matter under discussion. As memories fade, so does any evidence. Notification of the levels of sanction are also desirable- the employee should be aware of what exactly is at stake for them in each matter.

It would be hoped that such a model standard would be adopted by states following the Implied Standards and Rules and Standards Absent models of disciplinary procedure as outlined above. It may be of particular importance for jurisdictions falling into the latter category since they may be dependent upon the provisions of a collective bargaining arrangement for protection at such matters whereas not all employers may adopt such an approach. Collective bargaining. It is hoped that such a model standard could be drafted in a way that is broad enough to respect the legal traditions of a variety of jurisdictions whilst also ensuring that the core principles of procedural fairness are fully transmitted. Jurisdictions which are historically hostile to employment protection measures such as the United States and others as outlined in the CBR Labour Regulation Index[828] as having no regulation in respect of dismissal more generally may not adopt as such measures may be superfluous in the absence of any- or any significant- substantive or procedural rules regarding dismissal more generally. Other such jurisdictions include Georgia, Honduras, the Ivory Coast, Macedonia, Malta, Nicaragua, Nigeria and Paraguay[829]. Conversely, these jurisdictions should be best advised to consider such an adoption given the prevailing absence of such standards although economic and political reality for such jurisdictions may sound in the negative.

Jurisdictions more likely to adopt such a standard may be those who already have a culture of procedural and substantive protection for employees in respect of job security or those who can historically be viewed as adopting an incremental shift towards such ideals such as Rwanda, Senegal and South Africa[830] along with, it is hoped, jurisdictions who follow the 'Implied Standards' or 'Absence' models. This is because such a standard may help build upon an already established framework within a legal environment which is at least conducive to labour protection and which shows some historical willingness to reform.

5.7 Closing conclusions

[828] N78.
[829] Ibid.
[830] Ibid.

This study has investigated the rules relating to disciplinary proceedings in the United Kingdom and has isolated the provisions which pertain to a fair hearing. Following this investigation, it was found that, whilst there are some well-meaning case law provisions and well-intentioned legislative protections, the right to be heard in workplace disciplinary matters – at least those involving employees in the private sector – is not fully protected and can even be said to be non-existent. Moreover, such rules are not easy to find and whilst the ACAS code offers some guidance it is ultimately a non-binding document. The range of reasonable responses test from British Home Stores and Burchell is also not helpful for disciplinary matters with dismissals arising upon the basis of it falling to be judged by whether the employers' actions could be said to be 'reasonable'. This is not particularly clear and, moreover, does not generally apply retrospectively as regards previously determined disciplinary matters when only the final hearing is under scrutiny for fairness. Where such previous hearings are not examined there can be no accounting for the overall fairness of a final dismissal hearing, even if, it is submitted, the final hearing was itself procedurally fair.

On the basis that individual employment protection is a relatively new phenomena, the study then moved to investigate the practice of other jurisdictions with similar levels of respect for the rule of law and broadly similar labour law architecture. It was found that a significant number of jurisdictions deemed comparable retain more extensive provisions in respect of disciplinary matters than is the case in England and Wales, and in some cases, the right to be heard in disciplinary matters is specifically legislated for. In addition, it was found that more detailed provisions were available as regards the disciplinary processes with more support and structure provided so as to ensure fairness. Civil Law jurisdictions tended to provide more of these rules though not exclusively so since Ireland- a Common Law jurisdiction – provides firm and clear rules which are promulgated by statutory instrument. Common Law jurisdictions, on the other hand, tended to take a 'standards-based' approach whilst other jurisdictions seemingly had no rules in place, with the void perhaps left to be filled by collective bargaining arrangements. From this examination emerged three models – the 'Strong Rules Based' model, the 'Implied Standards' model and the 'Absence' model. The United Kingdom fell into the second category.

The 'implied standards model' is characterised by an implied reliance on standards of reasonableness in the disciplinary process along with potentially differing standards for public and private sector employees in disciplinary matters as well as a lack of codification. As discussed, these characteristics are also some of the initially identified problems. In terms of the practice of other jurisdictions in the 'Strong Rules Based' model, the United Kingdom position was far from ideal. The United Kingdom should adopt some of the practices there exhibited, so as to ensure more fairness in

disciplinary matters and to guarantee the right to be heard. This is not to suggest that provisions in foreign jurisdictions should necessarily be copied wholesale. As previously discussed, a more suitable approach may be for the United Kingdom to adopt a 'standards-based' approach to the problem which may seem more in keeping with the prevailing judicial ethos and avoid any potential transplant rejection as would be the overarching apprehension when making such changes to the law.

This thesis is entitled '*The Worker's Voice*'. As disclosed from the initial literature review and investigation, workers did not have a particularly strong voice in respect of certain important procedural aspects of disciplinary procedures. As stated previously, a procedurally fair dismissal hearing could have been preceded by a number of unfair disciplinary hearings or investigations which would, in all likelihood, never be examined at tribunal. The ultimate proposals disclosed by this thesis would add more volume to the workers voice during the preceding disciplinary matters, and, ultimately, would make any decision to dismiss at a final hearing safer and fairer. In terms of the mode of amplification, there are a number of options. This thesis has examined the rules and norms of a number of comparable jurisdictions and, combined with an appreciation of the common law, voluntarist and standards-based ethic of the United Kingdom's approach to such matters, set out proposals by which the worker voice can be amplified. It is, therefore, hoped that the legislator will take the proposals of this thesis into account when framing the next round of Employment Legislation in this area. If not the legislator directly, then interest could be garnered with the Law Commission, part of whose remit includes looking at information from other jurisdictions when framing proposals for domestic legislation[831]. In addition to potential interest from the legislator, this would potentially be of interest to ACAS regarding any updates to the Code of Practice on Disciplinaries and Grievances.

More broadly it is hoped that the findings from this thesis can help form and refine ideas of best practice in other related disciplines such as Human Resources Practice when determining the fairest possible way in which disciplinary and investigatory matters should be handled. Added to this is the prospect of putting such proposals before the international community via the model standard from earlier in this chapter. This was formulated with the International Labour Organisation in mind from where, it is hoped, that jurisdictions at an appropriate and receptive level of legal development can be moved to incorporate some of these ideas into their domestic legislation. As already outlined, formal protections for job security are a relatively recent global phenomena, in which some jurisdictions took an early lead over

[831] Law Commissions Act 1965, section 3(1)(f).

others in respect of laws pertaining to job-security[832] ahead of the global trend towards protections driven in part by the work of the ILO. It is hoped that the next developmental wave of protection in this area could be influenced to some degree by the work of this thesis and the findings herein.

APPENDICES

[832] Mexico being the first country to establish unfair dismissal protections in 1917; E. Yermin (2015), *Job Security: Influence of ILO Standards & Recent Trends*, in Matthew W. Finkin and Guy Mundiak, *Comparative Labor Law*: (Edward Elgar 2015) 20.

Appendix 1- Overview of Legal Systems and Labour Law mechanisms of the chosen jurisdictions

Australia

Australia has so far been classified as being of English Legal Origin[833] and being of the Global Anglosphere[834] on the basis of comparison so far.

Australia has a written constitution, the main source of which is the Commonwealth of Australia Constitution Act 1900[835] and a federal system with states being guaranteed the right to make their own laws under s107. It is also classified a 'common law' system[836].

Australian Employment cases appear to be dealt with on a first-instance basis by the 'Fair Work Commission'. Established by statute in 2009[837] the Commission calls itself 'Australia's national workplace relations tribunal'[838]. Under section 368 of the Fair Work Act all unfair dismissal claims are first subject to mediation. [839] Australia's Fair Work Commission acts as a de facto Labour Court under sec. 385, 390 FWA. Applications for unfair dismissal claims are likewise to be made to the Commission within 21 days of dismissal[840].

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[833] N106.
[834] N645.
[835] C. 12.
[836] N2, 252.
[837] Fair Work Act 2009 (AUS).
[838] Government of Australia and the Fair Work Commission, 'About Us', <https://www.fwc.gov.au/about-us> accessed 20 April 2023.
[839] The International Labour Organisation, 'Redress' https://eplex.ilo.org/redress/ accessed 20 April 2023.
[840] Fair Work Commission, 'Unfair Dismissal- Guide 3' (2021), online. <https://www.fwc.gov.au/documents/documents/factsheets/guide_3_makingapp.pdf> accessed 7 July 2021, 3.

Section 385 of the Fair Work Act 2009[841] provides protection from Unfair Dismissal for workers and s387(d) of the Fair Work Act 2009[842] gives workers the right to be accompanied at hearings.

Belgium

Belgium is classified as French Legal Origin[843] and Modern European Legal Culture[844]. It is a Civil Law system[845]. Belgium has specialist labour Courts as per the situation in the UK[846]. Works Councils are mandatory for organisations of over 100 employees[847]. Belgium does not have specific 'unfair dismissal' legislation[848] but according to Collective Bargaining Agreement (CBA) No. 109, the cause must not be manifestly unreasonable. According to the OECD, since 1st April 2014, the Labour Code has been amended to include a category of 'patently unreasonable dismissals'[849].It is unknown whether accompaniment is allowed at disciplinary or investigatory hearings. There are apparently no mandatory mediation or arbitration protocols[850].

Bulgaria

Bulgaria is classed as Socialist Legal Origin[851] and Modern European Legal Culture[852]. Although a Civil Law system, it has been reported that Bulgaria does not have a Civil Code[853]. Bulgaria does not have specialist labour Courts[854] or mandatory mediation or arbitration in cases of unfair dismissal[855]. Unfair dismissal is covered by the Bulgarian Labour Code[856] but there are no provisions made for a right to be accompanied. Bulgaria does not have works councils[857].

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[841] N837.
[842] Ibid.
[843] N106.
[844] N107.
[845] Aude Florini, 'The Codification of Private International Law: the Belgian Experience', in Private International Law, Edited by Peter McEleavy, Int. Comp. Law Q. 54 (2005), 499.
[846] Art 578, Judiciary Code, The International Labour Organisation, 'Redress', https://eplex.ilo.org/redress/ accessed 20 April 2023.
[847] Workerparticipation.eu.,'Workplace Representation- Belgium', <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Belgium/Workplace-Representation> accessed 20 April 2023.
[848] L & E Global, 'Alliance of Employer's Counsel Worldwide', <https://knowledge.leglobal.org/termination-of-employment-contracts-in-belgium/> accessed 20 April 2023.
[849] Office of Economic Cooperation and Development, 'Belgium', <https://www.oecd.org/els/emp/Belgium.pdf> accessed 5 October 2021, 2.
[850] The International Labour Organisation, 'Redress', <https://eplex.ilo.org/redress/>accessed 20 April 2023.
[851] N106.
[852] N107.
[853] Dimitar Stiomenov, *National Report on the Transfer of Movables in Bulgaria*, in Wolfgang Faber and Brigitta Lurger (eds), *France, Belgium, Bulgaria, Poland, Portugal* (European Law Publishers GmbH 2011), 361.
[854]Art 334(4) Labour Code (Bulgaria), The International Labour Organisation, 'Redress' <https://eplex.ilo.org/redress/> accessed 20 April 2023.
[855]N860.
[856] Labour Code 1986 (Bulgaria) Article 225.
[857]Workerparticipation.eu, 'Workplace Representation- Bulgaria', https://www.worker-participation.eu/National-Industrial-Relations/Countries/Bulgaria accessed 20 April 2023.

Canada

Canada is classified as being of English Legal Origin[858], of the Global Anglosphere[859] and is a Common Law[860] jurisdiction. The Canada Industrial Relations Board[861] serves as a specialist labour Court. Similar to the UK vis-à-vis ACAS, an 'Inspector' from the Industrial Relations Board will initially look into the case as a 'mediator'[862]. Canada does not have European-style works Councils[863]. Like England and Wales, Canada has specific unfair dismissal legislation[864] and has extensive rules on procedural fairness[865] Accompaniment to disciplinary meetings is followed from the United States case of *Weingarten*[866] failing to allow Union representation at such matters is potentially serious.[867]. It is, however: "*…well established that the right to representation does not extend to the investigatory process…"*[868] *Moreover, there is no general right to have legal counsel present. There is also no general obligation on the part of the employer to deal with an employee's lawyer*[869]*."*

Czech Republic

The Czech Republic, or "Czechia" as it is presently known, is classed as Socialist Legal Origin[870] and Modern European Legal Culture[871]. It is a Civil Law[872] system. It does not make use of specialist labour Courts[873] and there are no formally established works councils[874] although it is within the rules to

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[858] N106.
[859] N107.
[860] N2, 250.
[861]Government of Canada, 'Canada Industrial Relations Board' <http://www.cirb-ccri.gc.ca/eic/site/047.nsf/eng/home> accessed 20 April 2023.
[862]Labour Code (Canada) s241(2), see also the standards report on unjust dismissal, <https://www.canada.ca/en/employment-social-development/services/labour-standards/reports/unjust-dismissal.html#h2.6> accessed 20 April 2023.
[863] Roy Adams, 'Should Works Councils be used as Industrial Relations Policy?' Monthly Labor Review, July 1985, <https://www.bls.gov/opub/mlr/1985/07/art4full.pdf> accessed 20 April 2023.
[864] N862.
[865] *Baker v Canada* [1999] 2 SCR 817.
[866] N72.
[867] N723.
[868] *Naidu v. Canada Customs and Revenue Agency*,2001 PSSRB 124, 54.
[869] *Honda Canada Inc. v Keays*, (2008) S.C.C. 39.
[870] N106.
[871] N107.
[872]Marta Chroma, *The Czech Legal System and Contexts.* in Peter Lang, Bhatia V, *Mutilingual and Multicultural Contexts of Legislation. An International Perspective* Chapter: The Czech Legal System and Contexts, (Peter Lang 2015). 5.
[873] s72 Labour Code (Czech), The International Labour Organisation, 'Redress', <https://eplex.ilo.org/redress/> accessed 20 April 2023.
[874]Gianni Arrigo, Giuseppe Casale, 'A Comparative Overview of Terms and Notions on Employee Participation', (ILO 2010) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_123713.pdf> accessed 23 September 2021.

establish one[875]. The jurisdiction has specific unfair dismissal legislation under s46 of the Labour Code[876]. The rules are silent on disciplinary matters.

Denmark

Denmark is classified as Scandinavian Legal Origin[877] and also as belonging to the Modern European Legal Culture[878] and Civil, Scandinavian or Nordic Law[879]In respect of Employment disputes, mandatory conciliation is available[880] and specialist Labour Courts are only available for collective disputes, not individual ones[881]. Denmark also has the equivalence of Works Councils[882]. It has been reported that, in 2015, 80% of employees were covered by Collective Agreements[883]. The position on dismissal law is complicated:

> "In Denmark there is no general statutory prohibition against unfair dismissal. In principle, the employer is free to dismiss an employee[884]. There is protection in the main agreement ("Hovedaftalen") between the Danish Confederation of Trade Unions ("Landsorganisationen i Danmark", LO) and the Danish Employers' Confederation ("Dansk Arbejdsgiverforening". DA): Dismissal must be fair and notice must be given. In a case of serious misconduct the employer can dismiss without notice. The employer is obliged to justify the dismissal before the employee. However, this is not a condition for the validity of the dismissal. The main remedy against a dismissal is the conciliation procedure. An employee covered by a collective agreement may afterwards apply to the Board of Dismissal ("Afskedigelsesnævnet"). The Board may declare the dismissal unlawful and order the reinstatement of the employee. This applies if the employer is covered by the agreement, irrespective of whether or not the employees are actually members of the union."[885]

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875 Worker Participation.eu, 'Czech Republic' https://www.worker-participation.eu/National-Industrial-Relations/Countries/Czech-Republic accessed 20 April 2023.
876 Zakonik Prace, No65/1965 Coll. <https://www.legislationline.org/download/id/1152/file/57e59b5f06d4e5d2827e57b900e1772e.pdf> accessed 23 September 2021.
877 N106.
878 N107.
879 Ulf Bernitz, 'What is Scandinavian Law? Concepts, Characteristics, Future' Stockholm Institute for Scandinavian Law 1957 -2010, Online at <https://www.scandinavianlaw.se/pdf/50-1.pdf> accessed 23 September 2021,15.
880 The International Labour Organisation, *Redress,* <https://eplex.ilo.org/redress/> accessed 20 April 2023.
881 Ibid.
882 Worker Participation.EU, *Denmark* < https://www.worker-participation.eu/National-Industrial-Relations/Countries/Denmark/Workplace-Representation> accessed 20 April 2023.
883 Ibid.
884 European Commission *Termination of employment relationships, Legal situation in the Member States of the European Union,* (2006) 42.
885 Ibid.

As Denmark is covered by a large number of collective agreements[886] matters such as the right to accompaniment and disciplinaries are possibly covered by individual collective agreements.

Estonia

Estonia is classed as being of Socialist Legal Origin[887], Modern European Legal Culture[888] and Civil Law[889]. According to workerparticipation.eu, in 2015 only 33% of employees were covered by Collective Bargaining arrangements[890] and there are no established works councils[891]. Specific legislation on disciplinary procedures exists[892]. Estonia does not have specialist Labour Courts but does, however, have Labour Dispute Committees comprised of three members similar to the old-style UK Employment Tribunal[893].

Finland

Finland is variously classified as being of Scandinavian Legal Origin[894], Modern European Legal Culture[895] and Civil Law[896]. Individual Labour disputes are heard by ordinary Courts whereas disputes connected with collective agreements are heard by specialist labour Courts[897]. 91% of the population of Finland in 2015 was covered by a collective bargaining agreement and 74% were Trades Union members. There are no 'works council' arrangements but there is the right to worker representation at board level for companies with over 150 workers through the 'co-operation' procedure[898]. Finland has specific unfair dismissal provisions under chapter 12 Section 2 of Finnish Employment Contracts Act whereby 'unjustified termination' is mentioned and accompaniment at disciplinary hearings is provided for under Chapter 9 Section 2 of the same.

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[886] N715.
[887] N106.
[888] N107.
[889] The Central Intelligence Agency World Fact Book, 'Estonia', <https://www.cia.gov/the-world-factbook/countries/estonia/#government> accessed 20 April 2022.
[890] Worker participation.eu, <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Estonia> accessed 20 April 2023.
[891] Ibid.
[892] Employee Disciplinary Liability Act (Estonia) 1993.
[893] The International Labour Organisation, *Redress,* https://eplex.ilo.org/redress/. Accessed 20 April 2022.
[894] N106.
[895] N107.
[896] The Central Intelligence Agency World Factbook, 'Civil Law System based on the Swedish Model' <https://www.cia.gov/the-world-factbook/countries/finland/#government accessed 20 April 2022.
[897] The International Labour Organisation, *Redress,* <https://eplex.ilo.org/redress/> accessed 20/04/2022.
[898] Workerparticipation.eu, *Finland,* <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Finland/Board-level-Representation> accessed 20 April 2023.

France

France is classified as being of French Legal Origin[899], Modern European Legal Culture[900] and Civil Law[901]. There is the potential for individual labour disputes to be submitted to a specialist division of 'La Conseil des Prud'hommes'[902] and there is also mandatory conciliation[903]. There exists the provision for works councils within France[904] and there is specific provision against unfair dismissal within the Code du Travail[905]. Article L1232-7 of the Code du Travail makes provision for employee advisers to assist at dismissal hearings in the absence of a trade union agreement.

Germany

Germany is classed as German Legal Origin[906], Modern European Legal Culture[907] and Civil Law[908]. Preliminary conciliation is required[909] and there exist specialist labour Courts[910]. In 2015 there was 62% Collective Bargaining Coverage and 16% Trade Union Membership[911] Famously there are influential works councils in Germany who may be involved in dismissal matters[912]. Section 102 of the Works Constitution Act specifically lays down 'Co-Determination in the case of dismissal' with Section 102(1) stating that "The works council shall be consulted before every dismissal. The employer shall indicate to the works council the reasons for dismissal. Any notice of dismissal that is given without consulting the works council shall be null and void.". Section 102(2) gives the Works Council the right to object to any such decision regarding dismissal. Also see Protection Against Dismissal Act[913]

Japan

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899 N106.
900 N107.
901 The Central Intelligence Agency World Fact Book, 'France', <https://www.cia.gov/the-world-factbook/countries/france/#government> accessed 20 April 2023.
902 The International Labour Organisation, *Redress,* <https://eplex.ilo.org/redress/> accessed 20 April 2023.
903 Ibid.
904 Workerparticipation.eu *France* <https://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Workplace-Representation> accessed 20 April 2023.
905 Ministry of Justice of France, *The French Legal System*, <http://www.justice.gouv.fr/publication/french_legal_system.pdf> accessed 20 April 2023.
906 N106.
907 N107.
908 The Central Intelligence Agency World Fact Book, 'Germany' https://www.cia.gov/the-world-factbook/countries/germany/#government accessed 21 April 2023.
909 The International Labour Organisation, *Redress,* online at https://eplex.ilo.org/redress/ accessed 20 April 2023.
910 Ibid.
911 Workerparticipation.eu, *Germany,* <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany> accessed 21 April 2023.
912 Ibid.
913Dismissal Protection Act ('Kündigungsschutzgesetz') 1969 (Germany) <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl169s1317.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl169s1317.pdf%27%5D__1682073515711> accessed 21 April 2022.

Japan is classified as German Legal Origin[914], Modern European Legal Culture[915], Civil Law[916]. Japan does not have specialist labour Courts[917]. In 2016 16.7% of employees were covered by collective bargaining[918]. There are no works councils but there is specific unfair dismissal legislation as outlined in the Labour Standards Law of 1948[919]. It is unclear whether there is a specific right to accompaniment.

Iceland

Iceland is classified as Scandinavian Legal Origin[920], Modern European Legal Culture[921] and Civil Law[922]. Iceland has specialist labour Courts known as 'Felagsdomur'[923]. Although there are no established works councils there is a very high level of Union membership in Iceland[924] and an 'employer organisation density' of 78%[925]. According to the OECD, under Act No. 86/2018 the employment relationship can be terminated at will between the parties with certain exceptions[926]

Ireland

Ireland is classed as being of English Legal Origin[927], Modern European Legal Culture[928] and Common Law[929]. The jurisdiction has specialist labour Courts similar to the UK[930]. There is a voluntary conciliation process run by the

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914 N106.
915 N107.
916 'Central Intelligence Agency World Factbook, 'Civil Law based on German model', https://www.cia.gov/the-world-factbook/countries/japan/#government. Accessed 20 April 2022.
917 The International Labour Organisation, *Japan,* <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158904/lang--en/index.htm> accessed 21 April 2023.
918 Europa.eu, *Collective Bargaining – Japan,* <https://www.eurofound.europa.eu/country/japan#collective-bargaining> accessed 21 April 2023.
919 Labor Standards Act, Act No.49 of April 7, 1947 (Japan) Article 18-2 – 'A dismissal shall, where the dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as a misuse of that right and invalid.'
<http://www.japaneselawtranslation.go.jp/law/detail/?id=2236> accessed 5 October 2021.
920 N106.
921 N107.
922 Central Intelligence Agency World Factbook, 'Civil Law based on the Danish Model', <https://www.cia.gov/the-world-factbook/countries/iceland/#government> accessed 21 April 2023.
923Icelandic Labour Court, *About Social Justice*, <https://felagsdomur.is/um-felagsdom/> accessed 21 April 2023.
924Nordic Co-operation, *Trade Unions – Iceland*, <https://www.norden.org/en/info-norden/unions-iceland> accessed 21 April 2023 see also, OECD, 'Main Indicators and Characteristics of Collective Bargaining; Iceland' <https://www.oecd.org/employment/collective-bargaining-database-iceland.pdf> accessed 5 October 2021.
925 OECD, 'Main Indicators and Characteristics of Collective Bargaining; Iceland' <https://www.oecd.org/employment/collective-bargaining-database-iceland.pdf> accessed 5 October 2021.
926 OECD. 'Iceland', online <https://www.oecd.org/els/emp/Iceland.pdf> accessed 5 October 2021, 1.
927 N106.
928 N107.
929 Central Intelligence Agency World Fact Book, 'Common law system based on the English model but substantially modified by customary law' <https://www.cia.gov/the-world-factbook/countries/ireland/#government> accessed 21 April 2023.
930 The Irish Labour Court, <https://www.labourCourt.ie/en/> accessed 21 April 2023.

Workplace Relations Commission[931]. In 2015 there was a 44% collective bargaining coverage and 31% of employees were unionised[932]There are no provisions for works councils[933]. The jurisdiction has specific unfair dismissal legislation[934] and there may be the right to legal representation at dismissal hearings[935]. Moreover, the regulations on disciplinary procedures[936] give an employee 'the opportunity to avail of the right to be represented during the procedure'[937].

Israel

Israel is classified as being of English Legal Origin[938] and also "a mixed legal system of English common law, British Mandate regulations, and Jewish, Christian, and Muslim religious laws"[939]. The jurisdiction has specialist Labour Courts[940] which are inclined towards mediation in the first instance[941]. There are provisions for works councils[942] and there is no specific unfair dismissal legislation – this is usually contained in collective agreements[943]. There are apparently no provisions on disciplinary proceedings although it may be safe to assume that these too would be the preserve of collective agreements.

Luxembourg

Luxembourg is classified as Modern European Legal Culture[944] and Civil Law[945]. Luxembourg has specialist labour Courts[946] and conciliation is only

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[931] The Irish Workplace Relations Commission <https://www.workplacerelations.ie/en/complaints_disputes/conciliation/> accessed 21 April 2023.
[932] Workerparticipation.eu, *Ireland,* <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Ireland> accessed 21 April 2023.
[933] Ibid.
[934] Unfair Dismissals Act 1977, Number 10 of 1977 (Ireland).
[935] *Barry McKelvey* [2018] IECA 346, para. 38.
[936] SI 146 2000.
[937] Ibid. 4.6.
[938] N106.
[939] Central Intelligence Agency World Fact Book, *Ireland,* <https://www.cia.gov/the-world-factbook/countries/israel/#government> accessed 21 April 2023.
[940] Labour Courts Law 1967 (Israel) <http://www.knesset.gov.il/review/data/eng/law/kns6_laborCourt_eng.pdf>
[941] International Labour Organistion, 'Country Profiles: Israel', https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158902/lang--en/index.htm#P104_36193 accessed 21 April 2023.
[942] The International Labour Organisation, *Israel,*online at https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158902/lang--en/index.htm#P104_36193 accessed 21 April 2023.
[943]Organisation for Economic Co-Operation and Development, <https://www.oecd.org/els/emp/Israel.pdf> accessed 21 April 2023.
[944] N107.
[945] Central Intelligence Agency World Fact Book, *Luxembourg*, <https://www.cia.gov/the-world-factbook/countries/luxembourg/#government> accessed 21 April 2023.
[946] The International Labour Organisation, *Redress*, <https://eplex.ilo.org/redress/> accessed 21 April 2023, see also Price Waterhouse Coopers, *Introduction to Luxembourg Employment Law* <https://www.pwclegal.lu/en/docs/brochure/brochure-introduction-to-luxembourg-employment-law.pdf> accessed 21 April 2023.

mandatory for collective disputes[947]. There was 50% Collective Bargaining coverage in 2015[948] and 41% of employees were unionised[949]. There is provision for employee representation through an employee delegation and a works council-like "Joint Company Committee"[950]. Mandatory conciliation is only available in instances involving collective disputes[951] and there are specialist Labour Courts[952]. There is workplace representation of employees through the délégation du personnel[953] where there are fewer than 15 workers and there was found to be 50% collective bargaining coverage in 2015[954] with 40% Union Membership coverage[955]. There is provision in the law for unfair dismissal[956] and a pre-dismissal interview is required where the organisation has more than 150 employees[957]. Disciplinary rules are not obvious – these may be covered by collective bargaining agreements and by contract.

The Netherlands

The Netherlands is classified as French Legal Origin[958], Modern European Legal Culture[959] and Civil Law[960]. There is no mandatory or optional conciliation unlike the UK and no specialised labour Courts[961]. A striking and unique feature of dismissal in the Netherlands according to the Deloitte Legal Perspectives 'International Dismissal Survey'[962] is that an upfront approval of dismissal is required by the Courts. There is 81% Collective Bargaining coverage and 20% Union membership across the Netherlands according to workerparticipation.eu[963] and there are provisions for works councils[964]. There are provisions for unfair dismissal within the Dutch Civil

[947] Ibid.
[948] Workerparticipation.eu, *Luxembourg,* <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Luxembourg> accessed 21 April 2023.
[949] Ibid.
[950] Ibid.
[951] The International Labour Organisation, *Redress*, https://eplex.ilo.org/redress/ accessed 21 April 2023.
[952] Ibid.
[953] Workerparticipation.eu, *Luxembourg*, <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Luxembourg/Workplace-Representation> accessed 21 April 2023.
[954] Ibid.
[955] Ibid.
[956] Art. L 124-12 (1) Labour Code (Luxembourg).
[957] Thomsonreuters, 'Practicallaw', online at https://uk.practicallaw.thomsonreuters.com/5-503-2946?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a705170 accessed 25 March 2020.
[958] N106.
[959] N107.
[960] Central Intelligence Agency World Fact Book, *Netherlands* <https://www.cia.gov/the-world-factbook/countries/netherlands/#government> accessed 21 April 2023.
[961] The International Labour Organisation, *Redress*, <https://eplex.ilo.org/redress/> accessed 21 April 2023.
[962] Deloitte Legal, 'International Dismissal Survey',16 <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Legal/dttl-legal-international-dismissal-survey-2018.pdf> accessed 25/03/2020.
[963]Workerparticipation.eu, 'Netherlands', https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Netherlands accessed 21 April 2023.
[964] Ibid.

Code[965]. The situation regarding disciplinary and investigatory matters is unknown.

New Zealand

New Zealand is classed as English Legal Origin[966], Global Anglosphere[967] and Common Law[968]. There are specialist employment Courts similar to the UK[969] and the first stage in post-dismissal process is the Employment Relations Authority[970]. There are no works councils[971] and the jurisdiction has specific and comprehensive legislation on unfair dismissal[972]. The right to be accompanied at disciplinary and investigatory matters is also provided for in very broad terms under the Employment Relations Act 2000[973] and is also expanded upon in case law[974].

Norway

Is classified variously as Scandinavian Legal Origin[975], Modern European Legal Culture[976], Civil Law[977]. The jurisdiction has specialist labour Courts but not for individual disputes[978] and there is no mandatory conciliation for dismissal claims[979]. There is statutory provision for unfair dismissal claims[980]. According to worker-participation.eu 70% of employees are covered by collective bargaining and 52% of employees belong to Trade Unions[981].

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[965] Article 7:669 of the Dutch Civil Code gives examples of fair dismissals.
[966] N106.
[967] N107.
[968] Central Intelligence Agency World Fact Book, *'Common law system, based on English model, with special legislation and land Courts for the Maori'* <https://www.cia.gov/the-world-factbook/countries/new-zealand/#government> accessed 21 April 2023.
[969] Website of the New Zealand Employment Court, <https://employmentCourt.govt.nz/> accessed 21 April 2023.
[970] Empoyment Relations Authority, <https://www.era.govt.nz/footer/about-us/> accessed 21 April 2023.
[971] The International Labour Organisation, *Redress* <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158915/lang--en/index.htm> accessed 21 April 2023.
[972] See Test of justification under s103A, Employment Relations Act 2000 (New Zealand).
[973] No. 24, s. 236 (New Zealand).
[974] [2006] ERNZ 415 (EmpC), para 161.
[975] N106.
[976] N107.
[977] CIA World Factbook lists Norway as 'a mixed legal system of civil, common, and customary law' <https://www.cia.gov/the-world-factbook/countries/norway/#government.> accessed 21 April 2023.
[978] The International Labour Organisation, *Redress*, https://eplex.ilo.org/redress/, see also, website of the Norwegian Labour Court, https://www.arbeidsretten.no/engelsk accessed 21 April 2023.
[979] Ibid.
[980] Ss. 15-6 to 15-11 Working Environment Act, LOV-2005-06-17-62 (Norway).
[981] Workerparticipation.eu, *Norway*, <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Norway accessed> 21 April 2023.

Worker representation is allowed and there are some 'works councils' however their role is related to competitiveness rather than representation[982]. Accompaniment at disciplinary and investigatory meetings is unknown but this may be catered for under collective agreements.

Portugal

Portugal is classified as French Legal Origin[983], Modern European Legal Culture[984] and Civil Law[985]. Preliminary conciliation is required by the judge in Labour cases[986] and there are Labour Courts which have exclusive jurisdiction over cases involving dismissal[987]. According to worker-participation.eu, Portugal has 92% coverage by collective agreement and 19% Union membership[988]. Moreover, "works councils exist in theory but less frequently in practice"[989]. Portugal has specific legislation in respect of unfair dismissal which also covers disciplinary matters too[990].

Singapore

Singapore is classified as English Legal Origin[991], Global Anglosphere[992] and 'English Common Law'[993]. There do not appear to be specialist labour Courts available for dispute resolution and there is statutory silence on conciliation and arbitration according to the ILO[994]. There is, however, the Ministry of Manpower, to whom a first complaint of unfair dismissal lies[995] There does not appear to be any provision for works councils like the rest of the Common Law jurisdictions observed. There does not appear to be any provision made for works councils and information on collective agreements is difficult to source. The jurisdiction has specific unfair dismissal legislation in the Employment Act 1968 under s14[996]. There is also case law available on the

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[982] Ibid.
[983] N106.
[984] N107.
[985] Central Intelligence Agency World Fact Book, *Portugal*, https://www.cia.gov/the-world-factbook/countries/portugal/#government accessed 21 April 2023.
[986] The International Labour Organisation, *Redress*, https://eplex.ilo.org/redress/ accessed 21 April 2023.
[987] Ibid.
[988] Workerparticipation.eu, 'Portugal', https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Portugal accessed 21 April 2023.
[989] Ibid.
[990] Labour Code (Portugal) Art 327, https://dre.pt/application/conteudo/123169278 accessed 21 April 2023.
[991] N106.
[992] N107.
[993] The Central Intelligence Agency World Fact Book, *Singapore* https://www.cia.gov/the-world-factbook/countries/singapore/#government accessed 21 April 2023.
[994] The International Labour Organisation, *Redress*, https://eplex.ilo.org/redress/ accessed 21 April 2023.
[995] Singapore Ministry of Manpower, *Industrial Relations,* https://www.mom.gov.sg/employment-practices/trade-unions/industrial-relations accessed 20 April 2023.
[996] Singapore Statutes Online, Employment Act 1969, <https://sso.agc.gov.sg/Act/EmA1968> accessed 21 April 2023.

right to be heard / accompanied[997] which appears to be part of what may constitute a 'due enquiry' under the law[998].

Slovenia

Slovenia is classified as Socialist Legal Origin[999], Modern European Legal Culture[1000] and Civil Law[1001]. There is a requirement for mandatory conciliation[1002] and mediation can also be done through the Labour Inspectorate[1003]. There are also specialist labour Courts[1004]. According to worker-participation.eu, there is a 90% coverage of collective bargaining and 27% Union membership. There are works councils as provided for by 1993 legislation and according to a study from 2007 there was, at the time, 22.9% Works Council coverage in industries with 10 or more employees[1005]. There is specific legislation relating to unfair dismissal[1006] and there is a right to be heard stipulated for dismissal hearings[1007]. Article 85 implies extensive trade union involvement in dismissal matters and there is no specific mention of a right to be accompanied.

Sweden

Sweden is classified as Scandinavian Legal Origin[1008], Modern European Legal Culture[1009] and Civil Law[1010]. There is no mandatory conciliation or arbitration unless provided for by collective agreements[1011]. Specialist Labour Courts exist but these are only where employees are bound by a collective agreement[1012], other types of dispute will be dealt with by the District Court[1013]. According to worker-participation.eu, 88% of workers are covered by collective bargaining agreements and 70% of employees belong to a Union[1014]. There are no Works Councils and employee representation is

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997 *Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151.
998 Ibid.
999 N106.
1000 N107.
1001 Central Intelligence Agency World Fact Book, *Slovenia,* https://www.cia.gov/the-world-factbook/countries/slovenia/#government accessed 21 April 2023.
1002 The International Labour Organisation, *Redress*, https://eplex.ilo.org/redress/ accessed 21 April 2023.
1003 Ibid. (see also s216 ERA).
1004 Ibid.
1005 Workerparticipation.eu, *Slovenia,* https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Slovenia/Workplace-Representation accessed 21 April 2023.
1006 Employment Relationships Act 2003 (Slovenia) Article 83.
1007 Ibid.
1008 N106.
1009 N107.
1010 Listed on the CIA World Factbook as 'civil law system influenced by Roman-Germanic law and customary law', Sweden, <https://www.cia.gov/the-world-factbook/countries/sweden/#government.> accessed 21 April 2023.
1011 The International Labour Organisation, *Redress*, https://eplex.ilo.org/redress/ accessed 21 April 2023.
1012 Ibid.
1013 Ibid.
1014 Workerparticipation.eu, *Sweden,* https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Sweden accessed 21 April 2023.

actioned through the Trade Union[1015]. The jurisdiction has provisions in respect of unfair dismissal[1016] but accompaniment at disciplinary and investigatory matters is unclear.

Spain

Spain is classified as French Legal Origin[1017], Modern European Legal Culture[1018] and Civil Law[1019]. Mandatory conciliation is a requirement under the law of Spain[1020] and there are specialist labour Courts which deal with individual labour disputes[1021]. According to worker-participation.eu there is a 70% collective bargaining coverage and 19% trade union membership rate[1022]. There are provisions for works councils but these are apparently union-dominated[1023]. There is specific unfair dismissal legislation under the Statute of Workers Rights[1024] which also serves to address disciplinary matters to an exent[1025]

[1015] Ibid.
[1016] Employment Protection Act 1982 (Sweden) s80.
[1017] N106.
[1018] N107.
[1019] The CIA World Factbook lists Spain as a 'civil law system with regional variations', *Spain,* <https://www.cia.gov/the-world-factbook/countries/spain/#government.> accessed 21 April 2023.
[1020] https://eplex.ilo.org/redress/.
[1021] The International Labour Organisation, *Redress*, online at https://eplex.ilo.org/redress/ accessed 21 April 2023.
[1022] The International Labour Organisation, *Redress*, online at https://eplex.ilo.org/redress/ accessed 21 April 2023.
[1023] Workerparticipation.eu, *Spain,* https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Spain/Workplace-Representation accessed 21 April 2023.
[1024] Art. 53(4c).
[1025] See Chapter IV.

Tabular Overview

Jurisdiction	Unfair Dismissal Laws?	Arbitration	Mandatory Conciliation	Specialist Labour Courts Available
Australia	Section 385 of the Fair Work Act 2009	Optional - Section 369 Fair Work Act	Yes -Section 368 Fair Work Act	Fair Work Commission Sections 385, 390 Fair Work Act
Belgium	No specific unfair dismissal legislation but Collective Bargaining Agreement (CBA) No. 109, the cause must not be manifestly unreasonable- also see changes since 1 April 2014[1026]	N/A	N/A	Article 578 Judiciary Code
Bulgaria	Article 225 Bulgarian Labour Code	N/A	N/A	Article 344 (4) Labour Code refers to district / regional Courts only

[1026] OECD, '*Belgium*', <https://www.oecd.org/els/emp/Belgium.pdf> accessed 5 October 2021, at page 2. These are dismissals which: have no connection with the worker's ability or conduct, are not based on the operational requirements of the enterprise, establishment, or service, would never have been decided by a reasonable employer.

Canada	S240 Canadian Labour Code	Sections 240 / 240(2), 241(3), 242, Canadian Labour Code – employees must have been employed for at least 12 months and not be subject to a collective agreement. Arbitration – 'ordinary way' for dealing with unjust dismissal cases.	Yes- Sec. 241(2) Canadian Labour Code	
Czech Republic	S46 Czech Labour Code	N/A	N/A	Section 72 Labour Code – no specialist Labour Courts
Denmark	No[1027]	Conciliation must be attempted[1028]	Available but may be for collective agreements only[1029]	Only for workers covered by collective agreements[1030]
Estonia	Section104 Employment Contracts Act	N/A	Article 3(1) of Labour Code – if possible mediation should be used but Art3(4) - Courts can	Disputes relating to dismissal are heard by the Court/ labour dispute committee Articles 105-109 Employment Contracts Act

[1027] See European Commission, *Termination of employment relationships, Legal situation in the Member States of the European Union,* 2006.

[1028] Judge Jorn Anderson, *Case management in the Danish Labour Court*, 2004, 2, <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_160035.pdf.> accessed 20 April 2023.

[1029] Ibid, 3.

[1030] The International Labour Organisation, *Redress*, https://eplex.ilo.org/redress/ accessed 21 April 2023.

			be used if agreement not reached	
Finland	Chapter 12 Section 2 Employment Contracts Act	N/A	N/A	Disputes under collective agreements dealt with by Labour Court - Act on the Labour Court 646/19974. Disputes regarding individual labour rights heard by ordinary Courts.
France	Dismissal must be based on serious grounds such as those covered by L. 1232-1	N/A	Art. L 1411-1 LC – yes, in front of conciliation section of Conseil des Prud'hommes	Art. L 1411-1 LC – dispute over dismissal can be submitted to a 'restricted chamber' – 1 employer and 1 worker.
Germany	Section 102 of the Works Constitution Act- Co Determination in case of Dismissal, and Protection Against Dismissal Act 1951 Article 1 – must be socially justified dismissal	N/A	Yes Section 54 (1) Protection Against Dismissal Act	Section 4 PADA and section 2 of the Federal Labour Court Act 1953 (amended 2013)

Japan	Labor Standards Act, Act No.49 of April 7, 1947, Article 18-2 "A dismissal shall, where the dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as a misuse of that right and invalid"	N/A	N/A	See ILO documentation [1031]
Iceland	According to the OECD, under Act No. 86/2018 the employment relationship can be terminated at will between the parties with certain exceptions [1032]	N/A	N/A	Iceland has specialist labour Courts known as 'Felagsdomur' [1033] .

[1031] The International Labour Organisation, *Japan,* <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158904/lang--en/index.htm> accessed 21 April 2023.
[1032] OECD. '*Iceland*', 1 <https://www.oecd.org/els/emp/Iceland.pdf> accessed 5 October 2021.
[1033] Website of the Iceland Labour Courts, https://felagsdomur.is/um-felagsdom/ accessed 20 April 2023.

Ireland	Unfair Dismissals Act 1977, Number 10 of 1977	N/A	Available[1034]	Yes[1035]
Israel	Usually in Collective Agreements	N/A	N/A	Yes[1036]
Luxembourg	Article L 124-12 (1) Labour Code		Only for collective disputes Art. L. 164-1 LC.	Yes Art. L 124-11 (2) LC.
The Netherlands	Article 7:669 Dutch Civil Code gives examples of fair dismissals	N/A	N/A	No[1037]
New Zealand	Test of justification under s103A, Employment Relations Act 2000	N/A	Not mandatory [1038]	Yes[1039]
Norway	Sections15-6 to 15-11 Working Environment Act, LOV-2005-06-17-62	S10 Arbitration Act 2004 – individuals can submit to Arbitration	Article 17-1 (3) Working Environment Act – Conciliation Boards (forliksrådet) only hear collective disputes *but* Article 17-3 WEA-	Individual disputes relating to dismissal are heard by the ordinary Courts- Article 17-1 Working Environment Act, Mediation and Civil Proceedings Act (No. 28 of 2012) and Courts

[1034] Website of the Irish Workplace Relations Board, <https://www.workplacerelations.ie/en/complaints_disputes/conciliation/ > accessed 21 April 2023.
[1035] Website of the Irish Labour Courts, <https://www.labourCourt.ie/en/> accessed 21 April 2023.
[1036] The Knesset, 'Israeli Labour Courts Law 1967', http://www.knesset.gov.il/review/data/eng/law/kns6_laborCourt_eng.pdf. Accessed 21 April 2023.
[1037] The International Labour Organisation, *Redress*, https://eplex.ilo.org/redress/ accessed 21 April 2023.
[1038] Government of New Zealand, '*Solving Problems at Work*', https://www.employment.govt.nz/assets/Uploads/tools-and-resources/publications/17ac6cbb3e/solving-problems-at-work.pdf accessed 20 April 2023.
[1039] Government of New Zealand Employment Court Website, https://employmentCourt.govt.nz/ accessed 21 April 2023.

			employee alleging dismissal can demand negotiations with employer	of Justice Act (No. 5 of 1915).
Portugal	Labour Code Art 327	Only available for Collective Disputes Articles 144-150 Labour Law	Preliminary Conciliation required under Article 98 -I and Articles 52-53 of the Code of Labour Procedure.	For dismissal cases, yes - Code of Labour Procedure and Article 387 of the Labour Code.
Singapore	Section 14 Employment Act 1968	N/A	N/A	Ministry of Manpower possibly[1040]
Slovenia	Employment Relationships Act 2003 Article 83	Article 201 of Employment Relationships Act- arbitration can be provided for within collective agreement	Article 23 of Law on Labour and Social Court – where agreement has not been reached prior to this.	Article 200 Employment Relationships Act- yes but for disputes arising under collective agreements only
Sweden	Employment Protection Act SFS 1982:80	Can be settled through Arbitration but see exceptions in Chapter 1 Section 3 of the Labour Disputes Act (1974:371).	Labour Disputes Act (1974:371)- negotiations must have taken place prior to Court but this does not apply to individual employees	Chapter 2 Section 2 of the Labour Disputes Act (1974:371) states that "Labour disputes other than those referred to in Section 1 shall be dealt with and determined by a district Court." This means those

[1040] Singapore Ministry of Manpower website, *Industrial Relations,* https://www.mom.gov.sg/employment-practices/trade-unions/industrial-relations accessed 20 April 2023.

				not arising under a collective agreement.
Spain	Statute of Workers Rights, Article 53.4c	Available under Agreement on the Autonomous Resolution of Labour Conflicts – Extrajudicial System (V Acuerdo sobre solución autónoma de conflictos laborales – Sistema Extrajudicial).[1041]	Article 63 Labour Procedure Law- Conciliation is Mandatory	Article 2(a) Labour Procedure Law- Labour Courts have jurisdiction over individual disputes

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