

**National Employment Council for
Zimbabwe Energy Industry
Training Manual**

**Manual 4
NEC Employment Code
of Conduct**

INTRODUCTION

DISPUTES involving discipline of employees and employees grievances are handled in terms of the Zimbabwe Energy Industry Employment Code of Conduct and Grievance Handling Procedures, 2011, "the Industry Code".

Proceedings under the Industry Code are required to adhere to the elementary tenets of natural justice and principles of fair dismissal doctrine, providing for substantive fairness and procedural fairness as per the Code, Labour Act [Chapter 28:01] and Constitution of Zimbabwe. Briefly these are that no employee should be dismissed from employment without a valid reason pertaining to the employee's conduct, capacity or operational reasons pertaining to the undertaking or business. The employee must be afforded a reasonable and fair opportunity to defend herself/himself before a decision terminating the contract of employment is done, unless the employer cannot reasonably be expected to do so in the circumstances.

APPLICATION AND STATUS OF INDUSTRY CODE

The Zimbabwe Energy Industry Employment Code of Conduct was registered on 26 July 2011. Because of registration, the Industry Code applies exclusively in the first instance in disputes and grievances within the NEC scope of coverage.

Labour officers and designated agents are precluded from intervening in such disputes in terms of s 101 (5) of the Act, whilst the national code is not applicable by virtue of s 12B(2)(a)(b) of the Act which gives priority of registered employment codes over the national code. See also s 5 (a) of the Labour (National Employment Code of Conduct) Regulations, S.I. 15 of 2006. Further under s 45 (1) of the Collective Bargaining Agreement for the Zimbabwe Electricity and Energy Supply Industry, S.I. 1 of 2008 an employee who commits an act of misconduct specified in the Code of Conduct shall be dealt with in accordance with the procedure set out in the Industry Code.

*Under s 3, the Code applies to all employers and employees under the NEC scope of coverage, i.e. employees in Grades A1 to D2 or equivalent. Thus managerial employees above these grades are excluded unless the company specifically stipulates that they are covered - **Dulys Holdings v Chanaiwa** 2007(2) ZLR 1(S).*

The Industry Code takes precedence over works council codes. Works councils that desire to have workplace codes must first refer the draft code to the NEC for approval in terms of s 101 (1a) of the Act. If the NEC declines approval, the works council may refer the matter to a labour officer, whose determination shall be final "unless the parties agree to voluntary arbitration" in terms of s 101 (1c) of the Act.

CIRCUMSTANCES WHERE THE INDUSTRY CODE IS OUSTED

There are various circumstances where the Industry Code is ousted, partially or wholly:

- If a matter is not determined within 30 days of the date of notification of proceedings, "the employee or employer concerned may refer such matter to a labour officer, who may then determine or otherwise dispose of the matter." See s 101 (6) of the Act and s 18(f) Code. In **Marimo v National Breweries** S-125-00 it was held that this did not bar completely proceedings under a code after expiry of the 30 days. The bar only applies if a party has referred the dispute to the labour officer. Also where the justice of the case so demands parties can agree to extent the prescription period of 30 days per s 18(g) Code.

- Where the parties agree to refer the dispute to a labour officer – **Matangira v Standard Chartered Bank** LC/H/18/03.

- In special circumstances that render the application of the Industry Code inapplicable. Examples include:

- in situations of unlawful collective job action which may render the Industry Code procedures impracticable because the employee representatives themselves are involved - **Cargo Carriers (PVT) Ltd v Zambezi & Ors** 1996 (1) ZLR 613 (S) and **Tel-One (PVT) Ltd v CASWUZ** 2006 (2) ZLR 136 (S).

Involving senior managers who are directly involved in the implementation of the Code - **Samuriwo v ZUPCO Ltd** 2000 (1) ZLR 647 (S).

OFFENCES AND PENALTIES AND DISCIPLINARY AUTHORITIES

Offences and penalties

Part 2 of the Industry Code provides for the rules of conduct at the workplace to be observed by the employee. It also provides definitions of acts of misconduct. Section 8 provides for the categorisation of acts of misconduct and the penalties thereof. Acts of misconduct are categorised as minor, serious, severe and dismissable.

An employee can only be charged in terms of a specific offence under the Industry Code – s 15(b)(i) Code.

The penalties provided are the maximum penalty permissible, but the disciplinary authority is not obliged to impose the maximum in terms of s 8(3) Code.

Disciplinary and Appeals Committees

Part 3 provides for the Disciplinary Committee and the Appeals Committee in terms of their composition and terms of reference.

The Disciplinary Committee shall comprise of the following in terms of s 9:

Chairperson	1 (provided by the employer)
Trade union/Worker Representatives	3/alternate
Management	3/alternate
Secretary/Advisor	1/alternate

(who shall be a Human Resources person or a person with a legal background and provided by the employer, but shall not take part decision-making).

The following are highlights on the Disciplinary Committee:

- Management representatives will be determined by the employer and employee representatives by the trade union/workers committee.
- The quorum for the committee is five including the Chairperson, with at least 2 from each party.
- The Chairperson shall preside over all hearings.
- All issues before the Committee shall be by unanimous vote, fail-

ure of which by a majority vote of the members present, and in case of an equality of votes, the Chairperson shall have a casting vote.

- In terms of s 11 of the Industry Code, the Disciplinary and Appeals Committees shall not investigate alleged acts of misconduct, but only entertain or adjudicate cases of misconduct referred to them on the basis of the evidence placed before them.

The Secretary shall be responsible for preparing minutes of proceedings, preparing the record, advising the Committee on any relevant matters, and organising the commencement and notification of all parties and the disciplinary proceedings. She/he shall not take part in the proceedings of the decision-making.

The Appeals Committee composition is set out in s 10 of the Industry Code.

PROCEDURES PERTAINING TO INVESTIGATION, SUSPENSION AND HEARINGS

Introduction

Generally proceedings under the Industry Code must comply with principles of the natural justice doctrine and of fair dismissal and must adhere to set procedures, although flexibility is allowed and proceedings not bound by the "strict adherence to civil or criminal rules of procedure." See for example:

The Committee shall exercise impartiality, independence, fairness, and observe the principles of natural justice during the proceedings and in making determinations." [s 9(8)]

The Chairperson of the Disciplinary Committee "must exercise impartiality and fairness at all times." [s 9(3)]

The employer "administer discipline impartially and according to set standards and procedures." [s 5(1)(b)].

Proceedings under the Industry Code are divided into two main parts. Firstly is the procedure relating to minor offences which has three stages. The second part relates to procedure pertaining to serious, severe or dismissible misconduct which has five stages as discussed below.

Investigations

The first stage in all cases of misconduct, minor or serious, is that the employer must carry out due investigation to set the basis of a charge, if any, against the employee. The duty to investigate lies with management in terms of s 11(a) Code, which reads:

It shall be the duty of Management to investigate alleged acts of misconduct involving employees in their respective workplaces in order to determine whether or not to charge the employee concerned.

The local senior official must notify the employee of the investigations that are being carried out against her/him – s 13(c) Code.

An employee can only be charged, suspended and/or convicted of an act of misconduct after the carrying out of the “due investigation,” as is explicitly provided in the opening sentences of s 12(1) and s 13 of the Code. In **Mugwebie v Seed Co Ltd & Anor** 2000 (1) ZLR 93 (S) the court reversed a suspension because the employee was suspended without the appointment of an appropriate investigating officer as required by the code.

Procedure Relating to Minor Acts of Misconduct

This procedure has three stages governed by s12 of the Code. The following stages apply:

Stage 1: Investigation. This involves the carrying out of the due investigations, as above.

Stage 2: Inquiry and determination. After carrying out the due investigation, and the appropriate local senior official or manager is satisfied that an employee has committed minor act(s) of misconduct, she/he may within 7 days charge the employee and deal with the matter in terms of s 12 Code.

If the employee admits to the charge and after giving her/him an opportunity to respond, the manager give the employee a verbal warning, or reprimand, a first written warning or a final warning in terms of s 8(2).

If the employee denies the charge, the manager may hold an inquiry with the assistance of a senior member of staff and any employee representative, after which she/he will make a decision on the guilt or otherwise of the employee and give as penalty as above, if appropriate.

Stage 3: Appeal. If the employee is aggrieved by the above decision, she/he may appeal to the Disciplinary Committee within 7 working days of the decision per s 12(2).

Procedure Relating to Serious, Severe or Dismissible Misconduct

The second part involves serious, severe or dismissible misconduct. This has five stages, namely, (1) investigations; (2) charging and/or suspension; (3) the hearing; (4) determination and penalty; and (5) appeals.

Stage 1: Investigation

The appropriate local senior official or manager is required to carry out the due investigation before charging an employee with an act of misconduct – s 13 Code.

Stage 2: Charge(s) and Suspension

If after carrying out the investigations the appropriate local senior official or manager is satisfied that the employee has committed serious, severe or dismissible misconduct she/he may take two options within 7 days of concluding the investigations:

Firstly to refer the matter to the Secretary of the Disciplinary Committee without suspension of the employee, in terms of s 13 of the Code. In which case she/he must refer the matter together with a written statement specifying the alleged misconduct and

supporting evidence to the Secretary of the Disciplinary Committee. She/he must notify the employee. S 13 Code, or; She/he may charge and suspend the employee and refer the matter to the Secretary of the Disciplinary Committee, with or without pay and require the employee "to leave the workplace forthwith." – s 14 Code.

The discretion to suspend or not lies with the local senior official/manager. The laid out procedure of suspension must be strictly followed otherwise the suspension would be invalid - **Mugwebie v Seed Co Ltd & Anor** 2000 (1) ZLR 93 (S).

Within 7 working days after receiving the charge statement the Secretary in must;

in consultation with the Chairperson, set down a suitable date for the hearing. The date must be within 7 working days from the date of notification of time and place of the hearing – s 15; and

advise the employee in writing of: the charges of misconduct, citing the specific alleged violated provisions of the Code; the date, time and place of the hearing and the consequences of failure to attend; and the employee's rights in the hearing under s 19.

The Secretary must also attend to the other duties specified in s 15 for preparation of commencement of the hearing. These include: provide the employee with copies of all documents to be used in the hearing, at least 7 working days before the hearing; advise the Committee in writing of the date, time and place of the hearing and provide them with copies of all documents to be used at least 7 working days before the hearing; summon all relevant witnesses to attend the hearing and ensure all exhibits and the employee's personal file are available on the date of the hearing.

Stage 3: The Hearing

The hearing proceeds on the set down date, unless the employee has requested for postponement, at least 3 working days before the date in terms of s 17(2). Otherwise if the employee is in wilful default, the hearing proceeds in terms of s 18(b) of the Code.

The hearing must comply with the principles of natural justice and principles of procedural fairness as outlined in Manual 4. Suffice to highlight the following:

- the hearing is conducted in English but vernacular may also be used, and the employee is entitled to the service of an interpreter paid for by the employer.

- The proceedings must be completed within 14 working days unless the justice of the case requires otherwise, up to 30 working days.

- Section 19 provides for rights of the various parties:

- o The employee's rights include; to prosecute their own defence or through their representative and to do so without undue harassment or interruption; to call witnesses and to cross witnesses; to challenge the composition of the Committee or procedure used therein.

- o The Committee has the right to cross-examine the employee, the complainant, witnesses and to make a ruling on any challenge on its composition or procedure used. The Committee can enlist the services of a legal practitioner/human resources person to advise on specific issues.

- o The complainant has the right to appoint a "legal practitioner/an internal legal practitioner / an external registered legal practitioner to prosecute his/her case."

Witnesses are entitled "to give their evidence freely and without being unduly harassed or humiliated in any way."

The procedure of the hearing is set out in s 20, and may be summarised thus:

The reading of charges to the employee by the Chairperson and the answer of the employee to the charges – s 20(1).

If the employee pleads guilty, the Committee shall:

- o Find her/him guilty

- o Hear the employee's plea in mitigation, and

- o excuse the employee after advising her//him that the outcome of the case will be within the next 3 working days in writing.

Proceed to make its decision on the appropriate penalty.

If the employee admits some, but denies other charges, the Committee shall

- o Find her/him guilty of the charges admitted; and /or

Proceed with the hearing on the charges denied, or if it considers it appropriate, the Committee may abandon the charges denied and proceed to mitigation and penalty for the admitted charges.

If the employee denies the charges, the Chairperson shall -

- Ask complainant to set out its case. Thereafter the complainant is cross-examined by the employee, and after that by the Committee.
- The employer's witnesses to give evidence and be cross-examined by the employee, and then the Committee.
- Call on the employee to give her/his defence including evidence thereto, and cross-examined by the complainant and then the Committee.
- After the above, the employee shall call on her/his witnesses to give their evidence, and after each has given her/his evidence is cross-examined by the complainant and then the Committee.
- After the presentation of evidence from both the complainant and the employee has finished, the two are given to make closing submissions in support of their cases. Here they may put in relevant laws and cases. The complainant starts first and the employee finishes.

After closing submissions, the Chairperson excuses all the parties, for the Committee to proceed to make its determination. The parties must remain to be recalled for the pronouncement of the Committee's verdict.

Stage 4: Determination and penalty

After the closing submissions, the Committee continues to sit and reach its verdict after weighing the evidence, on a balance of probabilities and by consensus or majority vote, whether or not the alleged misconduct has been proved – s 20(2) (d)Code. In **ZESA v Dera** 1998 (1) ZLR 500 (S) the court reversed a dismissal because the tribunal had used the stricter criminal law standard of "beyond reasonable doubt."

After reaching its verdict the Committee shall per s 20 (3) recall the parties and –

If found not guilty, the Chairperson shall pronounce the verdict to the employee; or

If the verdict is that of guilty, the Chairperson shall:

Pronounce the verdict to the employee and invite her/him to make a plea in mitigation; and

Advise the employee that she/he shall be informed of the outcome of the case in writing, within the next 3 working days, after which the employee and their representative are excused.

Immediately after finding an employee guilty and hearing her/his plea in mitigation the Committee shall, in terms of s 20(4) –

Consider the mitigatory factors; and

Decide on the due penalty specified in s 8 (20). This includes taking into account:

That disciplinary action should in the first instance, be educational and that punitive action should only be taken when the said earlier steps have proved to be ineffective – s 8 Code.

The penalty specified in the Code “is merely the maximum penalty permissible and the... Committee is not obliged to impose the maximum.” S 8(3) Code; **Coh Coh Enterprises (Pvt) Ltd v Mativenga & Anor** 2001 (1) ZLR 151 (S); **ZFC Ltd v Geza** 1998 (1) ZLR 137 (S).

All the facts of the case, the aggravating and extenuating / mitigating factors, the history or record of the employee concerned and all the surrounding circumstances and other relevant factors – s 8(2) Code. Under s 12B(4) of the Act other relevant mitigation factors that justify a penalty lower than dismissal include “the length of the employee’s service, the employee’s previous disciplinary record, the nature of the employment and any special personal circumstances of the employee.” Thus the Labour Court reversed the dismissal of an employee found guilty of a serious offence because she had 17 years of service, was a widow and the sole bread-winner of her family.

The parity principle, namely as “far as possible similar offences committed in similar circumstances should be treated equitably through the award of similar penalties.” In **Jiah & Ors v PSC & Anor** 1999 (1) ZLR 17 (S) the court reversed the dismissal because *inter alia*, the employer had done unfair selective punishment of the leaders of a strike, whilst leaving out all other strikers.

After the Committee has determined the appropriate penalty, the Chairperson shall declare the proceedings closed. The Secretary thereafter shall do the following:

Within 3 working days of the close of the hearing advise the employee of the outcome of the case and her/his right of appeal under s 22 of the Code;

Advise the local senior official/manager on the outcome and to implement the determination – per s 20(5). An appeal does not suspend the decision – s20(8).

Prepare within 7 working days the minutes of the proceedings to be confirmed and signed by all the Disciplinary Committee members and availed to employee– s 20(6) and (7) Code.

Prepare the record of proceedings – s 9(6) Code.

Such record should contain sufficient information on the proceedings, summary of the evidence adduced, the determination and the reasons for the determination – **Sirdar's Manufacturing (Pvt) Ltd v China** 1995 (1) ZLR 368 (S).

Stage 5: Appeals and Reviews

An employee aggrieved by a determination of the Disciplinary Committee may appeal to the Appeals Committee in terms of Part 6 of the Industry Code. In summary this is:

The appeal should be done within 7 of the determination per s 21 (2), failure of which the employee applies for condonation and if denied the employee may seek recourse with the Labour Court – s 21(3).

The appeal may be noted before receiving the confirmed and signed minutes of the Disciplinary Committee – s21(4).

The appeal must be determined within 14 working days – s 21 (2).

The procedure of the Appeals Committee is set out in s21 and 22 as follows:

The rules and rights of parties in the Disciplinary Committee apply, with necessary modification – s 21(7) Code.

No new evidence may be introduced as the Appeals Committee confines itself to the record, subject to an application to the Committee for availing new evidence – s 22(1) (e).

An appeal hearing shall be conducted, where the Chairperson shall:

- invite the appellant employee to state the nature and grounds of her/his appeal;
- thereafter ask the Committee to seek clarifications, if any from the appellant.
- call on committee to seek clarification from complainant.
- call upon the employee to make a summary of her submissions, and thereafter excuse the parties.

Under 22(2) of the Code. after hearing all submissions, the Committee shall weigh the evidence and circumstances in support of the appeal, and decide, on a balance of probabilities, whether or not to-

uphold the appeal; or

uphold the decision of the Disciplinary Committee; or

refer the matter to the new Disciplinary Committee for a fresh hearing. The later is usually done where there were material procedural irregularities in the earlier hearing – **Air Zimbabwe (Pvt) Ltd v Mlambo** 1997 (1) ZLR 220 (S)

The decision of the Appeals Committee shall be the final decision of the company and no appeal shall lie thereof to any other official or committee of a company – s21(5) Code.

In terms of s 23 Code an employee aggrieved by a determination made by the Appeals Committee shall appeal to the Labour Court. The appeal should be noted within 21 working days of the determination – s 92D of the Labour Act as read with Rule 15, Labour Court Rules, S.I. 59 of 2006.

Additionally if a party is aggrieved by the conduct of proceedings under an employment she/he may make an application for review to the Labour Court in terms of s 89 (1) (d1) of the Act, or a composite appeal and review application under Rule 15(3) of the Labour Court Rules. A party must normally exhaust domestic remedies before going to the Labour Court - **Murowa Diamonds v Makumbe** S-16-08.

An appeal to the Labour Court does not suspend the decision appealed against – s 92E(2) of the Act.

Conclusion: Effect of Irregularities

Generally proceedings under employment codes must adhere to the provisions of the Code, such as time limits, composition of committees, requirements of natural justice. Where the violation is seri-

ous and subverts the basic tenets of natural justice, the effect of the violations is to render void ab initio the proceedings, i.e. there are a nullity, for instance where dismissal is done without any hearing. However, generally labour disputes are not determined on technicalities – **Dalny Mine v Banda** 1999 (1) ZLR 220 (S); **Air Zimbabwe (Pvt) Ltd v Mnesa** S-89-04; The employee must establish adverse prejudice before the proceedings can be nullified – **Nyahuma v Barclays Bank (Pvt) Ltd** 2005(2) ZLR 445(S) where there was a delay of a few days. Otherwise, remittal of the matter for a fresh and properly done hearing is the usual remedy - **Air Zimbabwe (Pvt) Ltd v Mlambo** 1997 (1) ZLR 220 (S) and **ZESA v Maposa** 1999 (2) ZLR 452 (S).

Prepared for NEC Zimbabwe Electricity and Energy Industry

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