REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 61/2012

In the matter between:

TRIO DATA BUSINESS RISK CONSULTANTS

NAMIBIA (PTY) LTD **APPELLANT**

and

SALVELIA ANDIMBA **FIRST RESPONDENT**

THE LABOUR COMMISSIONER **SECOND RESPONDENT**

NONDUMISO MBIDI **THIRD RESPONDENT**

THE LABOUR INSPECTOR **FOURTH RESPONDENT**

Neutral citation: *Trio Data Business Risk Consultants Namibia (Pty) Ltd v Andimba* (LCA 161/2012) [2013] NALCMD 29 (09 August 2013)

Coram: HOFF J

Heard: 28 June 2013

Delivered: 09 August 2013

ORDER

The appeal is upheld only to the extent that the order of reinstatement is set aside.
The award of compensation in the amount of N$12 497.20 is confirmed, which amount earns interest in terms of s 87(2) of Act 11 of 2007 from the date of award namely 25 September 2012.

JUDGMENT

HOFF J:

[1] The first respondent was employed by the appellant and was outsourced to Shoprite Checkers Tsumeb as a front end controller,

[2] On 23 May 2012 at a disciplinary hearing the first respondent was charged as follows:

> 'Negligent by not following Shoprite Receiving Producers on 14 May 2012. Receiving Country Beverages stock before the Shoprite Receiving Clerk causing shrinkage by receiving 10 units while is short and signing of the invoice without indicating the short delivery.'

The word 'producers' should read 'procedures' I believe.

[3] The first respondent pleaded guilty and added the following as it appears from the minutes of the disciplinary hearing:

> 'It is correct that I did not follow Company procedures and that a loss occurred due to my gross negligence.'

[4] It is common cause that the loss amounted to N$95.

[5] The chairperson of the disciplinary hearing Mr Walter Mostert from Nam-Labire recommended that first respondent's services be terminated with immediate effect. Subsequently on 31 May 2012 the first respondent received a letter of dismissal from the appellant.

[6] A dispute of alleged unfair dismissal was referred by first respondent against the appellant in terms of section 82(7)*(a)* of the Labour Act 11 of 2007 and subsequently an arbitration hearing took place on 13 August 2012 at the office of the Labour Commissioner in Tsumeb.

[7] The arbitrator found that the first respondent's dismissal was procedurally unfair, ordered the appellant to reinstate the first respondent with effect from 1 October 2012 in the same or similar position and to compensate the first respondent for the loss of income of four months in the amount of N$12 497.20 which amount was to be paid on 28 September 2012.

[8] The appeal lies against the finding and order of the arbitrator. In its amended notice of appeal the appellant listed a number of grounds of appeal against the finding of the arbitrator, namely, that the sanction of a dismissal was not appropriate under the circumstances, by ordering reinstatement as well as monetary compensation, and by not finding that the relationship between the appellant and first respondent has broken down irretrievably.

[9] During the arbitration proceedings Mr Walter Mostert from Nam Labire (the chairperson during the disciplinary hearing) represented the appellant and the first respondent was represented by Mr Ndjenjela Gottie. The first witness called on behalf of the appellant who was the prosecutor in the disciplinary hearing.

[10] Mr Tosen testified about a report he had received from the management of Shoprite, Tsumeb that one of the staff members of Trio Data (the appellant) did not follow procedures in the receiving bay. He requested an incident report from the first respondent.

[11] Mr Tosen explained that the procedure when stock arrives at the receiving bay, a receiving clerk from Shoprite Checkers must check the stock and thereafter a double checker from Trio Data must check the stock to endure that everything on the invoice is in the loading bay.

[12] It is common cause that on the morning of 14 May 2012 the first respondent was on duty. She went into the cage and she checked stock received from Country Beverages consisting of 500 ml cold drinks. The first respondent did not write on the invoice that there was a shortage. When the receiving clerk came he checked and noticed there were two cases of cola short. The first respondent marked it on the invoice as having been received. Mr Tosen testified that the first respondent explained that the pallet was too close to the fence, that she asked someone from Country Beverages to check the stock since she could not fit in and that this person informed her that there were ten cases.

[13] Mr Tosen testified that if the pallet was too close to the fence the receiving clerk should have moved the pallet with a trolley jack in order for one to move around the pallet to check the stock. Mr Tosen testified that the first respondent had to check the stock herself and could not have asked someone else to check it for her. In this regard there was a deviation from procedure. Mr Tosen further testified that the first respondent was a front end controller whose duty it was to control the ‘front end’ at the tills and that she was not suppose to be at the receiving bay. Mr Tosen testified that that he decided on a disciplinary hearing because first respondent did not follow procedure causing a ‘shrinkage’ which the appellant had to pay and added that the appellant could lose their contract with Shoprite if appellant does not take action since this incident is regarded as a very serious matter in their environment.

[14] During cross-examination Mr Tosen conceded that the first respondent at times was employed at the receiving bay, but insisted that she did not follow company procedure.

[15] Manfred Risho a trainee manager at Shoprite was the second witness called to testify on behalf of the appellant during the arbitration hearing. He confirmed the procedure testified about Mr Tosen and also testified that the first respondent although appointed as front end controller at times was employed at the receiving bay. He further testified that he discovered that two cases were short and entered this shortage on the invoice and called the first respondent and informed her about the shortage. The first respondent during her testimony testified that she herself wrote the shortage on the invoice and then called the witness Mr Manfred Risho.
It is common cause that two cases of cooldrink were short.
[16] The first respondent during her testimony informed the arbitrator that she received notice to appear on a charge of negligence the day before the disciplinary hearing. This is not in dispute. She received the notice at 16h00 the previous day.

[17] The disciplinary code and procedure of the appellant provides that employee must be given at least three working days notice to attend a disciplinary hearing in order to adequately prepare his or her case.

[18] It is common cause that the charge sheet was amended during the disciplinary hearing to read that the first respondent was grossly negligent and not merely negligent. Mr Tosen testified that this was done by the chairperson on his (ie Tosen‘s) request. Mr Tosen explained that he requested the amendment because the omission of the word ‘gross’ was a typing error when the charge sheet was drafted. It is apparent from the charge that the word ‘gross’ was entered in writing prior to the word ‘Negligent’ which was typed as well as the rest of the charge sheet.

[19] During the cross-examination of Mr Tosen by Mr Gottie, Mr Mostert stated that the amendment was ‘before everything started it was made gross negligence and then that is why its been answered as that’.

[20] The first respondent testified that no one informed her of the amendment of the charge from negligence to gross negligence. She testified that during the disciplinary hearing the charge was not read out but that she was only asked by the

chairperson whether she had read the papers – referring to the notice to attend a disciplinary hearing which she had received the previous day.

[21] Mr Gottie during his address submitted that where a charge sheet is amended the person affected must be informed timeously of such a change and not as it was done in this case ‘on spot’, in order for this affected person to prepare properly for the disciplinary hearing.

[22] It is common cause that the record of the disciplinary hearing does not reflect that Mr Tosen had asked during the disciplinary hearing that the charge be amended from negligence to gross negligence.

[23] I must add at this stage that in a letter dated 29 May 2012 from the appellant addressed to the first respondent the following was stated:

> ‘You appeared in a disciplinary hearing on 21 May 2012 at Shoprite Tsumeb on a charge of negligence and were found guilty as charged.’

There is no reference to gross negligence.

[24] The reason why Mr Gottie in his address during the arbitration proceedings emphasised the change of the charge sheet without adequate notice to the first respondent is that the severity of the sanctions prescribed in the code of conduct of the appellant varies in respect of the sanction which may be imposed for negligence and that which may be imposed for gross negligence.

[25] In respect of the offence of breaking company rules and not following due procedures the sanction for a first offender is a final written warning or dismissal. In respect of the negligent discharge of duties, a written warning. In respect of the negligent failure to carry out duties, a final written warning. In respect of where employees have not complied with Shoprite/Checkers rules and regulations, if serious, dismissal; if not serious a written warning.

[26] The question in my view which needs to be considered is whether the finding of the arbitrator that the dismissal was procedurally unfair ‘because the respondent had treated the pre-termination inquiry as a disciplinary hearing and the applicant had been under the impressions (sic) that she had been charged with negligent (sic) rather than gross negligent’.

[27] What is not disputed is that nowhere on the record of the disciplinary hearing is it reflected that the first respondent was informed of the amendment neither that she was given the opportunity to respond to such an amendment. Mr Tosen during his testimony in the arbitration proceedings never testified that the first respondent was informed of the amendment and that first respondent was given the opportunity to consider her response to the amended charge sheet.

[28] The appellant sets a standard in its code of conduct namely to give an employee at least three days to prepare for a disciplinary hearing. In this matter the appellant not only violated its own code of conduct by giving the first respondent less than 24 hours to prepare for the disciplinary hearing, but exacerbate the situation by charging the first respondent with a far more serious offence without giving her any time at all to reconsider her response to this serious charge which may carry the sanction of a dismissal. The first respondent was not represented during the disciplinary hearing.

[29] It is common cause that the first respondent had been employed by the appellant for a period of six years and that she had no previous warnings prior to this incident.

[30] My sense of fairness dictates that the first respondent given the amendment to the charge sheet and its consequences should have been given the opportunity to consider her position prior to the amended charge being put to her.

[31] I am in agreement with the arbitrator that the dismissal of the first respondent was procedurally unfair.

[32] However it appears that the relationship between the first respondent on the one hand and Shoprite/Checkers and the appellant on the other hand had irretrievably broken down and it appears to me that for this reason the order by the arbitrator that the first respondent be reinstated is inappropriate.

[33] I however agree that in the circumstances the first respondent be compensated in the amount ordered by the arbitrator.

[34] In the result the appeal is upheld only to the extent that the order of reinstatement is set aside.
The award of compensation in the amount of N$12 497.20 is confirmed, which amount earns interest in terms of s 87(2) of Act 11 of 2007 from the date of award namely 25 September 2012.

E P B HOFF

Judge

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APPEARANCES

APPELLANT:	C Mostert Instructed by Petherbridge Law Chambers, Windhoek
RESPONDENTS:	NO APPEARANCE

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