REPUBLIC OF NAMIBIA ***REPORTABLE***

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 13/2012

In the matter between:

ROSH PINAH CORPORATION (PTY) LTD **APPLICANT**

And

DEODAT DIRKSE **RESPONDENT**

Neutral citation: *Rosh Pinah Corporation (Pty) Ltd v Dirkse* (LC 13/2012) [2015] NALCMD 4 (13 March 2015)

Coram: HOFF, J
Heard: **12 April 2013 and 14 June 2013**
Ruling: **20 September 2013**
Reasons **13 March 2015**

Unfair labour practice – To treat employees, who have committed similar misconduct differently, is as a general rule, unfair. Consistency is simply an element of disciplinary

fairness and every employee must be measured by the same standards. It is the perception of bias inherent in selective discipline which makes it unfair. Unfair disciplinary action short of dismissal amounts to an unfair labour practice. In order to overcome a consistency challenge the employer must be able to show that there was a valid reason for differentiating between groups of employees guilty of the same offence. Onus of proof in allegation of unfair labour practice rests on employee to prove not only the existence of the practice but also that it was unfair.

Unfair Dismissal – Where employee worked overtime in excess of the maximum hours prescribed in s 17 (1) of the Labour Act, 2007 (Act no 11 of 2007) and in the absence of compliance with provisions of s 17(3), employee may lawfully refuse instructions by employer to work further overtime. In terms of s 33(2)(b) of the Labour Act it is unfair to dismiss employee because employee refuses to do that which an employer must not lawfully permit or require an employee to do. Where there is a conflict between conditions of employment contained in a contract of employment and a statutory prohibition, the statutory prohibition must prevail.

Compensation – Arbitrator may in terms of s 86(15) of the Labour Act, 2007 make any appropriate arbitration award including an award of compensation. Compensation should as a general rule place a dismissed employee in monetary terms in the position such employee would have been had the unfair dismissal not occurred, but in determining the amount a judge or arbitrator should be guided by what is reasonable and fair in the circumstances and not by a desire to punish the employer.

ORDER

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1. The orders given on 20 September 2013 in paragraphs 1 and 2 are confirmed (including the amount of interest stated by the arbitrator in the award). To the

extent that it has not yet been done, the appellant is ordered to pay the first respondent the amount of N$ 777 188.00 (plus interest) immediately.

2. The cross-appeal is dismissed;
3. The conditional cross-appeal is dismissed;
4. No cost order is made.

REASONS

HOFF, J: [1] This is an appeal against an arbitration award given by an arbitrator on 11 April 2012. The appellant (respondent in the arbitration proceedings) was ordered to pay the 1st respondent (applicant in the arbitration proceedings) as follows:

'1. The amount of N$ 777 188.00 for loss of income from 18 April 2011 and;

2. To pay the applicant an additional amount of the salary for two years in the amount of N$ 1 544 360.00

The total amount that the respondent should pay the applicant is N$ 2 332 540.00 and should be paid not later than 30 April 2012. The above amounts arrive from the last salary of the applicant that was N$ 64 750.00 per month.

The above amount earns interest from the date of the award at the same rate as prescribed from time to time in respect of a judgment debt in terms of the Prescribed Rates of Interest Act, 1975 (Act no. 1975)(sic)

Arbitrator Award is final and binding to (sic) both parties.'

[2] The respondent appealed against this award and listed a number of grounds of appeal. It was submitted initially that the so-called questions of law raised by the appellant mostly amounted to factual findings by the arbitrator. The appellant also listed what it referred to as 'grounds of appeal supporting questions of law' inter alia:

'The arbitrator erred in law in rewarding an additional amount of two years compensation to respondent without authority to do so and/or without justification or reasons, inter alia as

section 86(15) of the Labour Act, 2007 does not allow him to award an employee for possible future losses and/or issue punitive compensation awards;

The arbitrator erred in law in awarding compensation to respondent for a period from 18 April 2011 to 18 April 2012, alternatively to do so without justification or reasons presented in evidence;

The arbitrator erred in law in that she concluded that “the evidence was that the applicant continually questioned the authority of his supervisor and refused a direct instruction to do VFL’ yet in contradiction the aforementioned she found that he “did do VFL’s;

The arbitrator erred in law in that she failed to consider the issue under dispute as agreed between the parties, such as whether Mr Van der Merwe was biased in the disciplinary hearing held on 10 November 2010 and the issue of guilt pertaining to the hearing conducted on 4 April 2011;

The arbitrator erred in law by concluding or accepting that the disciplinary hearing held on 10 November 2011 was procedurally unfair due to the Mr Kondja Kaulinge having drafted the charges against the respondent attended the disciplinary hearing alternatively she erred in law by not providing supporting reasons on the decision/inference;

The arbitrator erred in law in that she misdirected herself or misinterpret how overtime calculations must be made in terms of the labour Act, 2007 in that she concluded or accepting that respondent worked 10:31 hours overtime which was also not supported by evidence;

The arbitrator erred in law in confusing the points in dispute agreed upon that she applied the points in dispute related to the second disciplinary hearing held on 4 April 2011 to the disciplinary hearing held on 10 November 2010;

The arbitrator erred in law in that she incorrectly understand or interpret her powers in section 86(15) of the Labour Act, 2007 in setting aside a final written warning issued to respondent;

The arbitrator erred in law in interpreting that respondent unfairly disciplined on 10 November 2010 even though she found that there was a direct refusal by respondent to do the VLF's;

The arbitrator erred on law by concluding the sanction imposed on respondent after the hearing on 4 April 2012 was unfair'.

[3] The respondent filed a cross-appeal from the arbitrators reward as follows:

'The first part appeal against, on the basis of the question of law and grounds of appeal set out below, is the arbitrator's failure to make any finding or order in respect of the first respondent's claim concerning losses suffered to his shares in the appellant on account of his unfair dismissal.

The first respondent herewith also notes a conditional cross-appeal against the arbitrator's failure to order reinstatement, which the first respondent will only pursue if this court should find the arbitrator erred in law in awarding compensation of an additional amount of the first respondent's salary for two years'.

[4] The appellant subsequently gave notice of its intention to oppose the cross-appeal. This court after hearing argument on the merits of the appeal gave the following order on 20 September 2013:

'1. The appeal is dismissed;
2. The finding that the first respondent had been dismissed unfairly by the appellant is confirmed;
3. That the amount of N$ 777 180-00 awarded in favour of the first respondent is confirmed;
4. That this matter is referred back to the arbitrator with the following orders:
    a) only to the extent that it has not been done, the arbitrator must make a finding in respect of first respondent's claim concerning losses suffered to his shares in appellant on account of his unfair dismissal;

(b) The arbitrator must make a finding in respect of the issue of reinstatement of first respondent;

(c) The arbitrator must give concise reasons required by section 86 (18) of Act 11 of 2007 why an additional amount of N$ 1 554 360.00 was awarded.

5. The above mentioned orders must be complied with not later than 25 October 2013.'

[5] The arbitrator replied on 24 October 2013 as follows:

In respect of the issue of losses suffered in respect of shares:

'1.1 The applicant testified that he was entitled to shares and also that the value of the shares is determined by market ,.price on the Johannesburg Stock Exchange.

1.2 The evidence was also that someone that deals with the stock exchange can determine the price and the market value.

1.3 The applicant also testified that he thinks that some of the shares of Kumba expired in 2010 and also that it would be difficult for him to say what the value of the shares was since he was outside the company but that external expert could determine the price.

No evidence to the value of the shares was put in front of me during the arbitration and as such I could not make an order on the shares with no value or figure in front of me'

In respect of the issue of re-instatement the arbitrator stated as follows:

'2.1 No re-instatement was ordered for the following reasons

2.2 The relationship between the applicant and the respondent has broken down and a working relationship would be intolerable.

2.3 The reasons was according to the evidence of Mr Beuke he took the issue between him and the applicant personal

2.4 The fact that both the applicant and Mr Claasen was (sic) charged for the same offence and dismissed but on appeal Classen's verdict was charged and he was reinstated and not the applicant

2.5 The fact that the applicant answered in his exit interview which was shortly after his dismissal that he would consider working for Rosh Pinah only under different management even though during the hearing he stated that he could work with Mr Beuke and for the respondent.

2.6 The fact that Mr Beuke who was the supervisor of the applicant felt that the applicant was undermining his authority.

2.7 the applicant also lodged a grievance against Mr Beuke and Mr Beuke was only given counselling for undertaking a underground VFL without a safety belt which would constitute a transgression of rules of 'I care fatal Risk Controls'.

[6] In respect of the additional amount the arbitrator stated the following:

> '3.1 The amount of N$ 1 554 360.00 was awarded to the applicant and the money was the salary of the applicant for two years which was N$ 64 765.00 per month.
>
> 3.2 The applicant asked for an additional amount for loss of income for four years should reinstatement not be ordered, but I awarded only two year;
>
> 3.3 What I took into consideration was how long the case take to be finalised if it goes on appeal which I estimated that it will be two years and that is why I ordered the amount of two years.
>
> 3.4 I also took into consideration that the applicant tried to secure other employment, and that he after an interview at Namdeb he was called and specifically asked about the case of dismissal. He was then later informed that he was not successful and that was a clear indication that it would be difficult for the applicant to get work while the case was not finalised.'

[7] The first respondent had been employed by the appellant for a period of 5 years in the position of 'Head of Management Accountant'. On 10 November 2010, the first respondent was arraigned in a disciplinary hearing on the following charges:

> 'Section 4: **RESISTING AUTHORITY**
>
> **4.1 Undermining authority**
>
> You continuously question my discretion as department head to hold you responsible to perform Visible Felt Leardership (VFLs). You don't monitor and enforce your staff's compliance with VFL's.

4.2 Refusal to execute reasonable and fair orders or ignoring such orders, or inciting or intimidating other employees to act accordingly.

You were instructed and are required as part of your responsibilities to conduct VLF's but you deliberately and or without valid cause refused to do so on many occasions. On two separate occasions in February and September 2010 you ignored direct instructions from your department head to perform your VFL responsibilities.

4.3 Ignoring standing orders or internal regulations

You were instructed and trained ad are required as part of your responsibilities to conduct VFL in terms of Visible Felt Leadership safety standards SHE-MS 2.2.1.3 but you deliberately and without valid cause refused to do so.'

[8] The department head referred to in 4.2 (and the immediate supervisor of the first respondent) was Mr Wendell Beuke. The chairperson at the disciplinary hearing was Mr Danie van der Merwe and the complainant was Mr Wendell Beuke. The first respondent pleaded not guilty to all four charges. At the conclusion of the disciplinary hearing on 22 November 2010 the first respondent was convicted of the first three charges but found not guilty on a fourth charge. The sanction imposed was a final warning valid for 9 months applicable to all three charges.

[9] The first respondent appealed on 25 November 2010 against the findings and sanction imposed by the chairperson of the disciplinary enquiry. The appeal was dismissed on 4 February 2011 by Mr Hendrik Lucas Graham, the appeal chairperson. On 19 April 2011, the first applicant appeared in another disciplinary hearing where he was charged for his alleged refusal to execute a fair and reasonable order. This charge related to an instruction by his supervisor, Mr Beuke, to remain available over the week-end of 15-16 January 2011 in order to finalise an 'audit pack' and which instruction was allegedly disregarded by the first respondent. The first respondent was convicted and his services terminated with immediate effect.

[10] On 20 April 2011 the first respondent lodged an appeal and on 23 May 2011 he received confirmation that his appeal was dismissed by the appeal chairperson Mr Rudi Otto.

[11] The relief sought by the first respondent was in the first instance that the arbitrator should declare the unfair disciplinary action as an unfair labour practice and set it aside, and secondly, the arbitrator should set aside the unfair dismissal and reinstate, alternatively, compensate the applicant for loss of income, future loss of income and damages.

[12] The first respondent in his summary of the dispute submitted that on a balance of probabilities there was not sufficient evidence to convict him on the charges neither were the procedures fair and in compliance with the respondent's disciplinary procedures. In respect of the unfair dismissal the first respondent submitted that his dismissal was unfair because he refused to do something which the appellant was not lawfully permitted or required of him to do and that there were valid and compelling reasons for his inability to comply with respondent's request to work overtime, as such the dismissal is automatically unfair.

[13] The first respondent referred these two disciplinary hearings as a dispute for conciliation and arbitration on 22 July 2011 stating that the dispute between the parties related to an unfair labour practice (unfair disciplinary action) and an unfair dismissal.

[14] The arbitration proceedings commenced on 14 November 2011 and were concluded on 17 February 2012. The appellant was represented by Mrs A Keulder and the first respondent by Mr C Daniels.

The evidence

[15] Three witness were called on behalf of the appellant and the first respondent testified in response thereto.

[16] Mr Beuke testified that he is employed as the financial manager at the appellant. On 15 September 2010, he met with 'the team in finance' and discussed the importance of VFL's and informed them that management has decided earlier in the year that management will no longer condone non-compliance with the scheduled VFL (Visibly Felt Leadership). It was stated that management would prosecute non-compliance. The first respondent then said 'well, that would be interesting'. This was said in the presence of other staff members and the witness regarded this as the undermining of his authority.

[17] The next day he addressed an email to first respondent and other staff members in which what had been discussed the previous day was confirmed. In this email, the recipients were given a direct instruction to perform their VFL obligations. The witness testified that this evidence related to the first as well as the second charges against the first respondent. The witness referred to an email dated 11 June 2008 from a Mr Christo Aspeling (the mine manager) to the first respondent in which a guideline was mentioned which could be used for SHEQ (Safety, Health, Environment and Quality). According to the witness the relevance of this communication is to underline that this is a formal part of the responsibilities of first respondent and that it was not fully complied with, the major outstanding portion being compliance with VFL's.

[18] VFLs were explained as a system whereby management would walk through the operation on a structured basis and that the entire mine would be divided into various sections and that senior staff were allocated on a scheduled basis to inspect or walk through each of certain items at these areas. The point of the VFL is to inform staff that management is observing, but management should also engage staff, correct incorrect matters where required, and also to give praise where things are being done properly.

[19] According to this witness VFLs were formally implemented during June 2010 at a SHE (Safety, Health and Environment) management meeting due to the fact that departments did not, with consistency, apply the VFLs. This witness handed in an as an exhibit (Exh F), an email dated 22 September 2010 addressed to himself by the first respondent and copied to Mr Mellis Walker, the head of finance at the respondent's head office in South Africa. In this email the first respondent summarized the discussion of 15 September 2010 as follows, (verbatim):

'Please be advised that your threat: ". . . direct instruction to perform . . . Failure to comply will be met with formal disciplinary proceedings" created problems earlier this year when you booked and taken finance staff underground on VFL trip. Both Williams and George confirmed during our meeting on 15 September that they were taken underground during VFL on a vehicle without safety belts – Williams told me your instruction was " hou vas aan tralies" – to hold on to the rails of the Bakkie. This is extremely dangerous and irresponsible, because another vehicle accident and LTI was reported afterwards in a separate during 2020. The trip should have been cancelled on the spot. Imagine what can happen to an office staff members not exposed to such environment travelling in a vehicle without safety belts – really very negligent. We have so far raised the issue with you and Yolanda of SHE department during our meeting with her. In fact our suggestion that step 8 be moved to step 2 or step 3 because it does not help to stop the action after your death – we are still waiting response on this matter.

Our discussion with you highlighted the following:

1. Employees' safety and health must not be compromised due to disciplinary threats as per abovementioned example. Quality of VFL should add value.
2. VFL is part of safety awareness, but should not be rated above SAFETY. This means disciplinary proceedings should not only focus on VFL but rather at non-compliance to safety requirements. There are currently a lot of traffic offences which are much dangerous than VFL visits but there are no threats in this regard although Disciplinary code provides for traffic offences and not VFL visits.
3. Safety risks in Finance environment is much lower than other operational environment and corresponding Zero-X reward system is designed as such, but if we expose

ourselves in an environment which were are really not trained then it means rewarding system for Zero-X days must be reviewed.

4. Finance environment has unique safety and securing issue, MONEY. We had two fraud cases within two consecutive years committed in exactly the same manner which could have been prevented or stopped if there was no display negligence. Items of potential fraudulent transactions were identified and provided to Finance Manager, but fraud continued and the company incurred unnecessary losses. But there is so far no disciplinary proceeding yet we are threatened for VFL. These are unfair labour practices. There should be consistency and fairness in what we do at RPZC.

   Other issues were also raised but abovementioned were major ones as far as I can remember. Both Wendell and finance team responses were emotional and there could be regrettable comments made but this was due to frustration and lack of commitment shown for concerns.'

[20] The witness testified that compliance with VFL visits were recorded by the SHE department were issued by e-mail weekly to all on the mine and was discussed by senior management at the monthly SHE forum. This was to ensure that staff comply with the programme or schedule as set out. He testified that the appellant regarded the VFL issue in a serious light and that VFL visits were not optional but were obligatory in respect of middle management and senior management on the mine. The first respondent was part of middle management. Exhibit R and R1 were handed in and in essence are lists of personnel required to perform VFLs and to what extent each individual had or had not complied therewith. It appears from these two exhibits that two VFL visits per month were required to be performed. Furthermore in respect of first respondent it is reflected that during the period January 2010 until June 2010 he had conducted only one FVL visit and that was during the period 1-12 February 2010.

[21] What these exhibits (R and R1) also reveal is that there were other individuals in the management cadre who also did not do VFL visits during aforementioned period (ie January 2010-June 2010). These persons were (from Human Resources) MHK Kaulinge (HR Manager) who did no visits at all as well as F Boje (CI Manager) who did

no visits at all; B du Plessis (Head: Training) did one visit during 17-18 June 2010; C Grobler (Shifboss in Mining section) did one visit during 22 May-4 June 2010; F Valombola (Shifboss) did no visits; W Coleman (from IT) did no visits; AD de Bruine (Mine Surveyor) did no visits; JCM Borrrego (Exploration Geologist) did no visit; and the complainant WHG Beuke did no visits during January 2010, did one visit during February 2010, one visit during April 2010, one visit during May 2010, one visit during June 2010, one during July 2010, one during August 2010, two during September 2010, and one during October 2010.

[22] The witness testified that after his email of 16 September 2010, G Zaahl, the Head Financial Accountant, did one VFL; the first respondent did one and WH Claasen did no VFL visit; that Claasen was also charged in a disciplinary hearing and was given a final warning.

[23] In respect of the second disciplinary hearing the witness testified that in terms of the conditions of employment employees may be expected to be on standby duties outside their normal working hours and that the company (ie the appellant) may require an employee to work overtime and on Sundays. The witness testified that a ‘year-end pack’ which recorded the annual results of the company (appellant) was due at 8h00 on 17 January 2011 and needed to be compiled and reviewed by middle management, ie the first respondent and the witness himself, before it was to be submitted to the external auditors. This did not happen because the first respondent provided the first draft on Friday (14 January) and then left over the weekend despite instructions by the witness to remain available at the site. The witness explained that the first respondent as ‘head management accountant’ had three persons who had to report to him, namely Paulette Kaulinge (accountant), Lucinda Kleinsmith (management accountant) and Williams Claasen (the senior management accountant).

[24] The head management accountant (first respondent) and the head financial accountant (Mr G Zaahl) reported to himself (ie to Beuke). The year-end pack was to

be compiled by Williams Claasen who in turn reported to the first respondent. This year end pack was then reviewed by the first respondent and once he has completed it, the witness would do the final review before it is submitted to the auditors.

[25] The witness testified that on 14 January 2011, and by email, he instructed the first respondent and Williams Claasen to be available over the weekend for purposes of finalising the pack and to deal with queries following the witness own review and the auditors examination of the pack. He testified that the first respondent had earlier applied for leave for 14 January 2011 and that he (ie Beuke) had declined the leave due to operational requirements, and that the first respondent was aware of that fact and the reason therefor. Beuke testified that the first respondent however worked that Friday, 14 January 2011. This witness testified that both the first respondent as well as Williams Claasen argued that the delayed 'month-end' was not due to their fault and that they would not be available over the weekend. The first respondent had also informed this witness that due to a prior commitment (ie taking his child to be enrolled at a school in Windhoek) he would only return on the Sunday evening.

[26] This witness testified that the first respondent and Williams Claasen were the only persons trained to deal with queries and submit data into the spread sheets.

[27] The first respondent completed the pack during the course of Monday 17 January and the audit was completed the next day. The witness testified that as a result of RPZC's late submission of the year end pack they were severely criticized by the EXXARO Financial Director during that week and that this criticism showed that his instruction to work overtime was justified. This witness further testified that the first respondent was not charged because of the late submission of the year-end pack or for delays that occurred previously, but because first respondent ignored his instruction to remain available to deal with queries.

[28] During cross-examination this witness was referred to an exhibit (JJ), an appeal form, where the first respondent had inter alia stated the following:

> 'Working more than 10 hours overtime is definitely not compliant with the Labour Act, 2007 and I cannot be expected to deliberately contravene Labour laws.'

[29] This witness replied that he only became aware of the provisions of the Labour Act during the disciplinary hearing and conceded that in the present circumstances it was unlawful to have instructed the first respondent to work additional overtime hours.

[30] In respect of the first disciplinary hearing and in respect of the first charge this witness agreed that during the disciplinary hearing the first respondent had denied using the words: "well, that would be interesting" and that a witness George Zaahl had also denied that first respondent had used those words during the meeting on 15 September 2010. When asked during cross-examination whether he could indicate where in Exhibit F the first respondent had undermined his authority this witness referred to points 3 and 4 which according to this witness had nothing to do with safety issues. When it was pointed out that those points were part of a summary of a discussion held on 15 September 2010 this witness was of the view that it nevertheless undermined his authority.

[31] The witness conceded that he could not in addition to the points mentioned in Exhibit F point to anything which had undermined his authority. The witness testified that when he invited senior staff including the first respondent to accompany him on a safety walk in the plant they had unnecessary concerns regarding protective clothing which resulted in an exchange of e-mails for 4 days. He further stated that he regarded the questioning, the attempts to get details, and the making of suggestions, as undermining his authority.

[32] In respect of the next charge of refusal to execute reasonable and fair orders and ignoring such orders or inciting and intimidating other employees to act accordingly, the witness testified that he withdrew part of the charge during the disciplinary hearing. This charge referred to two occasions during February 2010 and September 2010 and the reference to February 2010 was withdrawn because the first respondent did perform a VFL during February 2010. This witness explained that he originally saw on Exhibit R that only one VFL was performed during February and he had decided that, that was not enough.

[33] During cross-examination this witness further testified that the first respondent did one VFL during September 2010 but he decided to charge him nevertheless because the first respondent did not do it on schedule. According to him VFL's must be done on schedule and not just any visit would be regarded as a VFL. I must observe here that Exhibit R does not reflect that the first respondent has done a VFL during September 2010. The witness conceded that he had made an inscription on Exhibit R1 to indicate that Paulette Kaulinge (attached to the Finance section) had indeed done a VFL during 13 - 24 September 2010 even though there was originally no inscription to that effect. This was done, it was explained, on the strength of information he had received from Mrs Juliet Yisa from SHE. During further cross-examination the witness explained that he proceeded with the third charge, (ie that no VFL was done during September 2010), because in respect of the first respondent there was no VFL done within the schedule during July, August and September 2010 and that the respondent has only done 2 VFLs in a period of 22 fortnights, one VFL had to be done every 2 weeks.

[34] This witness further acknowledged that except for the first respondent and Williams Claasen, no other employee had been charged and disciplined for failing perform VFL's. It further transpired that a VFL is not regarded as in compliance with the set standard where a report had not been submitted to SHE. The witness conceded in respect of Paulette Kaulinge, that her report never reached SHE, that this was non-

compliance with the set standard but she was not charged. Exhibit MM addressed to RPZC management emanating from the first respondent contains a list of 16 employees who during the period 19 July 2010 until 29 October 2010 did not perform VFL's but only two (first respondent and Williams Claasen) had been disciplined.

[35] This witness testified during cross-examination that in respect of the incident during February 2010 where the witness had taken employees into the mine in a motor vehicle with no seatbelts at the back, that he had been told by the driver of the vehicle that there were no safety belts at the back of the vehicle, but nevertheless continued with the visit, and that the mine manager had afterwards told him that the visit should have been cancelled.

[36] The witness conceded that this conduct was in violation of the safety rules of the respondent and that the respondent does not tolerate unsafe practices. This witness conceded that his conduct could potentially have endangered people's lives and that a grievance was laid about a contravention of applicable legislation and safety regulations against him by the first respondent. According to him, he himself was never charged but was only counselled and was of the view that counselling was a first step in the disciplinary process.

[37] It was testified that the response of the mine manager on 10 February 2011 in respect of a grievance instituted by the first respondent was as follows:

'I have explained to Deodat Dirkse on the previous encounter that I did discuss the safety belt issue with Wendell Beuke. An instruction given by Wendell Beuke at that point in time was not good practice, and indicated to him that the same mistake should not be repeated in future. At the stage of this incident the mining personnel made use of a vehicle with defective safety belts in the back of the vehicle. This was seen as a mitigating factor in Wendell Beuke's instruction. The deficiency was however reported and rectified as explained by the memorandum from Wendel Beuke. I also explained to Deodat Dirkse that we do not have a

culture of taking disciplinary action against a person for a first transgression, depending on the level of work, training and risk involved. The Visible Felt Leadership principle is used in these cases. The misconduct or poor behaviour will first be discussed with the person involved. Disciplinary action follows only after the discussion or warning was unsuccessful.'

[38] This witness was referred to Exhibit O namely a document from SHE management which on p 7 stated *inter alia* the following:

'Although Visible Felt Leadership is a no name no blame system, there are, however rules which must be adhered to. If a manager, supervisor, employee or contractor is found transgressing these rules he/she will be disciplined, which could lead to a dismissal if found guilty.'

[39] Daniel Charl Stephanus van der Merwe testified that he was the chairperson of the first disciplinary hearing and that the first respondent had never prior to the hearing objected to him being the chairperson of the disciplinary hearing. Exhibit B was a summary of the hearing. This witness was then further led through all the exhibits handed in during the disciplinary hearing and what weight he had attached to these exhibits in order to convict the first respondent in respect of the first three charges.

[40] During cross-examination it was put to this witness that the first respondent did in respect of count 2 at the disciplinary hearing testify that he did three FVL's during September 2010 but that only two were recorded. This witness replied that he was not aware of the third one. The focus in respect of count 2 was only in respect of September 2010. This witness also conceded that part of his findings during the disciplinary hearing was that first respondent had indeed an overall commitment to safety on the mine, but that this finding was not reflected in the minutes of the disciplinary hearing. During re-examination this witness explained that though first respondent from a 'broader safety perspective' was committed to safety aspects, regarding the specific offences the first respondent was shown to be guilty of those charges.

[41] Petrus Hannes Fourie, (manager mining) was the chairperson of the second disciplinary hearing on 11 April 2011. He was referred by the representative of the appellant to an employment agreement which stated *inter alia* that an employee may be called upon to work shifts, may be expected to be available for standby duties outside normal working hours, and may be required to work on a Sunday.

[42] He was further referred to the minutes of the disciplinary hearing in which the complainant (Mr Beuke) confirmed that he (ie Beuke) had contributed to the delay in submitting the pack, and that 'Management Accounting' had not caused any delays. This witness testified on the issue of overtime, that it was mentioned, by the first respondent, that overtime was worked, but that it was never stated that this overtime had exceeded that which was allowed by law. This witness was referred to Exhibit JJJ to the effect that the first respondent had made him aware of the provisions of the Labour Act 11 of 2007 in respect of overtime and urgent work.

[43] The witness testified that during the hearing in order to consider his finding he asked himself three questions, firstly whether there was a valid order given; secondly, whether this order was fair and reasonable; and thirdly whether the first respondent actually refused to execute this order. In respect of the first question he testified that having regard to the e-mails referred to there was conclusive proof that the first respondent knew that he was suppose to be available over the week-end, and that an order was given in this regard.

[44] I do not deem it necessary to deal further with the witness's testimony regarding his findings in respect of the second and third questions but wish to refer to the testimony of this witness during cross-examination and the concessions made by him. This witness during cross-examination testified that the normal working hours of the first respondent from Mondays to Fridays, were from 07h00 until 16h00 except for lunch breaks between 13h00 and 13h30. The witness testified that at the time of the disciplinary hearing he was aware of the provisions of s 17(1) of the Labour Act, 11 of

2007 which provides that an employer 'must not require or permit an employee to work overtime except in accordance with an agreement, but such an agreement must not require an employee to work more than 10 hours overtime a week, and in any case not more than three hours' overtime a day.'

[45] This witness was also referred to the provisions of s 17(3) of the Labour Act which provides as follows:

'An employer may apply in writing to the Permanent Secretary to increase the limits on overtime worked referred to in subsection (1) if the employees affected by the application agree.'

[46] This witness was referred to Exhibit JJJ which was handed in during the disciplinary hearing and in particular paragraphs 5 which reads as follows:

'Deodat also highlighted the overtime hours worked during the week as this was already exceeding the allowed 10 hours overtime. The Labour Act, 2007 (section 17 (1-5) is very clear that only 10 hours are allowed anything beyond 10 hours requires special approval from the Government (Permanent Secretary).'

[47] And paragraph 6 which in part (verbatim) reads as follows:

'….It is however unfair and unreasonable to expect us to do anything that is not lawfully permitted, i.e working more than 10 hours overtime without prior approval Permanent Secretary, e.g Williams Claasen dismissal is in contravention of Labour Act, 2007 (section 33 (2) (b)). Apart from the fact that someone life is unfairly destroyed (e.g Williams) the company value system, company policies, Labour relations and Labour Laws are also destroyed.'

[48] Section 33(2)(b) reads as follows (under the heading 'Unfair dismissals'):

'It is unfair to dismiss an employee because the employee – fails or refuses to do anything than an employer must not lawfully permit or require an employee to do.'

[49] This witness conceded the following during cross-examination namely;

a) that first respondent had submitted that he had worked more than 10 hours per week during the disciplinary hearing;
b) that this submission was never disputed (by Mr Beuke);
c) that as chairperson he did not take into account the said overtime worked by first respondent;
d) that to have given the first respondent an instruction (in circumstances where he has worked more than 10 hours overtime) was an illegitimate instruction and against the Labour Act;
e) that the first respondent was therefore not obliged to follow such an instruction;
f) that first respondent had the right to refuse such instruction; and
g) with reference to s 33(2)(b),that it is unfair to dismiss an employee because the employee fails or refuses to do anything that an employer must not lawfully permit or require an employee to do.[1]

[50] When asked why, if the Labour Act provides that it is unfair to have dismissed the first respondent in those circumstances, the witness replied that first respondent had never told Mr Beuke *prior* to the disciplinary hearing that he had worked more than 10 hours overtime, but told Beuke that he had a prior commitment. Furthermore that Beuke had prior to the disciplinary hearing obtained advice from the HR department that he may proceed with the disciplinary hearing.

[51] This witness further tried to justify the sanction of dismissal by stating that after the conviction he had received information from the HR department that first respondent

[1] See p 619 -624 of the record.

had only worked 9.26 hours (ie 9 hours and 26 minutes) and that this information was taken into account in determining the punishment.

[52] This witness further agreed that had the HR department informed him that the first respondent had exceeded 10 hours overtime he would have come to a different conclusion namely that of 'not guilty'. The witness conceded that the said hours (9.26) were never mentioned *during* the disciplinary hearing and that the first respondent thus had no opportunity to dispute those hours which he as chairperson had obtained *afterwards.*

[53] The first respondent testified in respect of the first disciplinary hearing and his conviction on the first three counts that he felt that it was unfair labour practice to charge him with something where there were no rules to discipline someone for non-performance of VFL. In respect of the first charge first respondent testified that in terms of Exhibit F, Mr Beuke arranged a meeting with the finance team and during that meeting the finance team *collectively* expressed their concerns namely that VFL was a sub-section of safety and they considered safety more important than VFL. In this regard reference was made to the finance manager's (Beuke's) transgression of the safety rules when he gave instructions to Williams to hold on to the rails of the vehicle when they went underground on a very unsafe trip. Another issue raised was that the finance team should not be exposed to the underground, or to the plant, or other areas of the mine without proper exposure and training in respect of the risks involved. It was never his intention he testified, to undermine the authority of the finance manager and in particular by sending an e-mail to Mellis Walker.

[54] Regarding the second charge he testified that he had conducted his VFLs. In respect of the September VFL he testified that he had performed the VFL's, one of these was confirmed by a certain Blasins and a third one was done with a contractor 'Dex Hydraulics'. According to first respondent, the completion of the VFL report was one of the unresolved queries the finance team had because there were no rules that a

form must be completed. It has become custom according to the first respondent, that this report had been abused because employees would sit in their offices, have an idea of the area where the VFL was supposed to be done, and then completed the VFLs at their workstations without doing the visit itself. First respondent referred in this regard to Exhibit R which reflects that some individuals had done four VFL's in one month.

[55] First respondent pointed out that on the report itself there is no counter signature from the person who was visited to prove that an employee was indeed there and had done an VFL, and that in the absence of such a counter signature the report has no value. The first respondent further testified there was evidence that Mrs Paulette Kaulinge had been seen performing a VFL and there was no report for that specific VFL, but she was never charged for the non-performance of that VFL.

[56] The first respondent testified with reference to Exhibit MM that he has listed about thirteen employees who had for the period 19 July 2010 until 29 October 2010 not performed VFLs but that none of them, except himself and Williams Claasen, had been charged. This according to first respondent is discriminatory and unfair. With reference to the 'safety belt' issue the first respondent testified that the rules and standard are very clear, namely that there must have been 'disciplinary action' followed by a 'disciplinary inquiry.' In terms of the disciplinary procedures book used by EXXARO where one has transgressed safety rules or the Labour Act no counselling is done. According to first respondent counselling is normally done in behavioral or attitude issues. According to first respondent in this instance there was an inconsistent application of the rules.

[57] In respect to the issue of unfair dismissal (in the second disciplinary hearing) the first respondent testified that head office (EXXARO) would normally issue a time table with deadlines. This would be distributed to the relevant role players and subsequently an interim time table would be distributed. It was also indicated when Financial Accounting must complete their part and that by 12th of January 2011 all deadlines had been missed by the Financial Accounting team, not because of their own doing but for

various other reasons one of which was negligence or mismanagement by the finance manager, Mr Beuke. These delays happened outside management accounting division so by the time the results came to management accounting division it was very late and they had to work extra hours to compensate for lost time and in order to meet future deadlines. It was realized that the deadline of 17th January 2010 would not be met and Mr Beuke was advised to request for an extension of the deadline. This request was unsuccessful. It was explained that 'period 12' must first be completed, thereafter 'period 13' is done and thereafter the 'packs'.

[58] On Thursday 13 January 2011 the financial accountant, Mr Zaahl informed them that a 'period 13' had been closed and they as management accounting could start with with 'period 13'. He was subsequently advised by head office that an issue of a fringe benefit tax entry was 'under discussion'. This was confirmed by Beuke who informed him the fringe benefit tax had been implemented in April 2010 and related to tax which was never paid over to the 'government'. According to the first respondent this was the responsibility of Mr Beuke. The tax pack was supposed to have been completed by Mr Beuke and when Beuke submitted the 'period 13' tax pack, it was incomplete and Beuke was advised that the tax pack contained errors. This tax pack could accordingly not be used by the management accounting team to process the necessary entries in their books. Beuke agreed to provide a proper tax pack which could be used. This tax pack was never provided. The next day around 12h40 Beuke submitted again an incomplete tax pack. The first respondent was then advised by Beuke that a Mrs Althia Miller at head office would 'refine' the pack.

[59] About 12h45 first respondent advised Beuke that working overtime over the week-end would not be possible and overtime was 'highlighted' as well as prior arrangements. This was conveyed to Beuke because whilst they were awaiting for the pack, Beuke had sent out an e-mail indicating that they would have to work over the weekend and needed to answer queries.

[60] Subsequently on 14 January 2010 Beuke submitted a third tax pack. This tax pack was also wrong with the result that he (ie first respondent) eventually 'fixed' the tax pack and processed the necessary journals. Thereafter, (around 15h45), the full financial pack was given to Beuke and the auditors simultaneously.

[61] On Monday 17 January 2011 just after 06h00 first respondent came in. There were only three queries, and those were resolved. These were subsequently forwarded to Althia Muller by Beuke around 14h28 on 17 January 2014, (Exhibit UUU). The first respondent testified that various factors had caused the late submission of the report including a power outage on 14 January 2011 but that the major contributing factor was the delay in submitting the tax pack, timeously, by Beuke. The first respondent testified that the prior commitment was that he had to take children to school at that stage to Keetmanshoop and to Windhoek and since the internal deadline was first set at 12 January he thought that he could use the 14th of January to travel the distance. He denied that he had blatantly refused an instruction to work over that weekend.

[62] The first respondent testified with reference to exhibits XXX, YYY and ZZZ that he had worked 10 hours and 31 minutes overtime for the period Monday, 10 January until Friday, 14 January 2011. According to first respondent Exhibit YYY was given to the chairperson of the second disciplinary hearing by the HR department *after* the hearing. First respondent testified that on 19 April 2011 (ie the day of dismissal) he earned an amount of N$ 64 765.00 per month. First respondent testified that he had accepted certain shares in the company which would expire on a certain date and that these shares could have been sold in order to make an income from it, (Exhibits BBB and CCC). The value of these shares were determined by the market price on the Johannesburg Stock Exchange. He explained that before the expiry date of the shares a shareholder could sell the shares and that the difference between the market price and one's offered price is basically one's income.

[63] In the instance where an employee is dismissed such an employee looses all his or her shares in the company and since he had been dismissed he had lost some of his shares and some shares he had sold prior to his dismissal on 18 April 2010. The first respondent testified that in the circumstances he was forced to sell the shares at a lower price – this according to first respondent was a loss of income.

[64] The first respondent testified that after his dismissal he endeavored to look for employment at two or three occasions but was unsuccessful. The first respondent testified that his relationship with the appellant had not broken down to such an extent that he would not return to work, and that some of the employees (mentioned by the first respondent) kept in contact with him after his dismissal and that he had assisted them where he could. The first respondent testified that he has no personal problems with Mr Beuke and that the issues raised with Mr Beuke were raised in the interest of the company (appellant).

[65] During cross examination, the first respondent stated that on the Friday afternoon even though he had not calculated the overtime worked he knew that it would have exceed the limit should he have worked over the weekend. First respondent further agreed that in terms of his contract of employment that he had been aware of the provision that employees may be expected to be available for standby duty outside their normal working hours.

[66] During re-examination, the first respondent confirmed that Exhibit YYY was obtained from the HR Department and correctly reflects the overtime worked during the period Monday, 10 January 2011 until Friday, 14 January 2011. First respondent further explained that because of certain factors there is an allowance or a tolerance of 15 minutes in the morning which is not taken into account by the HR Department in the calculation of an employee’s overtime. First respondent further pointed out that no witness called on behalf of the appellant testified that he (ie first respondent) had only worked 7 hours and 45 minutes overtime as suggested by Mrs Annerie Keulder, the

legal representative appearing on behalf of appellant (respondent) during the arbitration proceedings.

[67] Mr De Beer who appeared on behalf of the appellant in this appeal submitted that in a nutshell the appeal concerns two points. Firstly, the parties had agreed to limit the dispute in respect of the first disciplinary hearing, namely: (1) whether the chairperson was biased; (2) whether there was a splitting of charges; (3) whether the involvement of Mr Kaulinge in the drawing up of the charges constituted an irregularity; (4) whether the charges were unfair; and (5), whether the rule was applied consistently. Secondly, there was no basis on which compensation could have been ordered by the arbitrator.

[68] It appears from the submissions by Mr De Beer that the arbitrator did deal in her ruling with two of these issues in dispute namely, the splitting of charges where the arbitrator ruled that even though there was a splitting of charges the fact that only one sanction was imposed was not indicative of unfairness, and secondly, that appellant was inconsistent in applying SHE policies. Mr De Beer submitted the contrary with reference to the fact that Mr Williams Claasen had been disciplined and Mr Beuke had been counselled by the mine manager Mr Aspelling. It was submitted that a disciplinary action need not be a formal disciplinary hearing, but may include counselling. Mr De Beer criticized the arbitrator for her failure to provide reasons for her finding that the policies had been applied inconsistently or why the dismissal was unfair.

[69] In respect of the second disciplinary hearing it was submitted by Mr de Beer that there was a serious misdirection on the law since the definition of overtime in s 8(1)(f) of the Labour Act excludes work done on Sundays, if it is not an ordinary working day for that employee. Nevertheless, so it was submitted, even if the overtime limit had been exceeded, that in terms of the contract of employment and in terms of the Labour Act, the first respondent had to be available on that Sunday.

[70] Mr de Beer also took issue with the fact of the amount awarded for loss of income and the additional amount equivalent to the salary for two years, and submitted that the arbitrator did not explain how she arrived at those amounts. It was further submitted that the award for loss of income was too excessive in the circumstance.

[71] Mr Boesak who appeared on behalf of the first respondent submitted in respect of the agreement to limit the issues in dispute, that the appellant's reliance on the matter of *OK Furniture v Mbeha*[2] is misplaced since that case is distinguishable from the case under consideration, and that the parties without objection had allowed the arbitrator to extensively deal with the complaint.

[72] In respect of the first disciplinary hearing Mr Boesak submitted that the appellant had failed to prove that the first respondent had committed those charges. In respect of the second disciplinary hearing it was submitted that it was clear that in terms of the Labour Act, an employer must not punish an employee for an act which the employee refuses to do which are in violation of the provisions of the Labour Act.

[73] I shall now deal with the referral that the disciplinary action amounted to an unfair labour practice.

Count 1

[74] Mr Beuke during cross-examination explained that after the VFL was formally introduced during 2008 there had been weekly presentations from the SHE department and various discussions at departmental meetings. There was a concern that a large number of employees did not perform VFL's and that was why at a SHE forum during June 2010, it was decided that non-compliance would be visited with prosecution. Mr Beuke testified that he had continuously in the past in 'weekly one-on-one meetings', had asked the first respondent to comply and first respondent had continuously argued his way out of it or simply declined, arguing that it was not safe, that he (ie first

[2] (LCA 25-2011)[2012]NALC 24 (15 June 2012)

respondent) was not trained, that it has not been discussed at the proper levels and that he (ie Beuke) viewed this conduct of the first respondent as a smokescreen for not performing VFL's as well as a smokescreen for first respondent for failing to monitor and enforce compliance by the staff under the first respondent.

Count 2 and 3

[75] It was conceded by Beuke that evidence presented to prove count 2 would also prove count 3 and both these counts allege failure to conduct VFL's, deliberately or without valid cause. In my view it amounts to a splitting of charges. I am however of the view that the first respondent was not prejudiced in view of the fact that only one sanction was imposed in respect of all three convictions. I am furthermore not convinced that the fact of splitting of charges *per se* tended to prove bias or unfairness on the part of the chairperson during the first disciplinary hearing.

[76] One of the issues in dispute mentioned by the arbitrator was the involvement of Mr Kaulinge in the disciplinary hearing. I am of the view that in the circumstances, the role played by Mr Kaulinge in no way suggests any unfairness during the disciplinary hearing. The two other issues in dispute mentioned by the arbitrator were the 'unfairness' of the charges and that 'the rule was not applied consistently'.

Onus of proof

[77] Section 33(4) of the Labour Act 11 of 2007 provides that once an employee has established the existence of a dismissal it is presumed, unless the contrary is proved by the employer, that the dismissal in unfair. Chapter 5 dealing with unfair labour practices is however silent regarding who bears the onus where there is an allegation of an unfair labour practice. The normal rule in my view should therefore apply, namely, 'whoever alleges must prove'. Therefore the employee must prove not only the existence of the practice but also that it is unfair.

[78] Regarding the two issues of dispute referred to by the arbitrator I shall first consider whether or not the rule has been applied consistently. If the answer to this

question is in the negative it may also be an answer to the fairness or otherwise of the charges.

[79] Grogan in his work[3] states that generally speaking it is unfair *in itself* to treat employees who have committed similar misconduct differently, and the author distinguishes between historical inconsistency and contemporaneous inconsistency. In respect of contemporaneous inconsistency the followings is postulated:

'Contemporaneous inconsistency occurs when two or more employees engage in the same or similar conduct at roughly the same time, but only one or some of them are disciplined, or where different penalties are imposed. The classic example is where two employees are both engaged in a fight, and neither can claim provocation or that he was acting in self defence. In such cases should, unfairness flows from the principle that like cases should, in fairness, be treated alike. Both forms of inconsistency may also be evidence of arbitrary action on the part of the employer.'

[80] This is often referred to as the 'parity principle'.[4] In *SACCAWU & Others v Irvin & Johnson (Pty) Ltd*[5] Conradie JA said the following at 2313C-J regarding the parity principle:

'There is really no separate principle involved. Consistency is simply an element of disciplinary fairness. . . Every employee must be measured by the same standards. . . Discipline must not be capricious. It really is the perception of bias inherent in selective discipline that makes it unfair. Where, however, one is faced with a large number of offending employees, the best one can hope for is reasonable consistency.'

[81] Grogan at p 224-5 advised that to overcome a consistency challenge, the employer must be able to show that there was a valid reason for differentiating between groups of employees guilty of the same offence.

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[3] Grogan. 2007. *Dismissal, Dismissal and Unfair Labour Practices (2nd Ed), p 223.*
[4] See Southern Sun Hotels Interests (Pty) Ltd v CCMA and Others [2009] 11 BLLR 1128(LC) at para 10.
[5] (1999) 20 ILJ 2302 (LAC)

[82] It is not disputed that a number of employees (referred to in Exhibit MM) did not perform the number of VFL's , as required, during the period 19 July 2010 until 29 October 2010 and a number of employees did not do VFL's prior to June 2010 (Exhibit R and R1). The complainant during the disciplinary hearings, Beuke himself, was amongst those who did not conduct VFL's as required by the SHE forum. In addition to this Beuke committed a serious safety breach (the safety belt incident).It is common cause that no other employees, except the first respondent and Williams Claasen, had been disciplined for failing to conduct VFL's.

[83] It was submitted on behalf of the appellant that the fact that Beuke had been counselled should be seen as a form of discipline, exercised by the appellant. This is in my view a feeble attempt to explain why Beuke in particular never faced any disciplinary action especially in view of the fact that in terms of Exhibit O (a document from SHE management) if a manager, supervisor or employee is found transgressing the rules relating to the performance of VFL's, he or she *'will be disciplined which could lead to a dismissal if found guilty'* (emphasis provided).This clearly in my view excluded any counselling. There was no valid reason provided by the appellant for differentiating between the first respondent and Williams Claasen on the one hand and all other employees who had apparently committed the same transgression. In my view the conduct by the appellant (by selecting only first respondent and Williams Classen) amounted to unfair disciplinary action and this in turn amounts to an unfair labour practice.

[84] I am of the view that the finding by the arbitrator, that the appellant unfairly disciplined the first respondent on 10 November 2010 was not as a result of any misdirection by the arbitrator.

[85] In respect of the second disciplinary hearing, it is not disputed by the appellant that the first respondent had up until Friday, 14 January 2011 worked 10 hours and 31 minutes overtime. These hours have been calculated on the basis of the extra time

worked from Monday, 10 January until Friday, 14 January 2011. It should be clear that the first respondent did not work (or claimed to have worked on Sunday 16 January 2011) and that the reference by the appellant to a serious misdirection on the law, is misplaced.

[86] The argument that the first respondent was obliged in terms of his contract of employment to be available over the week-end cannot in my view be used as justification for the non-compliance with the clear and obligatory provisions of ss 17(1) and 17(3) of the Labour Act. Where there is a conflict between conditions of employment contained in a contract of employment and a statutory prohibition, the statutory prohibition must prevail.

[87] Mr Fourie, the chairperson of the second disciplinary hearing, correctly conceded that the instruction given by Beuke that the first respondent was, in the absence of any compliance with the provisions of s 17(3), an unlawful instruction and that the first respondent was under no obligation to comply with such an instruction or that first respondent had the right to refuse to comply with such instructions. The appellant therefore could not have required the first respondent to remain available over the week-end in order to answer queries. In terms of s 33(2)(b) it was unfair to dismiss the first respondent in these circumstances.

[88] In my view what was quite alarming was the fact that the chairperson despite the fact that it was brought to his attention that the first respondent had worked more than the prescribed 10 hours overtime, nevertheless continued not only to convict him but thereafter dismissed the first respondent. The explanation why he had in any event dismissed the first respondent does not make any sense at all. In these circumstances the dismissal of the first respondent was automatically unfair.

[89] In respect of compensation awarded by the arbitrator, s 86(15) provides that an arbitrator may make ‘any appropriate arbitration award’ including*, inter alia,* an order of

reinstatement of an employee or an award of compensation. It was submitted by Mr De Beer that the award was an excessive one without any justification by the arbitrator. In *Shilongo v Vector Logistics (Pty) Ltd*[6], Parker, J stated that in the consideration of an appropriate award, an amount that would have been paid to the appellant had he not been dismissed may be awarded. In *Ferondo (Pty) Ltd v De Ruiter* [7], the court held that compensation should place a dismissed employee in monetary terms in the position he or she would have been had the unfair dismissal not occurred, but that in determining the amount a judge or arbitrator should be guided by what is reasonable and fair in the circumstances (to the employee as well as the employer) and not by a desire to punish the employer. It is further trite law that a dismissed employee is bound to mitigate his or her loss by seeking alternative employment. The flagrancy of the employer's non-compliance with the Labour Act may also be taken into account in determining an appropriate award of compensation.

[90] The arbitrator stated that an additional amount of N$ 1 554 360.00 awarded was an amount which was the equivalent of two years' salary of the first respondent imposed instead of the four years prayed for by the first respondent, and because she considered that the appeal may take two years to finalise. In addition, she took into account that the first respondent had tried, unsuccessfully, to secure employment from NAMDEB and that it would be difficult for the first respondent to obtain employment whilst this case is not finalised.

[91] I agree with Mr De Beer, that this additional amount awarded is excessive in the circumstances and not fair towards the appellant and may be seen as punishment. The arbitrator had erred in this regard. The amount of N$ 777 180.00 awarded as compensation appears to me to be fair in respect of both the first respondent as well as the appellant in view of the fact that it took about a year from the dismissal of the first respondent until the pronouncement of this award by the arbitrator.

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[6] NLLP 2014 (8) 555 LCN
[7] (1993) 14 ILJ 974 LAC

[92] I furthermore agree with the arbitrator that reinstatement was not an appropriate award in spite of the testimony of the first respondent that the relationship with the appellant had not broken to such an extent that it would not be conducive to a healthy employee-employer relationship. I say this in view of the fact that the first respondent had said himself, during the completion of a questionaire after his dismissal, that he would consider any future employment with the appellant only under a change of management (referring to Mr Beuke). More importantly, in my view if one has regard to the evidence presented, a picture of an hostile relationship between the first respondent and Beuke, his immediate supervisor, emerges. If reinstatement is to be ordered this would certainly perpetuate this unhealthy relationship and would not be in the interests of either the appellant or first respondent.

[93] Regarding the loss of income suffered in respect of issued shares, the arbitrator stated that no evidence regarding the value of the shares was placed before her with the result that she could not determine any loss suffered by the first respondent. I agree with this finding. I find it further inappropriate in arbitration proceedings to expect of an arbitrator to appoint an independent valuator in order to determine the losses suffered by the first respondent. It was primarily the duty of the first respondent to have placed such evidence before the arbitrator during the arbitration proceedings.

[94] In view of my findings aforementioned, the convictions as well as the sanctions imposed in both disciplinary hearings are set aside.

[95] In the result, the following orders are made:

1. The orders given on 20 September 2013 in paragraphs 1 and 2 are confirmed (including the amount of interest stated by the arbitrator in the award). To the extent that it has not yet been done, the appellant is ordered to pay the first respondent the amount of N$ 777 188.00 (plus interest) immediately.
2. The cross-appeal is dismissed;

3. The conditional cross-appeal is dismissed;
4. No cost order is made.

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EPB Hoff

Judge

APPEARANCE

Applicant	PJ De Beer
Of	De Beer Law Chambers, Windhoek
Respondent	C Daniels
Of	Clement Daniels Attorneys, Windhoek