REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2017/00005

In the matter between:

WINSTON CUPIDO **APPELLANT**

and

EDGARS STORES NAMIBIA LIMITED **FIRST RESPONDENT**
KAHITIRE KENNETH HUMU **SECOND RESPONDENT**
THE LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *Cupido v Edgars Stores Namibia Limited* (HC-MD-LAB-APP-AAA-2017/00005) [2018] NALCMD 25 (3 October 2018)

Coram: ANGULA DJP
Heard: **18 May 2018**
Delivered: **3 October 2018**

Flynote: Labour Law – Unopposed Labour Appeal – Appellant appealed against the arbitrator's award which held that his dismissal was both procedurally and substantively fair – Court found – The arbitrator erred in finding that the dismissal was both procedurally and substantively fair. Appeal upheld.

Summary: This is an appeal against the arbitrator's award, finding that the appellant's dismissal was both procedurally and substantively fair – The appeal is unopposed – The appellant was charged with four charges of misconduct – His internal disciplinary proceedings were chaired by a person from Audit and what is referred to as ER departments which formed part of the management of the respondent – The two departments were involved in the investigations of the allegations against the appellant which resulted in the charges being proffered against the appellant and for which the appellant was convicted – During the disciplinary hearing, the appellant made not less than four applications for the chairperson to recuse herself from presiding over the proceedings because she was conflicted or biased – At the end of the hearing the arbitrator concluded that the dismissal was both procedurally and substantively fair.

The appellant appealed against the findings of the arbitrator on the grounds that the arbitrator erred in law in finding that there was 'no serious and fundamental irregularity to be regarded as procedurally fatal to the disciplinary proceedings'; the arbitrator erred in law in finding that that a procedural defect *per se* does not render a dismissal unfair and that regard must be had to the presence or absence of substantial fairness; the arbitrator erred in law in finding that the dismissal was substantively fair, notwithstanding the mutually destructive versions between the parties which the arbitrator did not try resolve before he could make a finding which version was probable and thus acceptable.

Court held: The test for recusal is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before court or tribunal. The chairperson of the disciplinary hearing dismissed the appellant's application for recusal without applying the proper test for recusal, and therefore the arbitrator erred in not finding that the chairperson of the disciplinary hearing committed an error which tainted the requirement of fair procedure by her failure to find that the appellant had a reasonable apprehension of bias on the part of the chairperson.

Court held further: Where there are two mutually destructive versions, the applicant or plaintiff can only succeed, if he or she satisfies the court on a preponderance of probabilities that his or her version is true and accurate and therefore acceptable, and that the version advanced by the respondent is therefore false or mistaken and falls to be rejected. The arbitrator failed to carry out an exercise of weighing the two mutually destructive versions against each other or weighing the witnesses' respective versions against the general probabilities. Due to lack of such an exercise, the arbitrator's finding that the balance of preponderance favours the respondent's version is not credible and amounts to paying mere lip-service to the approach to the test to be applied in order to establish which version is probable and which is false.

The appeal was for the above reasons upheld.

ORDER

---

1. The appeal is upheld.

2. The respondent is ordered to compensate the appellant for loss of income in the amount equal to his monthly remuneration he would have received had he not been dismissed, calculated from the date he was dismissed to date of the arbitrator's award, being 28 September 2018.

3. There is no order as to costs.

4. The matter is removed from the roll and is considered as finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an appeal against the arbitrator's finding that the dismissal of the appellant was both procedurally and substantively fair and thus dismissed by the first respondent.

Brief background

[2] The appellant was employed by the first respondent as a regional operational manager. He was subjected to a disciplinary hearing, charged with four charges *inter alia* dishonesty, dereliction of duties, unacceptable conduct towards his subordinate; encouraging his subordinate to use fabricated information thereby bringing the company's name into disrepute.

[3] At the end of the disciplinary hearing, he was found guilty on three of the charges proffered. He appealed however the appeal panel of two, dismissed his appeal.

[4] The appellant then filed a labour dispute with the Office of the Labour Commissioner. At the end of the arbitration hearing, the arbitrator made an award, adverse to the appellant, concluding that the appellant's dismissal was both procedurally and substantively fair. This appeal is directed against the arbitrator's award.

Proceedings before the disciplinary hearing

[5] At the commencement of the disciplinary proceedings, the appellant applied that the chairperson should recuse herself from presiding over the matter. The basis of the application an email correspondence which was amongst the documentary evidence produced before the tribunal for such. The email circulated amongst members and the management and it stated inter alia that:

'The ROM in Namibia (Winston Cupido) have (sic) been handed to internal audit for an investigation. The admin team found some irregularities and they are confident that he will be dismissed. It is clear that he was dishonest and ER and Audit will work together to dismiss him.'

[6] It was not in dispute that the email was authored by the head of ER and furthermore that the chairperson of the disciplinary hearing was from the ER department. It was further not in dispute that one member of the appeal panel, one Sharlene Nagapa, had been involved in the investigation and evidence gathering against the appellant and had access to the evidence which was ultimately presented to convict the appellant. Furthermore, it was common cause that the second member of the appeal panel, one Warona, in an unrelated matter exerted undue influence on the chairperson of a disciplinary hearing to change her sanction from 'final written warning' to 'dismissal'. The chairperson of that disciplinary hearing Venovineja, testified for the appellant at the disciplinary hearing. There was also an attempt by Sharlene Nagapa, to dissuade Venovineja not to testify on behalf of the appellant.

[7] It was for those reasons that the appellant launched his first bid for the chairperson to recuse herself from presiding over the proceedings. He submitted that he harboured under a reasonable apprehension of bias on the part of the chairperson and that he would not receive a fair hearing.

[8] The chairperson dismissed the appellant's application for her recusal.

[9] Thereafter, on the second day of the disciplinary hearing, the appellant brought a second application for the recusal of the chairperson. The basis of this application was and it was not in dispute, that the chairperson was seen associating herself or being alone in the company of the company witness, one Ranjeev, at the moment when he was still testifying. It happened that the chairperson had forgotten her file at the hotel. She drove back to the hotel in the witness's car to fetch the file. The appellant further pointed out that he had discovered that the chairperson, the initiator and the company witness were staying at the same hotel. They stayed together at the same hotel during the duration of the disciplinary hearing which lasted over three weeks.

[10] Again the chairperson refused to recuse herself from further presiding over the matter.

Proceedings before the arbitrator

[11] Following the dismissal of his appeal, the appellant filed a dispute with the Office of the Labour Commissioner. At the end of the proceedings, the arbitrator made an award concluding that the appellant's dismissal was both procedurally and substantively fair.

[12] As regards the issue of procedural fairness, the arbitrator, made the following findings: With respect to the complaint by the appellant that about four witnesses testified via telephone link from South Africa, whereas the respondent's disciplinary code does not make provision for such a procedure, the arbitrator reasoned that the appellant was afforded an opportunity to cross-examine those witnesses and that he indeed cross-examined those witnesses and therefore, his constitutional right had not been infringed.

[13] As regards the conduct of the proceedings by the chairperson of the disciplinary hearing, the arbitrator found that there was nothing wrong with the procedure followed by the chairperson or that it was prejudicial to the appellant or and that she committed a serious and fundamental irregularity to be regarded as fatal to the proceedings.

[14] On the issue of substantive fairness, the arbitrator found 'on the balance of preponderance that the version of the respondent is true and accurate and the version of the appellant is false and falls to be rejected. In the end, there was a fair and valid reason to dismiss the appellant.

Grounds of appeal

[15] The appellant advanced the following grounds in support of his appeal:

‘15.1 The arbitrator erred in law in his finding that there was no serious and fundamental irregularity to be regarded as procedurally fatal to the disciplinary proceedings. This is because, in law the disciplinary process of the appellant militated against the principle of natural justice, transparency and impartiality and ‘breads grounds for disqualifying bias against a presiding officer’. The process was further compounded by the respondent’s non-compliance with the provisions of its disciplinary code which resulted in the appellant not enjoying a fair procedure. Accordingly the finding that the disciplinary procedure was fair constitutes a finding to which no reasonable arbitrator would have arrived at.

15.2 The arbitrator erred in law in finding that that a procedural defect *per se* does not render a dismissal unfair and that regard must be had to the presence or absence of substantial fairness.

15.3 The arbitrator erred in law in finding that the dismissal was substantively fair, notwithstanding the mutually destructive versions between the two sides, which the arbitrator did not try resolve before he could make a finding which version was probable and thus acceptable.’

Proceedings before this court

[16] The appeal is not opposed by the respondents, although from the record it appears that the papers were duly served on the respondents.

[17] Ms Katjipuka-Sibolile appeared for the appellant and filed comprehensive heads of argument. It feels rather odd to consider her submissions without the benefit of counter arguments but the court has no choice where an interested party was served with the papers but chose not to take advantage of the forum provided.

Procedural fairness

[18] On the question of procedural fairness, Ms Katjipuka-Sibolile correctly submits that the rule of natural justice against bias requires no more than that internal disciplinary proceedings must be conducted in accordance with the common sense

precepts of fairness. The employer must meet certain minimum requirements if the disciplinary hearing is to qualify as being procedurally fair[1].

[19] As has been observed, the appellant raised as a ground of appeal, that the finding by the arbitrator that the there was nothing wrong with the procedure followed by the chairperson of the internal disciplinary hearing. This finding in view missed the point. The appellant's complaint was not about the procedure followed but it was against the impartiality and apprehension of bias of the chairperson. The appellant contented that he had a reasonable likelihood or apprehension of bias if the chairperson continued to preside over the disciplinary proceedings. It was for those reasons that the appellant applied for the chairperson to recuse herself.

[20] It has been held that the apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by the judicial officer prior or during proceedings. In all these situations the judicial office must recuse him or herself[2].

[21] The test for recusal is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts that a judicial officer might not bring impartiality and an unprejudiced mind to bear on the resolution of the dispute before court[3].

[22] The chairperson of the disciplinary hearing dismissed the appellant's application for recusal without applying the proper test for recusal. She simply assured the appellant that he would be transparent and honest. I have earlier indicated that the arbitrator, misidentified or misconstrued the issues for decision before him by finding that 'nothing suggest that the procedure followed by Ms Sidibe was wrong' instead of making a finding whether there was a reasonable apprehension of bias on the part of the appellant and whether the appellant had discharged the onus on him.

---

[1] Parker, *Labour Law in Namibia* at page 147.
[2] *January v Registrar of High Court & Others* (I 396/2009) [2013] NAHCMD 170 (19 June 2013).
[3] January matter (supra); See also *Cenored v Ikanga* (LCA 13/2013) [2014] NALCMD 18 (30 April 2014).

[23] Counsel for the appellant, correctly in my view, submits in her heads of argument that at no time did the arbitrator bring his mind to bear on whether an observer in the position of the appellant would reasonably apprehend that the chairperson of the disciplinary hearing could be considered not to have been impartial; or whether viewed objectively, there existed a reasonable apprehension that the chairperson may have been biased.

[24] In my judgment, based on the undisputed facts and viewed objectively, the chairperson should not have agreed to preside over the disciplinary proceedings of the appellant given the fact that she was from the department which conducted the investigation against the appellant. Furthermore she had prior access to the material used to convict the appellant. It was common cause that the head of ER department, from which the chairperson came, had written an email stating that her department and the Audit department would work together to have the appellant dismissed. It is clear from those facts that the chairperson was compromised; and that she was conflicted. Under those circumstances, viewed objectively, she would not be expected to be impartial and unbiased, even with the best intentions.

[25] The chairperson had an opportunity to remedy the situation, by recusing herself when the applicant applied for her recusal. Instead of seizing the opportunity, she was dismissed the application out of hand and failed to give reason why she claimed she was not biased, and why the appellant should not be inapprehensive or as to her impartiality. In this connection, this court is of the considered view that the arbitrator erred in not finding that the chairperson of the disciplinary hearing committed an irregularity which tainted the requirement of fair procedure by her failure to appreciate that the appellant entertained a reasonable apprehension of bias on the part of the chairperson.

[26] The record of the proceedings shows that there were not less than three applications by the appellant for the recusal of chairperson. On the second day of the proceedings, the chairperson realized that she did not have her bundle of documents. She called for an adjournment to fetch her documents from her hotel. She travelled in one car with one witness for the respondent. On her return, the

appellant brought to her attention that it was inappropriate for him to be alone in a company of a witness. The appellant therefore asked for her recusal. She declined.

[27] The next application for the chairperson's recusal was made by the appellant when she was laughing at Mervin Haraseb, again one of the respondent's witness. She once again refused to recuse herself. The fourth application for the chairperson's recusal was made by the appellant when he objected to the testimony on behalf of the respondent to be made from witnesses based in South Africa via a telephone link. The appellant's objection was based on the fact that its disciplinary code did not make provision for such a procedure. The chairperson overruled the appellant's objection and ruled that the evidence is to be led via a telephone link. There upon the appellant again applied that the chairperson recuse herself. She refused.

[28] It was common cause that the chairperson, the initiator and the company witness were staying at the same hotel. They stayed together at the same hotel during the duration of the disciplinary hearing which lasted over three weeks. It was further common cause that the two persons who ultimately constituted a panel of appeal which considered the appellant's appeal were part of the management which was involved in the disciplinary hearing. They were conflicted and seriously compromised or contaminated. They should not have sat on the appeal.

[29] In my considered view, the cumulative effect of all the foregoing facts seriously and negatively affected the fairness of the disciplinary proceedings. My conclusion is therefore that the arbitrator erred in law in finding that there were 'no serious or fundamental irregularities (committed) fatal to the proceedings'. It is clear that the arbitrator's conclusion in this regard is so perverse that no reasonable arbitrator faced with the same facts would have arrived at such a conclusion. The arbitrator's finding in this regard stands to be rejected.

[30] The appellant contended that the chairperson of the disciplinary proceedings committed a procedural irregularity by allowing telephonic testimony of four witnesses notwithstanding objection by the appellant. Ms Katjipuka-Sibolile referred

the court to a South African[4] case where evidence was led via a long-distance call from Australia to South Africa. The court remarked that: 'the arbitrator allowed her evidence in the manner envisaged by section 138(1) of the LRA'. He concluded the arbitration in a manner that he considered appropriate in order to determine the dispute fairly quickly.

[31] Ms Katjipuka-Sibolile submits in this connection that the South African case is distinguishable from the present case in that: An attempt was first made to establish a video link, which failed, and the arbitrator gave reasons for his decision to allow testimony over the telephone. However in the present matter, no attempt was made to establish a video link, and the chairperson did not give reasons why he did not uphold the appellant's objection.

[32] The arbitrator accepted that the respondent's disciplinary code does not make provision for evidence to be presented via telephone link. He however found that the appellant was afforded an opportunity to cross-examine the witnesses who testified via a telephone link and therefore 'his constitutional rights were obviously not infringed'.

[33] I have carefully perused the Labour Act, 2007, and could not find a section which provide for a procedure whereby evidence may be led via a telephone link. I read section 138(2) of the South African LRA and it reads similarly to section 86(10) of the Labour Act. It provides that 'subject to the discretion of the arbitrator … 'as to the appropriate from of proceedings, a party to the dispute may give evidence, call witnesses, question witnesses of any party'. I do not think this section can be interpreted as giving the arbitrator the power to authorise a party to give evidence via a telephone link. In my view the arbitrator's discretion cannot be exercised to do something which has not specifically provided for by the enabling legislation

[34] Ordinarily, witnesses should attend proceedings in person. A party is entitled to observe the demeanour of a witness. The appellant was deprived of that opportunity. The obvious question which comes to mind is: How did the appellant know that the person testifying on the other side is indeed the person alleged to be

[4] *Simmers v Campbell Scientific Africa (Pty) Ltd & Others* (C751/2013) [2014] ZALCCT 34; (2014) 8 BLLR 815 (LC); (2014) 35 ILJ 2866 (LC) (9 May 2014).

without seeing the alleged witness. The right to fair trial is a fundamental right which should not be subjected to convenience or expediency unless specifically waived by the person in whose favour it operates. Such waiver is to be done with full appreciation of the consequences of such waiver.

[35] It would appear to me that the fact that when the appellant objected to evidence being tendered via telephone link, he did not waive his constitutional right. He obliged to cross-examine the witness, with full reservation of his right to challenge the arbitrator's decision as he does on this appeal.

[36] My conclusion on this point is that the arbitrator erred in law in not finding the chairperson of the disciplinary hearing acted unfairly towards the appellant by allowing the respondent to lead evidence via a telephone link.

Substantive fairness – valid and fair reason

[37] It is common cause that the arbitrator was confronted by two conflicting versions. After the arbitrator recited the evidence with reference to the charges proffered against the appellant, he found that he could not 'see no reasons why all these witnesses would fully implicate the applicant'. The arbitrator then concluded that he was 'satisfied on balance of preponderance that the version of the respondents is true and accurate and therefore acceptable and the version of the applicant is false and falls to be rejected'. The appellant's ground of appeal against the arbitrator's finding on this point is that the arbitrator did not try to resolve the mutually destructive versions before him.

[38] In *Cenored v Ikanga* (LCA 13/2013) [2014] NALCMD 18 (30 April 2014), Ueitele J at para 38 stated the following with regard to the approach to be adopted in dealing with mutually destructive versions:

'Once the chairperson was faced with two conflicting versions he had to, on probabilities, decide which of the versions is likely to be true. The test was stated as follows by Eksteen, AJP in *National Employers General Insurance v Jagers*-

> "Where there are two mutually destructive stories the plaintiff can only succeed … if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false." ' (Emphasis added)

[39] It is clear that the arbitrator did not even attempt to apply the test referred above to the conflicting versions before him. He failed to undertake a robust exercise of weighing the two versions against each other or weighing the respondent's version against the general probabilities. Without such an exercise, his finding that the balance of preponderance favours the respondent's version is not credible and amounts to paying mere lip-service to the approach to be employed to establish which version is probable and which is false.

Conclusion

[40] In light of the foregoing findings, I have earlier arrived with regard to procedural fairness, I consider it unnecessary to embark upon an exercise of applying the test to the versions which were before the arbitrator. The mere fact that the arbitrator failed to apply the proper test to the two versions before him constitutes an error in law and as such, is a valid ground for upholding the appeal for that reason alone. It is a legal requirement that in order for the employer to discharge the onus on him that the dismissal was fair, he must prove that the dismissal was both procedurally and substantively fair. '[T]he dual requirements of substantive fairness and procedural fairness constitutes the unbreakable unity of the test for fair

dismissal. The result is that the fulfilment of one requirement does not satisfy the test[5]'. This is especially in view of the content of the email averted to earlier.

[41] The appellant asks for reinstatement, alternatively compensation for loss of income. Given the sour relationship caused emanating from the litigation between the parties, coupled with the lack of trust between the parties, I do not think it would be reasonable nether advisable to order the reinstatement of the appellant. It would appear to me that the trust relation has been irretrievably broken down. For those reasons, I decline to order reinstatement of the appellant although he has been successful in his appeal.

[42] In the result I make the following order:

1. The appeal is upheld.

2. The respondent is ordered to compensate the appellant for loss of income in the amount equal to his monthly remuneration he would have received had he not been dismissed, calculated from the date he was dismissed to date of the arbitrator's award, being 28 September 2018.

3. There is no order as to costs.

4. The matter is removed from the roll and is considered as finalised.

_____

H Angula

Deputy-Judge President

[5] Parker: *Labour Law in Namibia* at page 156.

APPEARANCES:

APPLICANT:	U KATJIPUKA-SIBOLILE Of Nixon Marcus Public Law Office, Windhoek
FIRST RESPONDENT:	No appearance