REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-LAB-APP-AAA-2022/00020

In the matter between:

SUNSHINE PRIVATE COLLEGE **APPELLANT**

and

MUCHEMEDZI MOSES **FIRST RESPONDENT**
IMMANUEL HELAO HEITA N.O. **SECOND RESPONDENT**
THE LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *Sunshine Private College v Muchemedzi* (HC-MD-LAB-APP-AAA-2022/00020) [2022] NALCMD 59 (13 October 2022)

CORAM: SIBEYA J
HEARD: **23 SEPTEMBER 2022**
DELIVERED: **13 OCTOBER 2022**

Flynote: Labour law – Substantive fairness entails that the employer must, on a balance of probabilities, prove that the employee was actually guilty of misconduct or that he or she contravened a rule – Compensation discussed.

Summary: The appellant is a private college institution which offers education services. The first respondent was employed by the appellant as a science teacher from January 2020 to 24 March 2020 when he was dismissed by the appellant.

Following the disciplinary hearing in terms of which the first respondent was found guilty for allegedly offering private extra lesson to learners in his class. He was then dismissed from his position as a science teacher by the appellant. The First Respondent was dissatisfied with the dismissal and referred a dispute of unfair dismissal to the Labour Commissioner's office on 29 July 2020. In the arbitration proceedings, the arbitrator found that the first respondent's dismissal was substantively unfair and went on to award compensation in the amount of N$45 000. It is this decision which is the subject of the appeal.

Held that: the requirement of substantive fairness entails that the employer must prove that the employee was or could reasonably be expected to have been aware of the existence of the rule contravened. This requirement is self-evident. It is clearly unfair to penalise a person for breaking a rule that he or she has no knowledge of.

Held further that: the appellant has no written policy document regarding the alleged conflict of interest, thereof, breach of a non-existent policy cannot be attributed to the first respondent. The fiduciary duty owed by employees to employers discussed.

Held further that: the arbitrator acted judicially, not administratively, in the exercise of his discretion to determine the award of compensation.

ORDER

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1. The appeal is dismissed.
2. There is no order as to costs
3. The matter is removed from the roll and is regarded as finalised.

REASONS

SIBEYA J:

Introduction

[1] The purpose of employment policies are for employers to establish and communicate to employees what is acceptable, appropriate, ethical and constructive conduct in the workplace. Well-written, clear policies, supported by effective disciplinary procedures, ensure sound governance, risk and compliance control measures and help reduce the likelihood of misconduct, harassment, discrimination and unfair labour practices in the workplace. Employment policies thus serve as a set of rules for labour relations.

[2] The law is settled that it is within the providence of the employer to set standards of the conduct permissible to his or her employee and to determine the appropriate sanction for any misconduct. The courts even adhere to the sanction imposed by the employer for the misconduct and only interfere if such sanction results in unfairness in the sense that it is unreasonable.[1]

[3] However, the prime question that remains is where does the court draw the line, in the absence of a policy document or required standard of conduct set out for all to see?

Parties and representation

[4] The appellant is Sunshine Private College, a private company duly incorporated and registered in the Republic of Namibia, with its principal place of business situated at Erf 8709, Corner Atlas and Kupferberg Street, Eros, Windhoek. The appellant shall be referred to as such.

[5] The first respondent is Mr Moses Muchemedzi, an adult male and former teacher at the appellant. The first respondent is the only person who opposes the

[1] Collins Parker. (2012). *Labour Law in Namibia*. Windhoek: UNAM Press, p. 144.

appeal and, therefore, he shall be referred to as ‘the respondent’. Where reference is made to the appellant and the respondent jointly, they shall be referred to as ‘the parties’.

[6] The second respondent is Mr Immanuel Helao Heita N.O., an adult male cited in these proceedings in his official capacity as the arbitrator duly appointed by the Labour Commissioner in terms of s 120 of the Labour Act 11 of 2007 (‘the Labour Act’), to preside over the dispute referred to the Labour Commissioner as stated hereinabove. His address of service is 249-582 Richardene Kloppers Street, Khomasdal, Windhoek. The second respondent shall be referred to as ‘the arbitrator’.

[7] The third respondent is the Labour Commissioner, duly appointed in terms of s 120 of the Labour Act and the appointing authority of the arbitrator with his address situated at 249-582 Richardene Kloppers Street, Khomasdal, Windhoek. The third respondent shall be referred to as ‘the Labour Commissioner’. No relief is sought against the Labour Commissioner who is cited herein merely for the interest that he may have in the matter.

[8] The appellant is represented by Ms Mombeyarara, while the respondent is a self-actor.

Background

[9] The respondent was employed by the appellant as a teacher from 30 January 2020 to 24 March 2020, when he was dismissed.

[10] The respondent referred a dispute of unfair dismissal to the Labour Commissioner, following his dismissal after he was charged and found guilty of conflict of interest, for allegedly offering private extra lessons to the learners in his class.

[11] On 3 February 2022, the arbitrator, after hearing evidence, found that the respondent’s dismissal was substantively unfair. The appellant was ordered to pay the respondent an amount of N$45 000, which is equivalent to 3 months’ salary as compensation for the unfair dismissal.

[12] It is against this award by the arbitrator that the appellant now pursues the present appeal.

Grounds of appeal

[13] From the outset, Ms Mombeyarara indicated to the court that this appeal was not brought by the appellant merely to delay the payment of compensation to the respondent, but it is one based on genuine grievances against the arbitrator's reasons for upholding the respondent's claim.

[14] In this connection, I proceed to deal with the appellants grounds of appeal *seriatim*.

[15] As the first question of law, the appellant contends that the arbitrator erred in law when he found that the dismissal of the respondent was not based on a valid and fair reason as contemplated by s 33(1) of the Labour Act, and therefore was substantively unfair. This decision is challenged based on the following:

(a) The arbitrator failed to regard that the respondent, in his own evidence, admitted that he is in the business to offer extra classes to learners at the school and that he charges a fee of N$150 and traveling costs for his extra lessons, while knowing that the appellant also has an aftercare facility, where extra lessons are provided to learners after ordinary school hours. Furthermore, the failure of the respondent to disclose his private business which was in direct competition with the appellant amounted to a conflict of interest. The arbitrator also disregarded the evidence on the conduct of the respondent to charge for fuel and travel time as amounting to overreaching parents who are expecting quality service from the appellant's employees in exchange for the hard-earned school fees they pay for their children.

(b) The arbitrator erred in law when he failed to regard the respondent's conduct as a breach of trust between an employer and employee. Although there was no particular evidence showing that the respondent had rendered the extra classes to the learners, the attempt to secretly compete with the appellant amounted to a breach of trust between the

parties. The harbouring of such intention in itself constituted a violation of the respondent's obligation to render his services in good faith.

(c) The arbitrator failed to apply his mind to the law in that the respondent's conduct to make secret arrangements for extra classes was not an issue to be resolved on whether or not the respondent implemented the prohibited act, but one based on an analysis of whether the respondent's attempt to commit the prohibited act amounts to a conflict of interest and/or a breach of contract which goes to the root of the contract of employment.

(d) The arbitrator failed to regard the respondent's conduct to give extra classes as one which would reasonably have led the respondent to deliberately render substandard services to learners in the classroom with the intention to indirectly and unduly compel parents to enrol for his extra classes and at the expense of the appellant. The appellant, therefore, had a reasonable apprehension of fear that the respondent would be motivated to render poor quality service.

(e) The arbitrator did not accord due weight to the evidence on record that the respondent's acts of insubordination led to the inevitable disintegration of the employer-employee relationship which justifies the appellant to terminate the employment relationship of the parties for downplaying the intelligence of his superiors. The respondent demonstrates his *modus operandi* to disobey or challenge lawful authority when he asserts that he is a co-founder of the appellant whose ‘sweat and blood’ had given the appellant the status it presently enjoys.

[16] The second question of law that the appellant brings to this adjudication is that the arbitrator erred in law to award an amount of N$45 000 as compensation for the termination of the respondent's employment. The appellant contends further that any other arbitrator in the circumstances would not have awarded compensation of a three months' salary. The appellant further states that:

(a) The arbitrator failed to take into account that the respondent was still on probation and not on permanent employment. Due to the respondent's

insubordination, unprofessionalism and business operations in competition with the employer, the appellant had resolved to discharge the respondent from employment at the end of his probation period and no fixed contract had come into existence.

(b) Consequently, there was no reasonable basis for the arbitrator to award damages equivalent to a three months' salary as the respondent did not prove how he suffered the damages. Such compensation is shockingly unreasonable based on the available evidence that the respondent's probation period had not been confirmed and that he failed to mitigate his damages caused by the dismissal.

Appellants' case and arguments

[17] The gravamen of the appellant's case is that the respondent used his position as a science teacher to offer extra classes to his learners in exchange for payment of N$150 to the detriment of the appellant's aftercare facility, where extra lessons were given to the learners after ordinary school hours.

[18] In doing so, it is alleged, the respondent, by charging parents for extra lessons, ignited a reasonable apprehension of fear in the parents of the learners and the appellant, that he was withholding information in ordinary class hours to induce learners to attend to his extra lessons. *(the appellant's choice of words emphasised)*

[19] Ms Mombeyarara submitted that this is a clear violation of the respondent's common law obligation to execute his duties faithfully and honestly. On this score, Ms Mombeyarara placed heavy reliance on the case of *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another.*[2]

Respondent's case and argument

[20] The respondent's case was fairly straightforward. The respondent contended that the idea of extra lessons was brought to him by one of the parents (Ms Awaras) whose child in his class struggled to understand Physical Science. It was his case

[2] *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another* 1971 (3) SA 866 (W) at 867.

that Ms Awaras phoned him seeking for his assistance regarding extra lessons for her child.

[21] The respondent further contended that, the appellant does not have a policy which prohibits employees to give private extra lessons on their own time and neither was it brought to his attention that it was forbidden to give private extra lessons. The respondent, however, conceded that he did not inform the appellant that he intends to give private extra lessons, because it is a norm at every school in Namibia to offer private lessons when required by learners.

Legal principles

[22] Before I consider the issues which I am called upon to decide in this appeal, I will briefly set out the legal principles governing those issues.

[23] Section 33 of the Labour Act provides for the law on unfair dismissal. That section reads as follows:

> '33 Unfair dismissal
> (1) An employer must not, whether notice is given or not, dismiss an employee-
> (a) without a valid and fair reason; and
> (b) without following-
> (i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34(1); or
> (ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.'

[24] Section 33 of the LabourAct simply reinforces the well-established principle that the dismissal of an employee must be both substantively and procedurally fair.

[25] In *Dominikus v Namgem Diamonds Manufacturing*,[3] substantive fairness was explained as follows:

[3] *Dominikus v Namgem Diamonds Manufacturing* (LCA 4 of 2016) [2018] NALCMD 5 (28 March 2018).

‘[21] Substantive fairness means that a fair and valid reason for the dismissal must exist. In other words the reasons why the employer dismisses an employee must be good and well grounded; they must not be based on some spurious or indefensible ground. This requirement entails that the employer must, on a balance of probabilities, prove that the employee was actually guilty of misconduct or that he or she contravened a rule. The rule, that the employee is dismissed for breaking, must be valid and reasonable. Generally speaking, a workplace rule is regarded as valid if it falls within the employer's contractual powers and if the rule does not infringe the law or a collective agreement.’ (own emphasis)

[26] The requirements of procedural fairness include the right to be:

(a) informed of the nature of the misconduct allegedly committed and to be afforded adequate notice to prepare prior to the disciplinary enquiry;
(b) afforded the right to cross-examine witnesses called against the employee;
(c) afforded opportunity to be heard and to call witnesses in support of any defence raised;
(d) informed of the finding and the reasons for the finding;
(e) heard before penalty is considered and imposed,
(f) informed of the right to appeal etc.

[27] The foregoing principles are not absolute and are regarded as guidelines to determine whether an employee was given a fair hearing in the circumstances of each case.

[28] The test for a fair dismissal is therefore two-fold and both requirements of substantive and procedural fairness must be met. If an employer fails to satisfy one leg of the test, he or she fails the test of fairness and the dismissal is liable to be held as unfair.

[29] An arbitrator who is tasked with a duty to determine a dispute concerning alleged unfair disciplinary action or unfair dismissal must accordingly make a finding of whether or not the employer had a valid and fair reason to dismiss and whether a fair procedure was followed during the disciplinary hearing. If the arbitrator finds that there was no valid and fair reason for the dismissal, or that the process followed was unfair, the arbitrator must uphold the unfair dismissal or the unfair labour practice

challenge. If on the other hand the arbitrator finds that there was a valid and fair reason for the dismissal and that a fair procedure was followed during the disciplinary hearing the arbitrator must dismiss the complaint.

[30] I, however, pause here to mention that in *casu,* the focal point will be on substantive fairness. This is because the arbitrator's finding which is challenged in these proceedings, is that the dismissal was substantively unfair.

Discussion

Substantive fairness

[31] The requirement of substantive fairness furthermore entails that the employer must prove that the employee was or could reasonably be expected to have been aware of the existence of the rule. This requirement is self-evident as it is clearly unfair to penalise a person for breaking a rule that he or she has no knowledge of. [4]

[32] It was the respondent's case from the onset that in the realm of education, every area of interest should be based on a drafted policy document which teachers sign upon assumption of duty. What I understand the respondent to mean by this, is that he was not aware of any policy of the appellant which stipulates what constitute conflict of interest in its business.

[33] The respondent was emphatic that there was no policy in place and if there was ever such a policy, same was not brought to his attention by the appellant. As such, he was unaware that providing learners private extra lessons after school hours offended the appellant's policy and amounted to conflict of interest.[5]

[34] Faced with this bone crushing allegation, the appellant, did not provide a conclusive answer thereto. However, what is abundantly clear is that the appellant's policy was not produced during arbitration proceedings and such policy does not form part and parcel of the present appeal record. The only inference I can draw

[4] *SVR Mill Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2004) 25 ILJ 135 (LC).
[5] Page 192 of the Appeal Record.

therefrom is that indeed, no such policy document which defines what constitutes a conflict of interest in the eyes of the court existed.

[35] In light of the fact that the appellant has no policy, breach of a non-existent policy attributed to the respondent is difficult to apprehend.

Did the employer–employee relationship irretrievably breakdown because the respondent did not inform the appellant that he intended to conduct extra classes and did a conflict of interest arise?

[36] In this connection, Ms Mombeyarara strongly relied on the case of *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another (supra)*, at page 867-868 where Hiemstra J, remarked as follows:

'There can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests. It seems to be a self-evident proposition which applies even though there is not an express term in the contract of employment to that effect. It is stated thus in the leading case of *Robb v Green*, (1895) 2 Q.B .1, per Hawkins, J., at pp. 10 - 11:

"…I have a very decided opinion that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service."'

[37] I strongly agree with the powerful sentiments echoed by the above authorities that an employee owes a fiduciary duty to the employer not to work against his or her employer's interest, whether or not the employment contract makes provision for conflict of interest or not. In my view, however, the facts and circumstances of each case must be closely assessed in order to ascertain whether the fiduciary duty that an employee owes to an employer has been breached thus constituting conflict of interest.

[38] In *casu*, the appellant is barking the wrong tree. From the appeal record, it is clear that the respondent was at all times unaware or had no knowledge of the appellant's policy, in respect of the appellant's stance towards conflict of interest.

[39] It, nonetheless, still remains the duty of this court to determine whether on the proven facts, the respondent breached his fiduciary duty to the appellant.

[40] The respondent was at all times steadfast in his argument that there was no legal duty on him to disclose to the appellant that he was providing extra private lessons to his learners. It is further the norm to render extra lessons to the needy learners in most schools, be they in the public and or private sector, so the respondent stated.[6]

[41] The respondent went on to conclude that if the appellant was of the view that what he was doing was wrong, it was the prerogative of the appellant to inform him accordingly at the assumption of duty, which the appellant did only after a complaint surfaced from Ms Awaras. There is, no indication from the appeal record that the respondent persisted with his conduct afterwards.

[42] It is common cause that the appellant had a conversation with one of the parents, Ms Awaras, regarding extra lessons for her child.[7] The said arrangement for extra lessons was only made in respect of this one child. It is further undisputed that the extra lessons were intended not to be free and the respondent made it clear to Ms Awaras that she had to pay for his time and transport. The lessons were, however, never provided and no fee was paid. This much is evident from the appellant's own assertion.

[43] It was not established through evidence that the respondent rendered services to Ms Awaras in competition or against the best interest of the appellant. In any event, there is no evidence that the respondent was prohibited from rendering extra private lessons to his learners in general.

Other considerations

[6] Page 57 of the Appeal Record.
[7] Page 184 of the Appeal Record.

[44] Before I draw the curtains on this judgement to a close, I deem it prudent to address several issues which the appellant raised in its notice of appeal and in arguments. This issues had no foundation or were not in any way linked to the appeal record before this court.

[45] **Firstly**, the appellant alleged that the arbitrator failed to regard the respondent's conduct of to provide extra classes as one which would reasonably have led the respondent to deliberately render substandard services to learners in the classroom with the intention to indirectly and unduly compel parents to enrol for his extra classes and at the expense of the appellant. The appellant, therefore, had a reasonable apprehension of fear that the respondent would be motivated to render poor quality service. This was never established during the arbitration proceedings. As a matter of the fact the only persons that would have been able affirm such bold ended allegations are the learners in the respondent's classroom. No learner was called to testify.

[46] **Secondly**, the appellant alleged that the arbitrator did not accord due weight to the evidence on record that the respondent's acts of insubordination led to the inevitable disintegration of the employer-employee relationship justifying the appellant to terminate his employment for downplaying the intelligence of his superiors.

[47] The cornerstone of this present appeal stems from the fact that the respondent was dismissed due to the fact that he provided extra private lessons to his learners. From the appeal record, it is evident that the respondent disputed the allegations of insubordination in their entirety.

[48] Ms Mombeyarara could not authoritatively make out a case of insubordination or point to a particular act of insubordination. As a matter of fact, the respondent was not charged for insubordination. In any event, it appears from the record that the respondent only raised questions which amounted to seeking clarification. Nothing, therefore, turns on the submission of insubordination. I decline to make a definitive finding on this aspect because it will defeat the duty of the court in determining the live dispute between the parties.[8]

[8] Page 179 -183 of the Appeal Record

[49] **Thirdly,** the appellant alleged that the respondent undermined the lawful authority of the appellant by his referral to the appellant as ‘my school’ and assertions that the appellant’s existence was because of his ‘sweat and blood’. I consider this issue extremely trivial and of no assistance to the ultimate outcome of this judgement.

[50] With that said, I want to sound a word of caution to legal practitioners. Legal practitioners are officers of the court and should constantly adhere to their duty towards court. They should determine what is relevant from various facts and be concise in their litigating strategies with the primary aim to assist the court to resolve the dispute. This will certainly avoid sending the court into a wild goose chase on a fact finding mission on matters that are irrelevant and of no substance to the dispute. In a rapidly growing legal fraternity, courts do not have the luxury of time to dwell on academic issues or issues of no substance to the determination of the dispute between the parties.

Was the dismissal fair?

[51] As stated above, the Labour Act only approves dismissal that is not only lawful in the technical sense, but one that is also fair, meaning one that is not capricious but equitable, conscionable and just.[9]

[52] What then is fair reason? From what has been said, it is clear that the requirement for ‘fair reason’ involves a consideration of the question whether the employee is established to have committed misconduct and whether the ultimate sanction of dismissal, which is the capital punishment in labour relations, is suitable, taking into account all the circumstances of the case.

[53] Dismissal is a penalty, and in order to arrive at dismissal, a charge of misconduct that attracts dismissal must first be proven.

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[9] *Pep Stores Namibia (Pty) Ltd v Iyambo and others* 2001 NR 211 at 216H.

[54] In the present matter it was not proven that the respondent breached a fiduciary duty or any rule or policy and, therefore, the respondent should not have been found guilty of misconduct. As a matter of consequence, dismissal should never have been up for consideration as the initial hurdle of proving misconduct was not passed.

Compensation

[55] The appellant laid another attack on the compensation awarded as alluded to above. Ms Mombeyarara submitted that *in casu*, there was no evidence whatsoever led by the respondent as to how much is owed to him by the appellant and how that amount arose. On this score, she relied on the Supreme Court judgment of *Namdeb Diamond Corporation (Pty) Ltd v Gaseb,*[10] where Hoff JA said the following at para 98:

'In *Springbok Patrols (Pty) Ltd t/a Namibia Protection Services v Jacobs and Others*,[11] (an appeal in terms of s 89 of Act 11 of 2007) the principle was once again emphasised that where a party seeks to claim an amount owing to him or her under the Act, he or she must not only plead how that amount arose but also lead evidence to prove such an amount. In the present case, the respondent did not even begin to allege that he has suffered any damages (or is entitled to compensation as the court a quo found). The onus of proof of any claim of damages or compensation that the respondent might have had as well as the duty to adduce evidence on such claim, rested with the respondent.'

[56] Ms Mombeyarara further submitted that the arbitrator went ahead and decided the issue of compensation *mero motu* without any motivation for that decision whatsoever and in doing so, the arbitrator erred in law.

[57] Ms Mombeyarara, in conclusion, argued that the arbitrator did not account for the fact that the respondent contributed to his dismissal and, therefore, this should count against the compensation award. I find that this argument can be disposed of without breaking a sweat, regard being had to my earlier finding that the respondent was unfairly dismissed. This makes the said argument academic. In the same breath

[10] *Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 (SC) at p. 1029.
[11] *Springbok Patrols (Pty) Ltd t/a Namibia Protection Services v Jacobs and Others* Unreported judgment of Labour Court per Smuts J in [2013] NALCMD 17 (LCA 702/2012); 31 May 2013).

I find the submission regarding probation as equally academic since it was raised in consideration of compensation. Besides, the respondent was subjected to a disciplinary hearing which led to his dismissal prior to the lapse of the alleged probation period. The appellant was dismissed as a result of the disciplinary hearing and not probation.

[58] The award does not serve as a model of clarity which emulation thereof can be encouraged, but, it is nevertheless an award. The compensation appears to have been calculated at the monthly basic salary of N$15 000.[12]

[59] It is common cause that the respondent, in his statement of referral of the dispute, requested to be paid full monthly salary from April 2020 to December 2020.[13] This is eight months' salary, however, it seems evident that the arbitrator in exercising his discretion, only awarded compensation for a period of three months.

[60] The respondent's monthly salary was not in dispute.[14] It appears that the appellant is disgruntled not of an allegation that the monthly salary includes other benefits which were not proven but that no reasons for the award of compensation were given. The appellant further takes issue that no evidence of loss suffered was led or if loss was suffered, there is no evidence of how such loss was mitigated.

[61] Section 86(15) of the Labour Act, demands of the arbitrator to act judicially, not administratively, in the exercise of his discretion to determine the award of compensation.

[62] In *casu*, the compensation that was awarded is consistent with the amount that is equal to the remuneration for a period of three months that the respondent ought to have been paid by the appellant had he not been unfairly dismissed. In this regard I find the remarks by Gibson J in *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others,*[15] to be compelling when she said that:

'In my view had the case been similar to the case of *Navachab Gold Mine v Ralph Izaaks* delivered by this Court (Hannah J) on 1 September 1995 the position would have been different. The *Navachab* case as well as the *Ferado (Pty) Ltd v De Ruiler* 1993 14 ILJ

[12] Page 145 of the Appeal Record.
[13] Page 108 of the Appeal Record.
[14] Page 147 of the Appeal Record.
[15] *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC) at 223.

974 (LAC) are clearly distinguishable on the facts, in that in both cases the respondents sought compensation including loss of certain benefits, such as medical and or loss of a house. In such a case it was up to the respondents to establish subjectively what the losses entailed were.

Section 46(1)(a)(iii) is formulated in a way that distinguishes two types of awards. The Learned Chairperson chose to award the latter award, ie the amount equal to what could have been paid to the respondents as opposed to compensating for the patrimonial loss suffered. Given that election it became unnecessary for the Chairperson to call for evidence of the actual losses sustained by the respondents to be led.'

[63] I associate myself with the above remarks which sets out the correct exposition of our law, that where compensation is equivalent to remuneration that excludes other benefits, it is not necessary to lead evidence in order to establish the financial loss suffered.

[64] I therefore find no fault in the arbitrator's finding.

Conclusion

[65] In view of the foregoing conclusions, I find that the disciplinary proceedings held were substantively unfair. I further find that, although it would have been ideal for the arbitrator to set out the reasons for the compensation awarded in detail, the said award for compensation passes muster.

[66] Furthermore, considering the findings and conclusions reached, I find it unnecessary to consider all other grounds of appeal as I hold the view that they are immaterial to the decision of this matter. In the premises, I find that the appeal must fail on the merits and falls to be dismissed.

Costs

[67] Section 118 of the Labour Act provides that no order for costs would be issued by the Labour Court in labour matters, save in situations where the institution, defence or further pursuit of proceedings is either frivolous or vexatious. None of the parties argued that the institution or defence raised in the proceedings is frivolous or

vexatious and it is also not apparent from the record of proceedings. I will therefore not make an order as to costs in keeping with the purpose of s 118 of the Labour Act.

Order

[68] In view of the foregoing findings and conclusions, I make the following order:

1. The appeal is dismissed
2. There is no order as to costs
3. The matter is removed from the roll and is regarded as finalised.

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O S Sibeya

Judge

APPEARANCES:

FOR THE APPELLANT:	M Mombeyarara MM Legal Practitioners Windhoek
FOR THE 1ST RESPONENT:	In person