REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA **MAIN DIVISION,**

WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2021/00032

In the matter between:

HERITAGE PRIVATE SCHOOL	**APPELLANT**
and	
ONAI PATRICIA MUTIZWA	**FIRST RESPONDENT**
OFFICE OF THE LABOUR COMMISSIONER	**SECOND RESPONDENT**
MEMORY SINFWA	**THIRD RESPONDENT**

Neutral citation: *Heritage Private School v Mutizwa* (HC-MD-LAB-APP-AAA-2021/00032) [2023] NALCMD 10 (20 February 2023)

Coram: Schimming–Chase J
Heard: **9 September 2022**
Delivered: **20 February 2023**

Flynote: Labour Law – Labour Appeal – Against arbitration award – Severance Package – Section 35 of the Labour Act, 11 of 2007.

Summary: The first respondent was employed by the appellant in 2007 as a music teacher and was later promoted to the position of school principal. On 7 May 2020, the first respondent was summarily dismissed on grounds of poor

performance. At the time of her dismissal the first respondent's monthly remuneration was N$10 000. The arbitrator found *inter alia* that the dismissal was both substantively and procedurally unfair. The arbitrator awarded the first respondent, her monthly remuneration of N$10 000 for the period from March 2020 to 7 May 2020, severance pay for seven weeks and compensation for loss of income for six months. The appellant now appeals against the award only to the extent of the compensation and severance pay.

Held that, in terms of s 86(15) of the Act, the arbitrator has the power to make an award of compensation for loss of income.

Held that, s 35(1) of the Act provides that an employer must pay severance pay to an employee who has completed 12 months of continuous service if the employee is *inter alia* dismissed. In terms of s 35(2), severance pay will not be applicable in instances of a fair dismissal on grounds of misconduct or poor work performance.

Held that, the appellant abandoned the appeal against the arbitrator's finding that the appellant was employed at the appellant, and that her dismissal was procedurally and substantially unfair.

Held that, the amount of compensation awarded for loss of income was not only fair but reasonable and was justified in the circumstances.

Held that, the arbitrator's award of severance pay is legislatively justified in terms of s 35 of the Act.

ORDER

[1] The appeal is dismissed.

[2] There is no order as to costs.

[3] The matter is removed from the roll and regarded as finalised.

JUDGMENT

SCHIMMING-CHASE J:

[4] This labour appeal was noted in terms of s 89(1)(a) of the Labour Act, No 11 of 2017 ("the Labour Act"), by Heritage Private School ("the appellant"). The appeal was launched against the arbitration award of the third respondent dated 8 April 2021. The second and third respondents do not oppose the appeal. Ms Mutizwa ("the first respondent") opposes the appeal and appeared in person. The appellant was represented by Mr Nanhapo.

[5] The appellant is an academic institution. The first respondent was employed by the appellant as a music teacher and later as principal. According to the first respondent, she began employment at the appellant in the year 2012 until 7 May 2020, when she was dismissed.

[6] The appellant initially sought an order setting aside the award of the arbitrator dated 8 April 2021 on the basis that the arbitrator erred in finding that the dismissal of the first respondent was substantively and procedurally unfair, and ordered the appellant to pay the first respondent the amount of N$98 462,96.

[7] For the relief sought, the appellant set out three grounds of appeal, namely:

(a) that the arbitrator erred in law and/or fact when she found that there was an employment contract between the appellant and the first respondent;

(b) that the arbitrator erred in law by failing to place due regard to the fact that the respondent incorrectly joined Tanben College, a non-existent juristic person, to the proceedings. Any other reasonable arbitrator would have arrived at a different finding;

(c) that the arbitrator erred in law and/or fact in failing to place due weight on the fact that it was a material term of the relationship between the appellant and the first respondent that there was no fixed remuneration for services provided by the first respondent and that remuneration was subject to performance;

(d) that the arbitrator erred in law and/or fact in finding that the appellant acted procedurally and substantively unfairly by discontinuing the consultancy services of the first respondent on the basis that the first respondent was incompetent, had poor management skills and did little or nothing to assist the appellant to sustain its profits and maintain its reputable standards; and

(e) that even if the first respondent is deemed to be an employee, which is denied, then the arbitrator erred in law or fact in finding that the first respondent was unfairly dismissed because she failed and/or refused to take into account that the first respondent absconded from her duties for a period of six weeks during the Covid-19 pandemic as an excuse not to fulfil her obligations and other alternative duties which did not require face to face teaching or close contact with other staff members. The first respondent further failed or refused to consider the omission by the first respondent to give her best services to mitigate the impacts of Covid-19 on the appellant.

[8] During the appeal hearing, the appellant abandoned all but one challenge to the arbitration award. The appellant took issue with the finding of the arbitrator as regards payment of the severance package and loss of income to the first respondent. Mr Nanhapo did not persist with the other grounds as set out in the appellant's notice of appeal. For this reason, I will confine my decision to the issue of severance package and loss of income. References to the evidence led relating to the first respondent's dismissal are for background and contextual purposes only.

[9] Subsequent to her dismissal and on 20 May 2020, the first respondent referred a dispute to the Labour Commissioner ("the second respondent"). On the LC21, the first respondent indicated the nature of the dispute to be (a) unfair dismissal, (b) severance package and (c) outstanding salary.

[10] In her summary of dispute, the first respondent indicated that on 8 May 2020, she went to the appellant where she was employed for a staff meeting. This meeting was called by Mr Muyambo, the son of the Director and owner of the school. She was the only one called to this meeting. At the meeting the appellant informed her thar her services were terminated. When she asked for a reason for the termination of her services, she was not given one. She also explained that, when she inquired about her 'outstanding salary', Mr Muyambo informed her that he will have to approach the Ministry of Labour, Industrial Relations and Employment Creation.

[11] Mr Muyambo who testified for the appellant at the arbitration proceedings took the position that the first respondent was not entitled to the remuneration that she claimed because she did not fulfil duties in the manner she was required to, and her dismissal was justified on those grounds.

[12] Mr Muyambo admitted that the first respondent was employed by the

appellant, but that such employment was subject to her performance.[1] He did not dispute that the first respondent began employment with the appellant (then known as Tanben College, before it changed its name to Heritage Private School) in the year 2012. [2] He testified that the first respondent was employed by the appellant, initially as music teacher and then promoted to principal. [3]

[13] The arbitrator found that the first respondent was unfairly dismissed, and proceeded to set out her reasoning for the compensation award.

[14] As regards the outstanding salary, the arbitrator reasoned and found as follows:

'The applicant is claiming outstanding salary from March to 7 May 2020 when she was dismissed, but the contention of the respondent is that the applicant did not work that period, therefore she is not entitled to relief claimed. It is important to highlight that the applicant was still in the employment of the respondent for the said period and that during the said period a state of emergency and lockdown was imposed by government due to the outbreak of Covid 19.

It is evident that the applicant was not absent from work or stayed away from work or stayed away from work unreasonably but due to the laid down regulations, therefore she is entitled to the salary claimed as no evidence was adduced to indicate whether there was an agreement made between the parties for salary cuts or reduction.

The applicant claiming for payment of her outstanding salary from March – May 2020; severance pay and loss of income. As empowered by section 86(15)(e) of the Labour Act, 11 of 2007. I award the applicant her salary for March to 7 May 2020; seven (7) weeks' severance pay and compensation for six months loss of income. Applicant's relief is calculated as follows:

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[1] Record page 80.

[2] Record page 85 read with Record page 81.

[3] Record page 85.

1. Salary March and April 2022 = N$ 10 000 X 2 = **N$ 20 000**

2. Days worked May 2020 (5 days) = N$ 10 000/4.333 = N$ 2307.87/5
= N$ 461.57 X 5 = N$ 2307.87

3. Severance pay = N$ 2307.87 X 7 = **N$ 16 155.09**

4. Six (6) months' loss of income = N$ 10 000 X 6 = **N$ 60 000**

Total = **N$ 98 462.96'** [4]

[15] It was the first respondent's uncontroverted version that, she was the principal at the appellant. She started her employment with the appellant in 2012 as a music teacher and was later promoted to principal. Just before her dismissal her salary was N$10,000.[5] The last salary she received was in February 2020.[6] The first respondent sought her 'salary updated and the severance package'.[7] It was further her uncontroverted version that she had not received a salary since March 2020. It was common cause that she was dismissed on 8 May 2020. The first respondent did not attend school during lockdown. The school was accordingly closed. She made attempts to introduce online classes, but these suggestions fell on deaf ears.

[16] According to the appellant, no evidence was adduced to justify the award for severance pay and insofar as the compensation for loss of income is concerned, the appellant avers that this relief was not sought.

[17] The appellant's primary issue was that the appellant did not attend work and is not entitled to remuneration. Mr Mayumbo took the position that the first respondent's compensation claims were over exaggerated. Further that the first respondent was not entitled to remuneration especially not for a month for which she did not render services to the appellant. Using Covid-19 as an excuse does not justify this. [8]

[4] Appeal Record 60-61.

[5] Appeal Record 83 line 20.

[6] Appeal Record 82.

[7] Appeal Record 83 particularly line 15.

[8] Appeal Record 104.

[18] The first respondent vehemently denies that she did not show up for work. She had indicated that during the complete lockdown period she did not attend, but suggested online classes to mitigate any loss.

[19] It is common cause that the first respondent was employed by the appellant from 2012 to 7 May 2020. At the time of her dismissal, her monthly remuneration was N$10 000. She referred three disputes to the Labour Commission. These were, unfair dismissal, severance package and 'outstanding salary'.

[20] Section 86(15) of the Labour Act empowers the arbitrator to make an appropriate arbitration award, including an award of compensation.

[21] As an overriding principle, it is to be borne in mind that unless the arbitrator's decision is asserted to be perverse, an appellant court will be assiduous to avoid interfering with the decision of the arbitration for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is whether the decision that the arbitrator has reached is one that no reasonable decision maker could have reached. [9]

[22] In considering the amount of compensation payable in the circumstances, various factors are taken into consideration as the reason for the dismissal, namely the conduct of the parties during the occurrence of the dispute, evidence of any loss occasioned to the employee due to the dismissal, as well as evidence of the likely impact of the compensation order on the employee. [10]

[23] In *M Pupkewitz & Sons v Kankara,*[11] Mtambanengwe J (as he then was) held that in calculating the amount of compensation that was payable to an

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[9] *Gramatham v Norcross SA (Pty) Ltd v Tile Africa* (LCA 62/2013) [2017] NALCMD 27 (14 August 2017) par [45].

[10] *Chevron Engineering v Nakambule* 2004 (3) SA 495 (SCA) par [31] and the authorities collected there.

[11] *M Pupkewitz & Sons v Kankara* 1997 NR 70 (LC)

employee who had been dismissed unfairly, regard should be had to the actual loss suffered, or the amount that the dismissed employee would have been paid had he not been dismissed.

[24] The compensation is thus payment of the value, estimated in money, of something lost which consists of (1) an amount equal to the remuneration that the employer ought to have paid the employee had he not been dismissed or suffered other unfair disciplinary measure or some other labour injustice; and (2) an amount equal to any loss suffered by the employee because of the dismissal or other disciplinary action or other labour injustice.

[25] In determining the amount of compensation, the courts have taken into account the principle that compensation must not be calculated in a manner to punish an employer, or at enriching a claimant because it is awarded on the principle of *restitutio in integrum*.

[26] In *Novanam Ltd v Rinquest*, Ueitele J[12] held that in general, compensation calculated on a period between the dismissal of the respondent and the hearing of the complaint was reasonable and fair.

[27] In *Pep Stores Namibia Ltd v Iyambo and Others* [13] it was held that where an arbitrator awards compensation that is equal to the amount of remuneration that would have been paid to the employee had she not been dismissed, it may not be necessary for the employee to lead evidence to establish the amount involved. The amount should be within the employer's domain, but if the amount includes compensation for loss of certain benefits, for example medical benefits, then the employee must establish by evidence what the losses entail.

[28] In terms of s 86(15) of the Act, the arbitrator is empowered to make an appropriate arbitration award, including an award for compensation. The arbitration

[12] *Novanam Ltd Rinquest* 2015 (2) Nr 447 (LC) at par [23]

[13] 2001 NR 211 (LC) 222-223

hearing was conducted on 26 February 2021. That is nine months after the date of dismissal. I do not regard it unfair that the arbitrator awarded compensation for loss of income for six months. That was reasonable, particularly considering that the first respondent was summarily and unfairly dismissed. But for the unfair dismissal, the first respondent would have been entitled to N$10 000 per month for however long she would have been employed by the appellant. Therefore, N$60000 as compensation for loss of income, is not only fair, but also reasonable, if regard is had to all the circumstances of the case. I will therefore not interfere with the arbitration award insofar as compensation for loss of income is concerned.

[29] Section 35 of the Labour Act further regulates severance pay in labour relations. Section 35(1) provides *inter alia* that an employer must pay severance pay to an employee who has completed 12 months of continuous service, if the employee is dismissed. Severance pay must be in an amount equal to at least one week's remuneration for each year of continuous service with the employer. Section 35(2) provides that the provisions of ss (1) do not apply to a fair dismissal on grounds of misconduct or poor work performance.

[30] In this matter before me, it is no longer disputed that the dismissal was unfair. Therefore the appellant’s contention that severance pay is not due, is misconceived.

[31] The first respondent was employed by the appellant from 2012 to 7 May 2020. The seven weeks awarded for severance pay is justified on the evidence that was placed before the arbitrator.

[32] In addition, as regards the appellant’s assertion that there was no evidence before the arbitrator to make an award in terms of s 35, this too, is misconceived.

[33] Considering the terms of Table 1 as set out in s 10(3) of the Labour Act, it can be accepted from the evidence before the arbitrator that the first respondent’s

monthly remuneration of N$10,000 was set by month. Therefore, in order to calculate the weekly rate, one would have to divide the monthly rate of N$10 000 by 4.333 which gives the amount of N$2 307, 87. The multiplication of that amount by seven weeks is N$16 155,09. Effectively, all the evidence necessary to make an award in terms of s 35 of the Act was before the arbitrator, and was unchallenged for that matter. For this reason, the challenge against the arbitration award insofar as it relates to severance pay is also unmeritorious.

[34] There shall be no order as to costs as I do not regard the appeal to be frivolous or vexatious.

[35] In the result the following order is made:

[36] The appeal is dismissed.

[37] There is no order as to costs.

[38] The matter is removed from the roll and regarded finalised.

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EM SCHIMMING – CHASE

Judge

APPEARANCES

FOR THE APPELLANT:	T Nanhapo Of Brockerhoff & Associates, Windhoek

FOR THE FIRST RESPONDENT:	OP Mutizwa
	In person