

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2022/00070

In the matter between:

PUPKEWITZ AND SONS (PTY) LTD

APPELLANT

and

ISASKAR MUUNDJUA

FIRST RESPONDENT

KAHITIRE KENNETH HUMU N.O.

SECOND RESPONDENT

Neutral citation: *Pupkewitz and Sons (Pty) Ltd vs Isaskar Muundjua* (HC-MD-LAB-APP-AAA-2022/00070) [2024] NALCMD 8 (26 March 2024)

Coram: UEITELE J

Heard: 17 November 2023

Delivered: 26 March 2024

Flynote: Labour Act, 2007 – Labour law – Appeal against an award of arbitrator – Appeal in terms of section 89 (1)(a) of Act 11 of 2007 – Whether dismissal was substantively unfair – Appeal upheld.

Summary: The first respondent was employed by the appellant as a multi-skilled salesperson from 23 November 2015, until his dismissal on 08 November 2019. The first respondent was brought before a disciplinary committee for counts of failing to

follow Company Policies and Procedures, bribery and dishonesty. He was found guilty on the charges of failing to follow Company Policies and Procedures and dishonesty. His termination was recommended on the charge of dishonesty. Dissatisfied with the outcome, he appealed and the chairperson of the appeal dismissed the appeal and confirmed the findings and recommendation of the chairperson of the disciplinary hearing.

Dissatisfied again with the appeal Chairperson's decision, the first respondent referred a dispute of unfair dismissal to the Office of the Labour Commissioner. The arbitrator held that the first respondent was substantively unfairly dismissed. The appellant dissatisfied therewith approached this court for an order setting aside the award.

Held that an employee has a duty to obey his or her employer's lawful instructions.

Held that 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.

Held further that the requirements of procedural fairness include the right to be told the nature of the misconduct committed and to be afforded adequate notice prior to the disciplinary enquiry; to be afforded an opportunity to be heard and to call witnesses in support of any defence and to cross-examine witnesses called against you, informed of the finding (if found guilty) and the reasons for the finding, the right to be heard before penalty is imposed, informed of the right to appeal etc.

Held that 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 fails the test of fairness and the dismissal is liable to be held as unfair dismissal.

Held further that a court of appeal or a review court will not lightly overturn a finding of fact made by a trier of fact who has had the benefit of hearing and seeing witnesses in the witness-box, except in certain defined cases. One of such cases is where the probabilities clearly point the other way.

ORDER

1. The appeal is upheld.
2. The award issued by the Arbitrator, Mr Kahitire Kenneth Humu dated 14 October 2022, is set aside and replaced with the following order.

‘The complaint is dismissed.’

3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

UEITELE J:

Introduction

[1] This is an appeal against an arbitration award which was issued by an arbitrator of the Labour Commissioner in a dispute between the appellant and the first respondent. The appellant, is Pupkewitz and Sons (Pty) Ltd conducting business under the name Pupkewitz Megabuild as a retailer in building materials and hardware. I will, in this judgment, for ease of reference, refer to the appellant as Pupkewitz.

[2] The first respondent is Mr Isaskar Muundjua, who was employed by Pupkewitz as a multi-skilled salesperson at its Windhoek Central branch from 23 November 2015 until 08 November 2019 when his employment was terminated, following disciplinary findings of misconduct. The arbitrator who issued the award is

Mr Kahitire Kenneth Humu, the second respondent. The award was issued on 14 October 2022. I will, in this judgment, for ease of reference, refer to the first respondent as Mr Muundjua and to the second respondent as the arbitrator.

Background

[3] The background facts that gave rise to the present proceedings are fairly straightforward¹. They acuminate to this: On 02 October 2019, Mr Jacques Barnard, the Branch Manager at Pupkewitz Windhoek Central Branch was conducting an unspecified investigation and was reviewing the video surveillance (CCTV) footage. As he was reviewing the footage he observed Mr Muundjua transacting on the system and zoomed in. He noted that Mr Muundjua entered a certain Mr Deon de Waal's² passcode (kerridge account) and transacted on the system.

[4] After Mr Barnard observed Mr Muundjua transacting on the system he summoned Tubby (Rudolph) Kaaijk, the security supervisor, and Mr Muundjua to a meeting. Mr Barnard at that meeting and in the presence of Kaaijk, asked Mr Muundjua whether he used Mr de Waal's username or password (kerridge account), the question was put in Afrikaans: "gebruik jy Deon se password?" Freely translated means "are you using Deon's password?" The respondent denied that he used Mr de Waal's username or password. Barnard asked him for a second time, saying did you ever use the passcode of Deon de Waal, and Mr Muundjua again denied having done so. Barnard asked him a third time and he still denied that he used Mr de Waal's passcode.

[5] Mr Barnard then reminded Mr Muundjua about the CCTV cameras and showed him the footage. After Mr Muundjua viewed the footage he admitted to Mr Kaaijk that he used Mr de Waal's password. Mr Muundjua was then requested to provide a written statement in that regard, which he did on 03 October 2019. In the written statement Mr Muundjua, amongst others, stated the following (I quote verbatim from the written statement):

¹ I have discerned these background facts from the evidence on record which is not in dispute as between the parties.

² Mr Deon De Waal was Mr Muundjua's immediate supervisor, but, was at the time Mr Barnard discovered that Muundjua was using De Waal's kerridge account, no longer in the employment of Pupkewitz.

'As discussed yesterday (02/10/2019) with Jacques Barnard (JB)... my former supervise Deon De waal to order me to do the binning and overwrite the stock of the tiles and sanitary ware. Every time we receive the stock. Sometimes when he busy or when the client looking for discount he give me he give me his password to enter in computer to client discount and him he later checked how much or low did I gave to client.'

[6] After he provided the written statement Mr Muundjua was, on 23 October 2019, charged with misconduct. The misconduct charges that Mr Muundjua faced were the following:

1. On 09/09/2019 failed to follow **Company Policies and Procedures (Code of Conduct –Rule 2.6)** when you used Deon De Waal's kerridge account in order to give discount to customers.

2. On 01/09/2019 committed an act of **Bribery (Code of Conduct –Rule 3.26) and Abused your position (Code of Conduct –Rule 3.10)** as sales person by receiving payment for discount given in the form of cash from a customer, to the amount of N\$ 100.00.

3. On 02/10/2019 acted **Dishonestly (Code of Conduct –Rule 3.17)** that you denied using the kerridge account of Deon de Waal to give discount when you were confronted by your Manager, Jacques Barnard. You only admitted at later stage to using his password.'

[7] Mr Muundjua pleaded not guilty to the charges of misconduct. He was summoned to appear before an internal disciplinary hearing on 28 October 2019. At the conclusion of the hearing on 29 October 2019 he was found guilty of two charges namely failing to follow Company Policies and Procedures (Code of Conduct –Rule 2.6) when he used Mr de Waal's kerridge account in order to give discount to a customer. He was equally found guilty of acting dishonestly (Code of Conduct –Rule 3.17) when he denied using the kerridge account of Mr de Waal to give discount when he was confronted by his branch manager, Mr Barnard.

[8] Mr Muundjua was given a final warning in respect of failing to follow Company Policies and Procedures and was summarily dismissed in respect of the charge of dishonesty. He filed an internal appeal which failed and his employment was terminated on 08 November 2019. Dissatisfied with the outcome of the appeal he, on

17 March 2020 in terms of s 86 of the Labour Act 11 of 2007, referred a dispute of unfair dismissal to the office of the Labour Commissioner.

The arbitration proceedings

[9] As I indicated in the preceding paragraph, Mr Muundjua referred the dispute of unfair dismissal to the Labour Commissioner during March 2020. Conciliation of the dispute took place between June 2020 and September 2020 and when the parties could not settle their dispute, arbitration commenced during November 2020. The arbitration proceedings were concluded two years later on 06 June 2022 and the award rendered on 14 October 2022.

[10] After reviewing the evidence and the arguments advanced on behalf of the parties, the arbitrator came to the conclusion that Mr Muundjua's verbal denial that he was using or had used his supervisor's kerridge account was supplemented and thus overtaken by the written statement that Mr Muundjua made on 03 October 2019, at the behest of the appellant. The arbitrator thus found that in those circumstances (that is where Mr Muundjua, in writing, admitted using Mr de Waal's kerridge account) Mr Muundjua's dismissal was substantively unfair.

[11] The arbitrator accordingly ordered Pupkewitz to pay Mr Muundjua his salary from the date of dismissal till date of finalisation of this matter to wit: 08 November 2019 to 14 October 2022 which equal to 35 months (his monthly salary of N\$15 362-00 x 35 months = N\$537 670). The arbitrator furthermore ordered Pupkewitz to pay Mr Muundjua three months' salary as compensation for loss of income due to unfair dismissal which equal to N\$15 362 x 3 = N\$46 086.

[12] Pupkewitz, aggrieved by the findings and award made by the arbitrator, now appeals against the findings and the award.

Grounds of appeal and basis of opposing appeal

[13] Pupkewitz grounds its appeal on the contention that, in light of the evidence led at the hearing, no reasonable arbitrator could arrive at those findings. The arbitrator's findings and conclusions were thus perverse.

[14] Mr Muundjua opposes the appeal on the contention that the appeal is defective as the appeal attacks the factual findings by the arbitrator. Mr Muundjua further contends that his dismissal was unfair because Pupkewitz acted inconsistently as there were other employees in the same position as Mr Muundjua who were not dismissed. He further contends that there was no valid and fair reason for the dismissal; that the procedures leading up to the dismissal were flawed and that the arbitrator was justified in holding that the employment relationship between Pupkewitz and him had not been irretrievably broken down.

Issue for determination

[15] From the background information, the grounds of appeal and grounds of opposing the appeal that I have set out in this judgment, the principle question or issue to be resolved here is whether, on the evidence tendered at the arbitration proceedings, the arbitrator erred in finding that Pupkewitz did not have a substantive reason to dismiss Mr Muundjua.

[16] I now turn to determine that question.

Discussion

[17] In the process of determining the question of whether or not the arbitrator erred when he found that Mr Muundjua's dismissal was substantively unfair, I adopt the following procedure. I will first set out some of the legal principles that I find relevant to answer the question. After I have set out the legal principles, I will highlight the evidence led at the arbitration proceedings and the findings of the arbitrator in light of the evidence presented and my conclusions.

Legal principles

[18] I start off the discussion of whether or not the arbitrator erred when he found that the dismissal of Mr Muundjua was substantively unfair with the observation that an employee has a duty to obey his or her employer's lawful instructions. Grogan opines that obedience implies discipline and discipline implies rules. For rules to be

effective, they imply the power to impose sanctions on those who break the rules. An employer has the right and indeed a duty to maintain discipline in the workplace.³

[19] The right to maintain discipline at the workplace is recognised in the Labour Act 11 of 2007 (the Act). Section 33 of the Act empowers an employer to dismiss an employee if the employee breaches rules of conduct as long as the dismissal is fair.⁴

[20] Section 33 of the Act simply reinforces the well-established principle that dismissals of employees must be both substantively and procedurally fair.⁵ This court has in a number of judgments accepted that:

‘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.’⁶

[21] This court has furthermore stated 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. This requirement is self-evident, it is clearly unfair to penalise a person for breaking a rule of which he or she has no knowledge of. The Labour Court has stressed the principle of equality of

³ John Grogan. *Workplace Law*. 10thed p 129.

⁴ That section, in material terms, 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.

(2) ...

(4) In any proceedings concerning a dismissal-

(a) if the employee establishes the existence of the dismissal;

(b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.’

⁵ *Rossam v Kraatz Welding Engineering (Pty) Ltd* 1998 NR 90 (LC).

⁶ *Letshego Bank of Namibia v Bahm* (HC-MD-LAB-APP-AAA-2021/00011) [2022] NALCMD 2 (10 February 2022) at para 36.

treatment of employees – the so – called parity principle. Other things being equal, it is unfair to dismiss an employee for an offence which the employer has habitually or frequently condoned in the past (historical inconsistency) or to dismiss only some of a number of employees guilty of the same infraction (contemporaneous inconsistency).⁷

[22] The requirements of procedural fairness include the right to be told the nature of the misconduct committed and to be afforded adequate notice prior to the disciplinary enquiry; to be afforded an opportunity to be heard and to call witnesses in support of any defence and to cross-examine witnesses called against you, informed of the finding (if found guilty) and the reasons for the finding, the right to be heard before penalty is imposed, informed of the right to appeal etc. These procedural steps are not inflexible nor are they absolute. They are regarded as guidelines to determine whether an employee was given a fair hearing in the circumstances of each case.⁸

[23] As indicated earlier, 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 fails the test of fairness and the dismissal is liable to be held as unfair dismissal.⁹

[24] In the present matter, Mr Muundjua was dismissed after having been found guilty of dishonesty. This court endorsed the reasoning that dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently.¹⁰ In the Canadian case of *Lynch & Co v United States Fidelity & Fidelity & Guaranty Co*¹¹ Fraser J argued that:

“Dishonest” is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning.’

⁷ *Dominikus v Namgem Diamonds Manufacturing (LCA 4/2016) [2018] NALCMD 5 (23 March 2018)*

⁸ *Ibid.*

⁹ *Rossam v Kraatz Welding Engineering (Pty) Ltd 1998 NR 90 (LC).*

¹⁰ *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa (LCA 62/2013) [2017] NALCMD 27 (14 August 2017).*

¹¹ *Lynch & Co v United States Fidelity & Fidelity & Guaranty Co [1971] 1 OR 28 at 37,38, Ont SC.*

The evidence led at the arbitration hearing

[25] The evidence that was presented at the arbitration hearing is not disputed by any of the parties. In a nutshell, the evidence led at the arbitration hearing was the following. Mr Muundjua was employed in terms of a written contract of employment and reported to a supervisor, Mr de Waal. Both Mr Muundjua and Mr de Waal were under the management of Mr Barnard, the Windhoek Central branch manager.

[26] Mr Muundjua's contract of employment, amongst other terms, provided that he had to fulfil the functions relating to his position and assigned to him within the framework of Pupkewitz's policies, procedures, practices, rules and regulations and within the limits of his authority and that he had the duty to acquaint himself and to act in accordance with Pupkewitz's policies, including its Code of Conduct and its Information and Communication Technology (ICT) Policy.

[27] Mr Muundjua received a copy of the Code of Conduct and acknowledged the duties as regards the policies in writing. The Code of Conduct included the provisions of paragraph 3.17 dealing with dishonesty. In line with employees' fiduciary duties, the Code of Conduct in paragraph 3.17 pertinently prohibits all forms of dishonesty, including lying, the unauthorised removal of Pupkewitz's, or clients' or other employees' property and the making of a false statement. The ICT Policy included provisions about employees' passwords to access Pupkewitz's different systems. That ICT Policy determined that passwords may not be shared by anyone, including administrative assistants or secretaries.

[28] Mr Muundjua, further admitted that Mr de Waal was not authorised to give his passcode to him to transact on the kerridge system. Despite the policy, Mr Muundjua transacted on the kerridge system using Mr de Waal's password over a period of about three years. He did so to pass discounts to customers at Mr de Waal's request and with his consent. This normally occurred when Mr de Waal was busy.

[29] As stated earlier, Mr Muundjua, after having been asked no less than two times, denied that he used Mr de Waal's password and only admitted to using Mr de

Waal's password after he was confronted with the CCTV footage. Mr Muundjua testified that he understood the question to be in the present tense implying that he was still using Mr de Waal's password at the time when Mr de Waal had been dismissed from Pupkewitz's employment.

[30] Mr Muundjua testified that his denial was based on his reasoning that "at the time, when questioned, Deon was already dismissed, how can we use his code". Mr Muundjua maintained that he admitted to having used Mr de Waal's code in the past but denied that he was still using it at the time when he was confronted by Mr Barnard.

[31] Pupkewitz conceded that a certain Norman also used Mr de Waal's code/password but that he was not charged with misconduct and dismissed because when he was confronted, he admitted using the password. Pupkewitz, however maintained that the only reason why Mr Muundjua was dismissed is because he lied and was therefore dishonest.

Findings of the arbitrator

[32] The arbitrator after evaluating the evidence summarised in the preceding paragraphs found that Pupkewitz did not have a valid reason to dismiss Mr Muundjua and the dismissal was therefore substantively unfair. The arbitrator reasoned as follows in arriving at his conclusion (I quote verbatim from the arbitration award):

'42. It is common cause that Applicant [that is Mr Muundjua] was simply terminated because it was alleged he acted dishonestly by denying to the manager (Mr Barnard) that he had been using Mr Deon De Waal's password.

43. I must point out here that I am not going consider every aspect of this matter in isolation but rather take a holistic picture of the events that transpired as from 02nd October 2019 up to the last date Applicant was finally dismissed.

44. Mr Barnard testified that he saw/observed the Applicant using Deon De Vaal's code and when he confronted him about this, the Applicant denied using the password.

45. However the next day 03rd October 2019 Applicant submitted a written statement admitting using the said password and the purpose for which such password was provided.

46. Unfortunately, Mr Deon De Waal did not testify before this tribunal.

47. Ms Luzane Van Der Merwe (Human Resources Manager at Pupkewitz) testified that the ICT policy is clear that nobody should use another's password and that each and every employee has a personal password which is his/her secret.

48. At this juncture alone, the question would be running through one's mind is that if that is indeed the dictates of the ICT policy at Pupkewitz, then how did Mr Barnard knew that the password be used by the Applicant that time was that of Mr Deon de Waal?

49 Mrs Van Der Merwe further to testify that every employee has a password every week for security purposes. Now if that is the case, taking into consideration the fact that Mr Deon De Waal was no longer in the employ of the respondent at the time applicant was using the password, how then was it possible for the applicant to have renewed the said.

50. Therefore, I believe the version of the applicant that he given the code by De Waal way back before he left the company. The said verbal denial of the code was supplemented by a written statement which was submitted at the behest of the respondent and should have ended the matter there.

51. Therefore I concluded that the applicant's dismissal was substantively unfair.'

Was the arbitrator correct in his findings?

[33] Mr Rukoro who appeared for Mr Muundjua argued, with reference to *Purity Manganese (Pty) Ltd v Shikongo NO and Others*,¹² that it is a well-established principle of our law that an appeal court will not lightly interfere with a factual finding by the arbitrator who heard and saw the witnesses testify and observed their demeanours. He argued that in the present matter there are no grounds to justify an interference by this court and the arbitration award must be allowed to stand. In fortification of his argument, Mr Rukoro quoted from that judgment the following statement by Miller AJ:

¹² *Purity Manganese (Pty) Ltd v Shikongo NO and Others* 2013 (2) NR 473 (LC).

[13] It must be borne in mind that the Labour Act does not permit appeals against findings of fact per se arrived at by an arbitrator in arbitration proceedings.'

[34] The test whether an issue is a question of law or a question of fact was laid down by the Supreme Court in *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd*,¹³ but neatly summarized by the court in *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another*¹⁴ as follows:

[30] This court has recently revisited the test to be applied in determining whether or not a finding by an arbitrator is an appealable question of law under s 89(1)(a): *Van Rensburg v Wilderness Air Namibia (Pty) Ltd* Case No. SA 33/2013 delivered on 11 April 2016. O'Regan AJA held that s 89(1)(a) reserves determination of facts to the arbitration process and an appeal relating to decisions on fact will therefore only be entertained where the arbitrator has made a factual finding on the record that is arbitrary or perverse. An arbitrator's conclusion on disputed facts which a reasonable arbitrator could have reached on the record is not perverse and thus not subject to appeal to the Labour Court. The corollary is that an interpretation of facts by an arbitrator that is perverse in the sense that no reasonable arbitrator could have done so is appealable as a question of law. When a decision of an arbitrator is impugned on the ground that it is perverse, the Labour Court 'should be assiduous to avoid interfering with the decision for the reasons that on the facts it would have reached a different decision on the record'. It may only interfere if the decision reached by the arbitrator is 'one that no reasonable decision-maker could have reached.'

[35] In the present matter, Pupkewitz confirmed in the testimony before the arbitrator that the reason why it dismissed Mr Muundjua is the fact that he denied (which denial was false) having used Mr de Waal's password when he was confronted by his branch manager, Mr Barnard. The question which the arbitrator had to answer was whether Mr Muundjua's denial was calculated to deceive Pupkewitz. The question of how Mr Barnard came to know that the password used by Mr Muundjua was that of Mr de Waal was not in dispute and was therefore irrelevant.

[36] Another factor which the arbitrator seems to have found to be a mitigating factor, in the arbitrator's view, is that Mr Muundjua was contrite about his misconduct and thus decided to, after having been requested to do so, provide a written

¹³ *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC) at para 43-44.

¹⁴ *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another* 2016 (3) NR 849 (SC) at para 30-31.

statement in terms of which he admitted that he has used Mr de Waal's password for a period of over three years and that his written admission should have been the end of the matter. There is no basis or evidence for that finding.

[37] Whether or not Mr Muundjua was contrite will depend on his version as to why he ultimately came out with the truth. Mr Muundjua suggested, throughout his testimony at the arbitration proceedings, that he understood that the question put to him by Mr Barnard was whether he was at that time (that is during October 2019) using Mr de Waal's password. Pupkewitz on the other hand suggested that Mr Muundjua admitted to using Mr de Waal's password only after he realized that there was indisputable evidence pointing to him having used Mr de Waal's password.

[38] The arbitrator made no finding in this regard, he simply concluded that once Mr Muundjua admitted that he used Mr de Waal's password that should have been the end of the matter. Again there is no basis for that approach. I accept that a court of appeal or a review court will not lightly overturn a finding of fact made by a trier of fact who has had the benefit of hearing and seeing witnesses in the witness-box, except in certain defined cases. One of such cases is where the probabilities clearly point the other way.

[39] I do not agree with Mr Rukoro that in the present matter there are no grounds to justify an interference with the factual findings of the arbitrator by this court. In my view, the present matter is a case where the probabilities, in support of Pupkewitz's contention that the reason why Mr Muundjua told the truth in his written statement was the fact that he realized that the game was up, are so overwhelming that this court would be justified in interfering with the arbitrator's findings.

[40] According to the testimony presented on behalf of Pupkewitz, Mr Muundjua was asked on at least three occasions whether he used or is using Mr de Waal's password. The questioning in my view, thus, eliminated the confusion of whether or not it was directed to the past or present. On all three occasions, Mr Muundjua denied having used or using Mr de Waal's password, but once he was confronted with the CCTV footage and the documentary evidence he admitted the truth. Mr Muundjua had the opportunity to come clean on his own and tell the truth if his conscience was troubling him.

[41] Mr Muundjua had been using Mr de Waal's password for a period of over three years, why he did not disclose that upon enquiry remains a mystery. In the light of the above, the probabilities overwhelmingly support the version that Mr Muundjua's telling the truth had nothing to do with him misunderstanding the questions put to him or that he was contrite about his lies, but had everything to do with him having realised that his false denials had been discovered.

[42] This finding has certain implications for Mr Muundjua. One of these is that, notwithstanding his attempt to deceive his employer, he still continued to be dishonest by falsely maintaining that the reason why he ultimately came out with the truth was that he misunderstood the questions posed to him. By saying precisely that, he was still continuing to lie to Pupkewitz. Not only did Mr Muundjua seek to mislead or deceive Pupkewitz in regard to this last mentioned aspect, but, he also sought to mislead the arbitrator.

[43] In the circumstances of this case there was simply no basis on which it could be said that Mr Muundjua was contrite. I therefore find that the finding by the arbitrator that upon Mr Muundjua admitting the truth the matter should have ended there is a decision which no reasonable arbitrator would have reached and the arbitrator's finding in that regard is thus perverse.

[44] Dishonesty (whatever its form and shape, be it a lie, theft fraud or misinformation) is generally seen as a serious offence and in certain instances can justify dismissal. In *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*, it was stated that "trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and the relationship between employer and employee".¹⁵

[45] Mr Barnard testified, at the arbitration hearing, that the lie which Mr Muundjua told made it impossible for him to trust him any further, rendering the employment relationship intolerable. I therefore find that indeed the relationship between Pupkewitz and Mr Muundjua has irretrievably broken down.

¹⁵ *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC).

[46] One other basis on which Mr Muundjua opposed the appeal is his contention that Pupkewitz's conduct in dismissing him was inconsistent and thus unfair as another employee (a certain Mr Norman) in a similar position (in that he also used de Waal's passcode) was not disciplined at all nor dismissed.

[47] The requirement that employees must be aware of the rules of the workplace gives rise to the further principle that employers enforce their rules consistently. I indicated earlier that our courts have stressed the principle of equality of treatment of employees – the so – called parity principle.

[48] This court has held that an employee seeking to rely on the inconsistent application of discipline by the employer must mount a proper challenge. This in turn requires evidence of other similar cases which attracted different and less severe disciplinary sanctions to warrant the inference that the employer had been inconsistent.¹⁶ The court furthermore, quoting and approving the reasoning by John Grogan¹⁷ stated that:

'Consistency challenges should be properly mounted. Little purpose is served by employees simply claiming at the beginning of an arbitration hearing that the employer has treated other employees more leniently in some earlier case or cases. Where this occurs, the employer's representative can justifiably raise the objection that he or she is unaware of the details of the earlier case(s). The arbitrator must then disallow the objection or grant a postponement. Furthermore, a claim of inconsistency can be sustained only if the earlier cases relied on are sufficiently similar to the case at hand to warrant the inference that the employer has indeed been inconsistent. Comparison between cases for this purpose requires consideration not only to the respective employees' conduct, but also of such factors as the employees' remorse and disciplinary record, whether the workforce has been warned that such offences will be treated more severely in future, and the circumstances surrounding the respective cases'.

[49] Regarding this issue, the proper question is whether Mr Muundjua has made out a case of inconsistency in the treatment between him and the said Norman. The testimony of Mr Barnard was that when he confronted Norman about him using Mr

¹⁶ *Namibia Wildlife Resorts Ltd v Ilonga* (LCA 03/2012) [2012], delivered on 5 July 2012.

¹⁷ Grogan, J. In his work; *Dismissal, Discrimination & Unfair Labour Practices*. 2005 at pp 225 – 226.

de Waal's passcode, Norman without hesitation admitted that he did and for that reason no further action was taken against him. While, in Mr Muundjua's case, he (Mr Muundjua) falsely denied having used the password. It was testified on behalf of Pupkewitz that Mr Muundjua was dismissed not because he used Mr de Waal's password but because he lied when he was asked about him using it. I therefore find that there was no inconsistent treatment of similarly placed employees.

[50] On the evidence presented before the arbitrator, I find that, the arbitrator's findings and award cannot be upheld. The award is not justified by the evidence that was led before him as no reasonable arbitrator, properly directed, would have arrived at such a conclusion, given the entire matrix of the case. His conclusion in this regard are perverse and must not be allowed to stand. It is therefore liable to be set aside.

[51] For the reasons set out in this judgment I make the following order:

1. The appeal is upheld.
2. The award issued by the Arbitrator, Mr Kahitire Kenneth Humu dated 14 October 2022, is set aside and replaced with the following order:

'The complaint is dismissed.'

3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

SFI UEITELE
Judge

APPERANCES

Appellant: Piet Burger (assisted by Uaraera Tjaveondja)
Of Kinghorn Associates,
Windhoek

First Respondent: Steve Rukoro (assisted by Jerhome Tjizo)
Jerhome Tjizo & Company Incorporated,
Windhoek