



## LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

## JUDGMENT

Case no: LCA 8/2012

In the matter between:

**MANAGEMENT SCIENCE FOR HEALTH****APPELLANT**

and

**BRIDGET PEMPERAI KANDUNGURE****FIRST RESPONDENT****BRO MATHEW SHINGUANDJA, NO****SECOND RESPONDENT**

**Neutral citation:** *Management Science for Health v Kandungure* (LCA 8/2012)  
[2012] NALCMD 6 (15 November 2012)

**Coram:** PARKER AJ**Heard:** 19 October 2012**Delivered:** 15 November 2012

**Flynote:** Labour Law – Appeal – Appeal from arbitral award – Interpretation and application of s 33(1) of the Labour Act 11 of 2007 – Court finding that appellant has failed to establish that arbitrator misconstrued s 33(1) of the Labour Act – Accordingly court confirming arbitrator’s decision that dismissal of the first respondent is unfair.

**Flynote:** Labour Law – Appeal – Appeal from arbitral award – Compensation in terms of s 86(15)(e) of the Labour Act – Court finding that arbitrator did not exercise his discretion properly in his award of the amount of compensation.

**Summary:** Labour Law – Appeal – Appeal from arbitral award – Appellant contending that arbitrator misconstrued s 33(1) of the Labour Act when he found dismissal of the first respondent to be unfair – Court finding that in the absence of a properly constituted disciplinary hearing which should have satisfied the minimum requirements of a fair procedure under the Labour Act appellant could not have decided it had a valid and fair reason to dismiss the first respondent in terms of s 33(1) of the Labour Act – Consequently, court concluding that the appellant failed to discharge the onus cast on it by s 33(1) of the Labour Act – Court confirming arbitrator’s decision that dismissal is unfair.

**Summary:** Labour Law – Appeal – Appeal from arbitral award – Award of compensation in terms of s 86(15)(e) of the Labour Act – Court finding that arbitrator did not take into account certain crucial considerations in assessing of the compensation – The considerations are extent to which employee contributed to his or her dismissal, the nature of business of employer and principle that the aim of compensation under the Labour Act is not to punish employer – Accordingly court concluding that arbitrator did not exercise his discretion properly when he awarded the amount of compensation – Court interfering with amount of compensation ordered by the arbitrator.

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## ORDER

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- (a) The appeal against the part of the arbitrator’s award, namely, that the dismissal of the respondent by the appellant is unfair is dismissed.
- (b) The appeal against the part of the award concerning the amount of compensation ordered is upheld, and the amount of compensation is set aside and is replaced with the following:

The appellant must not later than 31 January 2013 pay the first respondent as compensation an amount of N\$85 423,08 (representing four months’ remuneration); and the amount earns interest in terms of s 87(2) of the Labour Act, calculated from date of this judgement to date of final and full payment.

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## JUDGMENT

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PARKER AJ:

[1] This is an appeal against an arbitral award made in favour of the first respondent in which the arbitrator decided that the dismissal of the first respondent by the appellant is unfair, and ordered the appellant to pay compensation to the first respondent in the amount of N\$149 490,39. The amount is made up as follows: 'being her monthly package' of N\$21 355,77 'times seven (for seven months), which she would have earned had she not been unfairly dismissed, ie from August 2011 to 28 February 2012'. The amount was ordered to earn 'interest from the date of this award in terms of section 87(2) of the Labour Act 11 of 2007'.

[2] The appellant has raised five grounds of appeal (ie (a) to (e)). However, in the course of his submission, Mr De Beer, counsel for the appellant, appears to abandon grounds (a) and (b). And so it is to the rest of the grounds that I direct the present enquiry.

[3] The talisman on which the appellant hangs its appeal is that the arbitrator 'erred in law by his (its) interpretation and application of section 33(1) of the Labour Act'. Counsel characterizes that ground as the 'crux of the appeal'. It is Mr De Beer's argument that 'the arbitrator erred by concluding that there was not (no) compliance with section 33 in that Appellant did not present "well formulated charges" to the Respondent and did not go "through a proper, impartial and properly constituted disciplinary committee".' For that reason, so counsel submits, 'firstly the evidence does not support such inferences and secondly the conclusion is ill-conceived and incorrect'. I now proceed to test the appellant's contentions as articulated by its counsel against s 33(1) of the Labour Act.

[4] The evidence is incontrovertible that the respondent was called to a meeting arranged by her employer to discuss her absence from work allegedly without leave. On any pan of scale that meeting can never be described as a disciplinary hearing, after which the employee could have suffered any sanction under the Labour Act. To describe that meeting as a fair process, as Mr De Beer appears to do, is, with

respect, to misunderstand the first stage in the disciplinary procedure involving an employee under the Labour Act. Mr De Beer submits that the process was fair. What process? According to Mr De Beer the meeting was a process. Yes, of course, it was a process; but process about what and for what? For instance, what charge was communicated to the respondent before the meeting? None; none at all. And what was the purpose of what Mr De Beer calls 'a process'? In my opinion, it was to make a preliminary enquiry into, that is, to investigate, the first respondent's alleged industrial or labour wrongdoing, to wit, absence from work without leave.

[5] In order for an employer to find that a valid and fair reason exists for the dismissal of his or her employee, the employer must conduct a proper domestic enquiry – popularly known as disciplinary hearing in Labour Law. And in that regard, the procedure followed need not be in accordance with standards applied by a court of law, but certain minimum standards which are set out in the next paragraph must be satisfied. A disciplinary hearing is required and necessary where the employer is considering any punishment under the Labour Act, particularly and especially dismissal. An exploratory or investigative meeting held between the employee and the employer – like as happened in the instant matter – is not enough as can be gathered from the minimum requirements set out in the next paragraph. It is after a proper disciplinary hearing has been held, as aforesaid, that the employer is able to determine whether he has a valid and good reason to dismiss the employee within the meaning of s 33(1) of the Labour Act.

[6] The minimum requirements are these: (a) The employer must give to the employee in advance of the hearing a concise charge or charges to enable him or her to prepare adequately to challenge and answer it or them. (b) The employee must be advised of his or her right of representation by a member of his or her trade union or a co-employee. (c) The chairperson of the hearing must be impartial. (d) At the hearing, the employee must be given an opportunity to present his or her case in answer to the charge brought against him or her and to challenge the assertions of his or her accusers and their witnesses. (e) There should be a right of appeal and the employee must be informed about it. See *Food & Allied Workers Union and Others v Amalgamated Beverages Industries Ltd* (1994) 15 ILJ 630 (IC). I accept submission by Mr Phatela, counsel for the respondent, that first, no precise charge was preferred against the respondent; second the respondent was, as I have said

before, invited to a meeting where her absence from work was an agenda; and lastly the respondent was not given an opportunity to exercise her right to representation.

[7] Having failed to meet even the minimum requirements of a disciplinary hearing, the employer could not – as a matter of law – have found that it has a valid and fair reason to dismiss the respondent. It is not enough to tell an employee, as Mr De Beer appears to suggest, ‘But you know what you have done wrong: you absented yourself from work without permission’. Such contention violates this court’s sense of justice and fairness; such utterance cannot constitute a concise charge in our law. Indeed a proper disciplinary hearing might have shown the employer that, for instance, respondent’s absence from work could be explained adequately and satisfactorily. Furthermore, if a concise charge had been delivered to the respondent in writing, she could have decided to obtain the services of a co-employee or a union member to advise her as to the rules and policy of the appellant concerning absence from work and the consequences and how to answer any charge that has been preferred against her. In the instant case, the employer assumed that since the respondent was absent from work, she has breached a policy or rule of the employer, and so there was no need to go into the trouble of holding a properly convened disciplinary hearing where the respondent would be given the opportunity to answer a concise charge which would have been communicated to her in advance of any such hearing.

[8] *Pace* Mr De Beer; the e-mail of 2 February 2011 cannot be described as a concise charge in Labour Law or any branch of Law. Of course, a fair procedure does not necessarily entail the right to an oral hearing – but the critical phrase that completes the principle is ‘in all instances’. With utmost deference to Mr De Beer, I have to say that Mr De Beer conveniently or ignorantly leaves out this critical phrase in his failed attempt to show that there was a fair procedure within the meaning of s 33(1) of the Labour Act, even if there was no oral hearing. Thus, with respect, Mr De Beer misses the point. As I have said more than once, what the respondent was called to was an exploratory meeting to enable the appellant to investigate the respondent’s alleged wrongdoing in order to learn more about it. In this instance, where it was in the contemplation of the employer to apply s 31(1) of the Labour Act and mete out a punishment, particularly a dismissal, the employer must hold a formal disciplinary hearing and satisfy at least the minimum requirements adumbrated in para [6]. The case of the first respondent is not whether there was an oral hearing or

written hearing; it is that there was simply no hearing at all of any hue or shape that one could write home about. That is the submission of Mr Phatela, and I accept it, for the reasoning I have set out previously.

[9] For all the foregoing reasons, I find that there was no hearing – oral or written – after which the appellant could have meted out any punishment under the Labour Act; but more important, the conclusion can be taken further thus. Since there was no disciplinary hearing, it cannot be said that the employer found that there was a valid and fair reason to dismiss. It is not enough for the appellant to say – and Mr De Beer takes the refrain – that absence from work merits a dismissal. That may be so, but that conclusion is not a matter of course in our Labour Law. It is – as I have said more than once – at a disciplinary hearing properly constituted and which satisfies the requirements of fair procedure (as set out previously) that may find the employee guilty of any wrongdoing, and may then mete out the sanction of dismissal or any other sanction under the Labour Act.

[10] The arbitrator found that the dismissal of the first respondent is unfair. I have pored over the record, and for the foregoing reasoning and conclusions, I have no good reason to fault the finding of the arbitrator. I accept Mr Phatela's submission that the appellant has failed to discharge the onus cast on it by s 33(1) of the Labour Act. In this regard, in my judgement, the appellant has failed to establish that the arbitrator erred in law in his interpretation and application of s 31(1) of the Labour Act. In the face of this holding, I do not see any good reason to consider the other grounds and the respondent's answers thereto. On this ground alone the appeal fails: it fails on the critical ground concerning the interpretation and application of s 33(1) of the Labour Act made by the arbitrator in his award.

[11] But that is not the end of the matter. The appeal is against the entire award which includes the award of compensation. That being the case, it behoves me to consider the award of compensation, too. In terms of s 86(15)(e) of the Labour Act an arbitrator may award such amount of compensation as he or she considers reasonable, fair and equitable, and regard being had to all the facts and circumstances of the particular case. In this regard two crucial considerations should not be ignored in the award of compensation in terms of the Labour Act that meets the mark of reasonableness, fairness and equity. They are (a) the extent to which the employee's conduct contributed to his or her dismissal, and (b) the principle that the

aim of compensation in terms of the Labour Act is not to punish the employer where an award of compensation is made against the employer in favour of the employee. See *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka and Others* Case No. LCA 47/2007 at para 16 (unreported). As to (a); I find that the respondent contributed greatly to her own dismissal. She was absent from work for some weeks without leave, although this does not detract from my finding above that no disciplinary hearing was held during which the respondent would have been given an ample opportunity to give – if she so wished – an adequate and satisfactory explanation for her absence. And as to (b); I find that the appellant is a non-profit-making organization which assists in the training of medical personnel primarily for the State. It is not a business for profit. Having taken into account these crucial considerations, I think the amount of compensation awarded is unreasonable, unfair and inequitable. That being the case, I think I should interfere with the arbitrator's decision in that regard and award an amount that is fair, reasonable and equitable.

[12] For the foregoing reasoning and conclusions I make the following order:

- (a) The appeal against the part of the arbitrator's award, namely, that the dismissal of the respondent by the appellant is unfair is dismissed.
- (b) The appeal against the part of the award concerning the amount of compensation ordered is upheld, and the amount of compensation is set aside and is replaced with the following:

The appellant must not later than 31 January 2013 pay the first respondent as compensation an amount of N\$85 423,08 (representing four months' remuneration); and the amount earns interest in terms of s 87(2) of the Labour Act, calculated from date of this judgement to date of final and full payment.

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C Parker  
Acting Judge

## APPEARANCES

APPELLANT:

P De Beer

Of De Beer &amp; Keulder Legal Practitioners, Windhoek

FIRST RESPONDENT:

T C Phatela

Instructed by Diedericks Incorporated, Windhoek