REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-LAB-APP-AAA-2022/00076

In the matter between:

TELECOM NAMIBIA **APPELLANT**

and

PURITY MANDJOLO **FIRST RESPONDENT**
FERGIE UUMATI **SECOND RESPONDENT**
BESTER MAIBA SINVULA N.O. **THIRD RESPONDENT**

Neutral citation: *Telecom Namibia v Mandjolo* (HC-MD-LAB-APP-AAA-2022/00076) [2023] NALCMD 20 (12 May 2023)

Coram: SIBEYA J
Heard: **21 April 2023**
Delivered: **12 May 2023**

Flynote: Labour Law – Labour Appeal – Substantive and Procedural fairness – Section 33 of the Labour Act 11 of 2007.

Summary: The first and second respondents were employees of the appellant stationed at the Rundu Teleshop as Commercial Support Agents. The first and second respondents were charged with misconduct and subjected to a disciplinary hearing which resulted in their dismissal upon conviction. They referred a dispute of unfair dismissal to the Office of the Labour Commissioner for determination. They launched an internal appeal against their dismissal which appeal was dismissed for lacking merits. It is this dismissal that the first and second respondents referred to the Office of the Labour Commissioner claiming that the dismissal was unfair.

At the Office of the Labour Commissioner, the arbitrator found in favour of the first and second respondents and ordered their reinstatement and further awarded them compensation. On 22 December 2022, the appellant filed an appeal against part of the arbitration award. On 23 December 2022, the appellant applied for and on 27 January 2023, obtained an order to stay the execution of the arbitration award pending the finalisation of the appeal.

Held – Section 33 of the Labour Act underpins the trite principle that the dismissal of an employee must be both substantively and procedurally fair.

Held that – the test for a fair dismissal is two-fold and it requires that for the dismissal to be fair, both substantive and procedural fairness must be proven. Failure to satisfy any of the two requirements may lead to the dismissal being unfair.

Held further that – the finding of the arbitrator that the action of the chairperson of the disciplinary hearing to persuade the second respondent to admit to the charges rendered the dismissal of the first respondent procedurally and substantively unfair is irregular as such action was not directed to the first respondent, and consequently, cannot be allowed to stand.

Held – that a chairperson of the hearing must not be biased and impartial at all material times. It is procedurally unfair for a chairperson of a disciplinary hearing to directly or indirectly persuade an accused employee into pleading guilty to an offence charged.

Held that – employees who are similarly circumstanced should receive equal treatment and similar penalties should be applied to offenders who find themselves in similar circumstances.

Held further that – the onus is on he who alleges inconsistence to prove such inconsistence. The arbitrator, *in casu*, committed an irregularity in law when he found, without evidence to substantiate the finding being led, that the appellant applied the Disciplinary Code inconsistently in comparison of the first and second respondents' matter to that of Mr Sasele.

The appeal is upheld.

ORDER

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1. The respondents' late filing of the grounds of opposing the appeal is condoned.
2. The appellant's appeal succeeds.
3. The arbitration award delivered by the arbitrator on 6 December 2022 in as far as it provides that the dismissal of the first respondent was procedurally and substantively unfair, and that the dismissal of the second respondent was substantively unfair, is hereby set aside.
4. There is no order as to costs.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

SIBEYA J:

Introduction

[1] Honesty and dishonesty are common words that randomly fall from the lips of several persons without sincere appreciation of the magnitude of the force that they

command. They are mighty words with the capacity of making or breaking a relationship, and an employment relationship is no exception.

[2] Before court is a labour appeal noted by the appellant against the arbitration award delivered by the arbitrator on 6 December 2022.

[3] The first and second respondents referred a dispute of unfair dismissal to the Office of the Labour Commissioner for determination subsequent to a disciplinary hearing on charges of misconduct. At the disciplinary hearing the first and second respondents were found guilty of misconduct and dismissed from employment by the appellant. They launched an internal appeal against their dismissal which appeal was dismissed for lacking merits. It is this dismissal that the first and second respondents referred to the Office of the Labour Commissioner claiming that their dismissal was unfair.

[4] At the Office of the Labour Commissioner, the arbitrator found in favour of the first and second respondents and ordered their reinstatement and further awarded them compensation.

[5] On 22 December 2022, the appellant filed an appeal against part of the arbitration award.

[6] On 23 December 2022, the appellant applied for and on 27 January 2023, obtained an order to stay the execution of the arbitration award pending the finalisation of the appeal. The appeal is opposed only by the first and second respondents.

Parties and representation

[7] The appellant is Telecom Namibia, a company duly registered according to the laws of the Republic of Namibia with its registered address situated at No. 9 Luderitz Street, Windhoek. The appellant shall be referred to as such.

[8] The first respondent is Ms Purity Mandjolo, an adult female and former employee of the appellant and a resident at Rundu.

[9] The second respondent is Ms Fergie Uumati, an adult female former employee of the appellant and a resident of Rundu.

[10] The first and second respondents are the only ones who oppose the appeal and they shall be referred to as 'the respondents'. Where reference is made to the appellant and the respondents jointly, they shall be referred to as 'the parties'.

[11] The third respondent is Mr Bester Maiba Sinvula, 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 Act'),[1] to preside over the dispute referred to the Labour Commissioner. His address of service is 32 Mercedes Street, Khomasdal, Windhoek. The third respondent shall be referred to as 'the arbitrator'. No relief is sought against the arbitrator and he is cited herein merely for the interest that he may have in the matter.

[12] The appellant is represented by Mr Muluti, while the respondents are represented by Ms Nyatondo.

Points *in limine*

Failure to attach a power of attorney

[13] The respondents raised a point *in limine* that the appellant failed to file a special power of attorney and/or attach a resolution authorising the institution of the appeal resulting in the appeal being defective. It is the respondents' case that in view of the defective appeal, there is no appeal proper serving before court.

[14] Ms Nyatondo argued that the filing of a special power of attorney or Board resolution authorising the respondent to appeal is required before an appeal can be

[1] Labour Act, Act 11 of 2007.

set down and ultimately heard. She relied on rule 119(10) of the rules of the High Court for her contention and called for the dismissal of the appeal on this basis.

[15] Mr Muluti argued contrariwise. He argued that rule 119(10) finds no application to labour matters. He argued that, in labour appeals, no special power of attorney or Board resolution is required for a labour appeal to be filed and prosecuted. He submitted that the point *in limine* lacks merit and should be dismissed.

[16] I find it prudent to address rule 119(10) on which Ms Nyatondo relies for the point *in limine* raised. Rule 119(10) of the rules of the High Court provides that:

'(10) The registrar may not set down an appeal referred to in rule 116 or 118 or under this rule at the instance of a legal practitioner unless that legal practitioner has filed with the registrar a power of attorney authorising him or her to appeal and the power of attorney must be filed together with the application for a date of hearing.'

[17] Rule 116 referred to above regulates civil appeals from the magistrates' courts while rule 118 regulates criminal appeals from magistrates' courts. Rule 119 on the other hand regulates appeals in terms of any legislation. I hasten to add that appeals in terms of any legislation referred to in rule 119 refers to appeals in terms of any legislation where the appeal process is not regulated. It is a well-settled principle of statutory interpretation that where a specific process or meaning is provided for in a particular legislation such process or meaning takes precedence over general interpretation.

[18] This, being a labour appeal, means that the first point of call to determine the labour appeal process are the rules of the Labour Court. Rule 17 titled Appeals under various provisions of Act (the Labour Act 11 of 2007) provides, *inter alia*, that:

'… (2) An appeal contemplated in subrule (1)(a) and (b) must be noted by delivery of a notice of appeal on Form 11, setting out concisely and distinctly which part of the decision, or order is appealed against and the grounds of appeal, which the appellant relies for the relief sought….

(17) The appellant may, within 14 days after receiving the statement referred to in subrule (16), apply to the registrar on Form 5, on five days' notice to all other parties, to assign a date for the hearing of the appeal and the registrar must, after consultation with the judge-president, assign such a date and set the matter down for hearing on that date.'

[19] Rule 17 of the rules of the Labour Court does not provide for the requirement of a power of attorney or resolution authorising the institution and prosecution of the labour appeal to be filed together with the application for a date of hearing. This is contrary to rule 119(10) of the High Court rules which expressly requires the power of attorney in civil appeals, criminal appeals or appeals from other legislations. I find that it is incorrect to have regard to the rules of the High Court on an aspect of a labour matter where there are Labour Court rules crafted to regulate labour matters. In the present matter, the Labour court rules must take precedence. I, therefore, find that the point *in limine* raised by Ms Nyatondo is misplaced and ought to be dismissed, which I hereby do.

Late filling of the respondents' grounds of opposing the appeal

[20] Mr Muluti argued that the respondents failed to comply with rule 17(16) of the Labour Court rules for not filing their grounds of opposing the appeal in time as prescribed. Ms Nyatondo, on her part, acknowledged the respondents' failure to file the grounds of opposition in time and sought condonation for such default.

[21] It is apparent from the record that the filing of the respondents' grounds of opposing the appeal lapsed on 16 March 2023. The respondents filed their grounds of opposition on 17 March 2023, being a day late and, as stated above, sought condonation thereof. Although the explanation advanced in support of the application for condonation is, in my view, shaky, I find that considering that the grounds of opposition were filed just a day late, in the exercise of my discretion the respondents' default deserves to be condoned. I was further not apprised of the prejudice that the filing of a day out of the prescribed time would cause to the appellant. As a result of the aforesaid, I condone the respondents' non-compliance with rule 17(16) of the rules of the Labour Court.

Background

[22] The respondents were employees of the appellant stationed at the Rundu Teleshop as Commercial Support Agents. They were charged as follows:

(a) First respondent:

'Charge 1: Misuse of company property (funds) for private purposes:

Funds to the amount of N$1,732.00 for private purposes and again after the following customers have paid their accounts at Rundu Teleshop:

1.1 Mr. Haindaka – amount of N$698.00 paid on 30 January;

1.2 Mr. Kondjereni Voitto – amount of N$572.00 paid in December 2019 and 30 January 2020 respectively;

1.3 Mr. Evalista Karapo – an amount of N$462.00 paid in December 2019.

Charge 2: Attempting to bring, or causing the name of the company to be brought into disrepute when the abovementioned customers' accounts were suspended whilst they have made payment.

Charge 3: Gross negligence or incompetence which shall mean failure to adhere to or execute work according to work standards and/or regulations or any action or failure to act, contrary to that of the reasonable employee with serious or potentially serious consequences for the company:

Gross negligent or executing tasks without due care as expected from a Teleshop – Rundu Commercial Agent. Acted contrary to the Treasury Policy by failing or deliberately failing to issue the above-mentioned customers with their receipts after payments were done, and paid misappropriated monies in the accounts of customers contrary to regulations and standards required.'

(b) Second respondent

'Charge 1: Misuse of company property (funds) for private purposes:

Funds to the amount of N$1,581.00 for private purposes and again after the following customers have paid their accounts at Rundu Teleshop:

1.1 Mr. Hamadila – amount of N$410.00 paid on 10 February 2020;

1.2 Mr. Jacobus Shikongo – amount of N$450.00 paid on 10 February;

1.3 Mr. Sackey Shilunga – an amount of N$271.00 paid on 10 February 2020.

Charge 2: Attempting to bring, or causing the name of the company to be brought into disrepute when the abovementioned customers' accounts were suspended whilst they have made payment.

Charge 3: Gross negligence or incompetence which shall mean failure to adhere to or execute work according to work standards and/or regulations or any action or failure to act, contrary to that of the reasonable employee with serious or potentially serious consequences for the company:

Gross negligent or executing tasks without due care as expected from a Teleshop – Rundu Commercial Agent. Acted contrary to the Treasury Policy by failing or deliberately failing to issue the above-mentioned customers with their receipts after payments were done, and paid misappropriated monies in the accounts of customers contrary to regulations and standards required.'

[23] The respondents were subjected to a disciplinary hearing. They were subsequently convicted as charged and dismissed on 26 November 2020. Disgruntled by the outcome of the disciplinary hearing, the respondents lodged an internal appeal which provided no desired results. Their appeal was dismissed.

[24] The respondents, thereafter referred a dispute of unfair dismissal to the Office of the Labour Commissioner. After hearing evidence, the arbitrator, in an award delivered on 6 December 2022, found that the dismissal of the respondents was substantively and procedurally unfair and ordered the appellant to reinstate them in the positions which they held before dismissal. The arbitrator further ordered that the

respondents be compensated for remuneration from the date of dismissal to the date of the award.

[25] Dissatisfied with the award, the appellant filed this appeal on 22 December 2022. The appellant further applied for an order to stay the execution of the award pending the determination of the appeal. The said order to stay the execution of the award was granted by this court on 27 January 2023. The appeal is opposed by the respondents.

Grounds of appeal

[26] The appellant set out the following grounds on which its appeal is based:

(a) That the arbitrator erred when he found that the dismissal of the respondents was substantively and procedurally unfair when they were aware of the rule transgressed, and that on the evidence together with their confession to the transgression, they were guilty of misconduct;

(b) That the arbitrator erred when he found that the respondents were dismissed while on leave while this position found no application to the respondents;

(c) That the arbitrator erred when he found the conduct of the chairperson of the disciplinary hearing grossly irregular and thereby vitiating the fairness of the whole disciplinary process, as being procedurally and substantively unfair, while the same arbitrator found the respondents guilty of transgressing the rule accused of; the evidence proved the commission of serious offences where dismissal or final written warning is provided for in the Disciplinary Code; and incorrectly applied the principle of consistency;

(d) That the arbitrator erred when he ordered reinstatement and compensation after finding that the respondents were guilty of

misconduct where dismissal was an appropriate sanction in terms of the appellant's Policy and disregarded the fact the respondents were repeat offenders.

[27] The respondents' filed their grounds of opposition to the appellant's appeal. They engaged the grounds of appeal raised by the appellant pound for pound, as it were. The respondents stated that the arbitrator cannot be faulted in his findings as he properly accounted for the evidence and arguments, and in the exercise of his discretion found for the respondent. The respondents further state that the order of reinstatement was arrived at after consideration of the circumstances of the matter and after finding it to be reasonable, fair and equitable. In respect of compensation, it was stated by the respondents that remuneration was an agreed fact as per the agreement of the parties. The respondents prayed for the dismissal of the appeal.

Evidence at arbitration

Evidence in respect of the first respondent

Ms Michelle Visagie

[28] The appellant led the evidence of Ms Michelle Visagie. Ms Visagie testified, *inter alia*, that she is employed by the appellant as the Commercial Supervisor for Rundu and Nkurenkuru. She testified further that she carried out an investigation and also reported the matter to the Commercial Manager, Mr Silvan Amunyela who also carried out an investigation about the alleged misconduct committed by the first respondent.

[29] Ms Visagie testified further that the disciplinary hearing took place in the absence of the first respondent and her representative, Ms Sophia Egelser following their decision to walk out of the hearing. She stated that the first respondent and her representative were unhappy with the status of the Disciplinary Code, as they claimed that there were two Disciplinary Codes available.

[30] Ms Visagie testified further that on 20 December 2019, a Mr Haindaka approached her at the Teleshop in respect of a suspended account while he made the payment with the first respondent. At this time the first respondent was on leave. Ms Visagie testified further that when the first respondent returned to work, she, on 30 December 2019, called for a meeting with Mr Haindaka and the first respondent where Mr Haindaka of account number 120638785 confirmed having made payment of N$698 during December 2019 and on 28 January 2020 to the first respondent. It was Ms Visagie's further testimony that on 30 January 2020, and contrary to the Treasury Policy, the first respondent paid funds in the account of Mr Haindaka.

[31] Ms Visagie testified further that after the said meeting, two other customers raised similar complaints. She said that Mr Kondjereni Voitto, a customer with account number 120671286 was suspended on 10 December 2019 and 17 January 2020 whilst he paid his account with the first respondent. She stated that on 31 January 2020, and contrary to the Treasury Policy, the first respondent paid an amount of N$572 in the account of the customer. It was further the second time that the first respondent took money from a customer without capturing it on the system.

[32] Ms Visagie further testified that a certain Mr Evalista, a customer with account number 120655949 had his account suspended on 10 December 2019 notwithstanding having paid an amount of N$462 to the first respondent. On 31 January 2020, the first respondent paid back this amount contrary to the Treasury Policy.

[33] Ms Visagie testified further that the first respondent was issued with the Treasury Policy and she signed for it. The Treasury Policy requires that a receipt must be issued for every payment received and the type of payment must be recorded, for example, cash or cheque. It was her testimony further that the first respondent received moneys from the persons mentioned above but the customers were not provided with receipts. She further testified that the first respondent is prohibited from paying money into the accounts of customers after such money had been inappropriately taken. She further said that the first respondent confirmed that she received the money in question and did not crediting the accounts of the customers.

[34] Ms Visagie testified further that the first termination letter of 16 November 2020 was retracted pending the policy dispute. Upon being resolved, the first respondent was issued with a termination letter of 26 November 2020. In respect of the first respondent's leave, Ms Visagie testified that she was informed by the Human Resource Department that such leave for 19 November to 30 December 2020 was not processed as the first respondent was already recommended for dismissal. The leave was endorsed 'this leave is cancelled because the employee is recommended for dismissal and pending termination letter…'

Mr Silvan Amunyela

[35] Mr Amunyela testified that at the time of the incident he was employed by the appellant as a Retail Commercial Manager for Northeast based in Tsumeb and he was the supervisor to Ms Visagie. He said the Treasury Policy was received and signed by the first respondent. He disputed the assertion that he requested the first respondent to write a confession. He testified further that during 27 or 28 January 2020, he travelled to Rundu to attend to a meeting, on the request of Ms Visagie, about complaints received from clients whose accounts were suspended despite paying their accounts.

[36] Mr Amunyela testified further that the respondents attended the meeting, and asked for explanations, they admitted to having misappropriated the customers' money. He requested them to reduce their explanations to writing.

Mr Eddy Kgobetsi

[37] Mr Kgobetsi testified, *inter alia*, that he is an Account Manager and was the chairperson of the disciplinary hearing. He testified that at the hearing scheduled for 8 October 2020, the first respondent and her representative were not present and they tendered no apology. At the subsequent hearing of 28 October 2020, just before he could readout the charges, first respondent's representative, Ms Sophia Egelser, objected to the reliance of the Disciplinary Code of 1998 as there was one of 2004. He responded that he will take note of the objection and make the decision together

with his finding on the merit. He said further that the first respondent and her representative opted to walk out of the proceedings and the hearing proceeded in their absence. As a result a plea of not guilty was recorded on behalf of the first respondent.

[38] Mr Kgobetsi testified further that the appellant only has one Policy of 1998 as confirmed by the chief executive officer. It was his testimony further that, on the premise of the evidence presented to him by Ms Visagie and Mr Amunyela, he found the first respondent guilty on all charges. He testified further that he also considered the aggravation factors that the first respondent enriched herself at the prejudice of the customers and the appellant. He recommended the dismissal of the first respondent. The first respondent was also afforded the right to appeal after receiving the termination letter.

Evidence in respect of the second respondent

Ms Michelle Visagie

[39] Ms Visagie testified that the second respondent signed the Treasury Policy and received a copy thereof. She testified further that the second respondent was present at the disciplinary hearing conducted on 27 October 2020, but did not participate in the proceedings. She testified further that the account number 120505459 of Mr Genius Amadhila was suspended on 12 January 2020. The second respondent paid an amount of N$410 on 10 February 2020.

[40] Ms Visagie testified further that another customer, Mr Jacobs Shikongo with account number 120447475 was suspended on 9 February 2020 and on 10 February 2020, the second respondent paid an amount of N$450 in the customer's account.

[41] Ms Visagie testified further that a customer, Mr Sackey Shilunga with account number 12009471228 was suspended on 9 February 2020 and the second respondent paid an amount of N$271 in the account of Mr Shilunga.

[42] It was the testimony of Ms Visagie further that the second respondent, in an email addressed to Mr Silvan Amunyela, confessed to the charges.

Mr Silvan Amunyela

[43] Mr Amunyela testified that he was requested by Ms Visagie to travel to Rundu to attend to a meeting in respect of the complaints received from customers who paid their accounts but still had their accounts suspended. He testified further that, at the meeting, the respondents admitted to taking the customers' money and he requested the respondents to reduce their explanations to writing. He, subsequently received an email from the second respondent where she admitted to taking the money from customers.

Mr Eddy Kgobetsi

[44] Mr Kgobetsi testified, *inter alia*, that the second respondent and her representative were present at the disciplinary hearing of 27 October 2020, but they opted not to participate in the proceedings. He testified further that the second respondent had an opportunity to defend herself but only participated in the proceedings at mitigation stage after he found her guilty of all preferred charges against her.

[45] He testified further that during mitigation, the second respondent stated that since she was found guilty, she would like to apologise for everything that happened, she took the customers' money for her personal use and further that she was not forced by Mr Amunyela to write the statement that she wrote. The second respondent was informed of the right to appeal.

First respondent's evidence

[46] The first respondent testified that she was employed by the appellant in the year 2010. She testified that she signed the Treasury Policy. It was her testimony further that the 1998 Disciplinary Code was active. She stated that she was instructed by Mr Amunyela to confess. She further confirmed her signature

appearing on the confession letter that was addressed to Mr Amunyela. She denied taking money from customers. She further testified that she walked out of the disciplinary hearing after the chairperson refused to postpone the matter pending the resolution of the issue of the applicable policy.

[47] The first respondent further testified that the appellant did not apply its rules consistently as other similarly placed employees were issued with warnings and were subjected to dismissals. She further testified that she was served with a dismissal while she was on leave.

Second respondent's evidence

[48] The second respondent testified that she was employed by the appellant in 2016 as a Commercial Agent. She denied taking money from customers. She testified that on 28 January 2020, Mr Amunyela instructed her, together with the first respondent, to put everything in writing and wait for warnings to be issued to them. She also testified that her reason not to participate in the proceedings was due to the unresolved issue of the applicable policy.

[49] The second respondent led the evidence of Mr Tashiya Nauyoma who testified, *inter alia*, that on the day of the disciplinary hearing he received a phone call from the chairperson of the disciplinary hearing inquiring as to how well he knew the second respondent. Mr Nauyoma testified further that the chairperson requested him to speak to the second respondent to plead guilty to the charges and ask for forgiveness. He said further that he proceeded to speak to the second respondent as requested by the chairperson. He said further that he was shocked when he learned that the second respondent was dismissed.

Analysis

[50] Before I address the specific grounds of appeal in order to determine propriety of the appeal I deem it prudent to set out the legal principles applicable to unfair dismissal. I do so below.

[51] Section 33 of the Act sets out the law on unfair dismissal. It reads:

'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.'

[52] The said s 33 underpins the trite principle that the dismissal of an employee must be both substantively and procedurally fair.

[53] This court in *Dominikus v Namgem Diamonds Manufacturing*,[2] explained substantive fairness in the following terms:

'[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)

[54] Procedural fairness on the other hand includes 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 the opportunity to be heard and to call witnesses in support of any defence raised;

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

(d) informed of the finding and the reasons for the finding;
(e) heard before the penalty is considered and imposed,
(f) informed of the right to appeal, etc.

[55] The above principles are not absolute and are, therefore, guidelines to determine whether or not an employee was given a fair hearing in the circumstances of each case.

[56] What is apparent from the above legal position is that the test for a fair dismissal is two-fold and it requires that for the dismissal to be fair, both substantive and procedural fairness must be proven. Failure to satisfy any of the two requirements leads to the dismissal being unfair.

[57] The task that I am seized with is, therefore, to determine whether or not the arbitrator was correct, in law, to hold that the dismissal of the respondents was procedurally and substantively unfair. This finding is to be analysed in consideration of the grounds of appeal raised by the appellant.

Procedural fairness

[58] It was the finding of the arbitrator that the rules said to have been contravened existed and that the respondents were aware of the said rules. This finding was not appealed against by the appellant. There is further no cross-appeal from the respondents where such finding could have perhaps been challenged. The absence of an appeal towards the said finding leaves such finding intact and unscratched. The arbitrator proceeded to find that:

'[87] The existence of the rule was never contested by the applicants as evidence points that the treasury policy was made available to each of them. I consider the rule valid and reasonable under the circumstances.'

[59] Despite the said finding not been challenged on appeal, I hold that the finding is further supported by evidence and was correctly made.

[60] In as far as the non-attendance by the first respondent and non-participation by the second respondent in the disciplinary proceedings is concerned, parties are *ad idem*, correctly so in my view, that if a party fails to attend disciplinary proceedings or attends but opts not to participate in the proceedings, he or she does so at his or her own peril and should not later cry foul of the outcome of the hearing. This much was also the finding of the arbitrator.

[61] The respondents appear to have qualms with their confession letters as they state that such letters were not voluntarily made but that they were forced or coerced to draft such letters by Mr Amunyela. The said letters read as follows:

<u>First respondent</u>

'To: Silvan Amunyela
Subject: Statement

I'm hereby confessing what happened, I have three client *(sic)* who I assisted, the first was Evaliosta Karapo, she paid me, I had financial problem, we didn't have food at home, I used it. End of the month I paid he account. I forgot to mention her because her account was paid off. The second one is Kondjereni Voitto, he paid with me 572, which I'm still settling this month. The third one is Johannes Haindaka, they paid with me 698, Boss, because of imperfection, I was tempted to use it. My intention was to pay it to the account not that to cover it *(sic).*

Boss, I'm really sorry and regretting doing it, if I could turn back time, I could not be in this trouble. Please have mercy on me and if you may find it in your heart to forgive me and give me at least chance, I swear to the living God, that it won't happen ever again. My husband earns less, if I loss *(sic)* this job I won't manage to feed my kids, I really need this job, I plead and humble myself to you boss, please forgive me? I know that this is against company policies but I swear it won't happen again.

Please boss, have mercy on me,

Kind regards
Purity Mandjolo

(Signed)'

Second respondent

'To: Silvan Amunyela

I'm whereby *(sic)* had to sort out my rent that was due and my landlord threatened to chase me out if it is not paid.

My intention was to pay their account, because of temptation I took the money.

Tate Silvan, I am really sorry and regretting doing it. Please have mercy on me and if you hereby *(sic)* confession what happened, I assisted for clients, the FNB guy, Shilongo, Stackey and Ambirosius, I had financial problems.

May you find it in your heart to forgive me and give me a last chance. I swear to the living God, that it won't happen ever again. I know what I did was against company policies and really regret doing it. I really need this job and promise on my grandmother's grave this actions you won't hear about anymore.

Really I am sorry Tate Silvan
Fergie'

[62] The arbitrator made an emphatic finding when he stated as follows:

'[88] Moreover it is clear from the letters written to Mr Silvan Amunyela that the applicants had a hand in using the respondent's money for private purpose. I accept the evidence as presented. Taking into account the circumstances surrounding the confession letters, it is not correct to conclude that there was some kind of coercion...

[63] On procedural fairness, the arbitrator found, based on the evidence of Mr Tashiya Nauyoma, that the chairperson of the disciplinary hearing committed a gross irregularity when he telephoned Mr Nauyoma to talk the second respondent into confessing to the charges. The chairperson, on his part, as Mr Muluti argued, testified that he could not recall talking to Mr Nauyoma regarding the said allegation.

That is presently water under the bridge as we have a finding by the arbitrator that such allegation was proven.

[64] The arbitrator was correct that a chairperson of the disciplinary hearing should not be bias and impartial at all times. The arbitrator proceeded, based on the aforesaid finding, to conclude that the dismissal of the respondents was both procedurally and substantively unfair. The question that begs for an answer is to what extent does the said finding impact on the outcome of the proceedings. I shall return to this question as the judgment unfolds.

Substantive fairness

[65] In a decision that is not appealed against, the arbitrator found that the respondents used the appellant's money for private purposes. This is exactly what the charges on which the respondents were convicted of at the disciplinary hearing and dismissed entailed. This finding, I should add, is supported by the evidence presented. It is, in my view, not suprising that the arbitrator went on to find as follows regarding the respondents:

> '[92] On a balance of probabilities the applicant transgressed the rule…'

[66] I hold the view that the arbitrator was correct in the finding that it was established on a balance of probabilities that the respondents transgressed the rule. This I find particularly after having regard to the evidence of Ms Visagie that a customer, Mr Haindaka approached her in a Teleshop and inquired about his suspended account whilst he made payment to the first respondent.

[67] Upon first respondent's return to work from leave, she arranged a meeting with the first respondent and Mr Haindaka, where Mr Haindaka confirmed the payment made to the first respondent. There was further testimony that the first respondent misappropriated the money paid by Mr Voitto and Mr Evalista for personal purpose and without paying the accounts of the customers leading to the suspension of the said accounts despite payment being received from the customers. The first respondent's confession letter corroborates this evidence.

[68] In respect of the second respondent the evidence revealed that Mr Amadhila, Mr Jacobs Shikongo and Mr Sackey Shangula paid for their accounts with the second respondents, but notwithstanding such payment their accounts were suspended. The second respondent misappropriated the said money for personal purposes. Her confession letter corroborated the evidence led. The second respondent further testified in mitigation where she stated that she is guilty and she tendered an apology and further stated that she was not forced to write the statement in reference to the confession letter.

[69] Having considered the evidence led which, in my view, established the guilt of the respondents on the preferred charges I proceed to consider the impact that the irregularity found by the arbitrator on the part of the chairperson could have on the disciplinary process. To commence with, the said allegation related to the evidence of Mr Nauyoma to contact the second respondent and persuade her to plead guilty and apologise so that she could receive a warning. This request has no first respondent in sight. It has nothing to do with the first respondent. No evidence was led to establish that a similar request was directed towards the first respondent. It follows, therefore, that the arbitrator committed an irregularity in law when he painted the first respondent with paint of the same colour as that of the second respondent, so to speak, despite the foreignness of such paint to the first respondent. I find that the said request directed at the second respondent is of no consequence to the first respondent.

[70] I find that the finding of the arbitrator that the aforesaid action of the chairperson rendered the dismissal of the first respondent procedurally and substantively unfair is irregular and, consequently, cannot be allowed to stand.

[71] With respect to the second respondent, I find that the actions of the chairperson as per the testimony of Mr Nauyoma cannot be condoned. As alluded to herein above, a chairperson of the hearing must be unbiased and impartial at all material times. It is procedurally unfair for a chairperson of a disciplinary hearing to directly or indirectly persuade an accused employee into pleading guilty to an offence charged.

[72] Procedural unfairness is, however, not the end of the inquiry as it must be determined if the employer had a valid and a fair reason to dismiss the employee. In *Indongo Auto (Pty) Ltd t/a Indongo Toyota v Iipinge,*[3] Masuku J was faced with the same question and he remarked as follows:

'[76] …I am of the considered view that the *Kamanya* principle, should carry the day.'[4]

[73] In *Kamanya,* O'Linn P at 127 -128, set out the position and effect of procedural unfairness in the dismissal of an employee where there is a valid and fair reason as follows:

'The result in my view is that no order for reinstatement, re-employment or compensation should be made by the District Labour Court against the employer, where the employer has succeeded in proving before it a fair reason for dismissal, whether or not such employer has proved that a fair procedure was applied before the domestic tribunal. In such a case, it would be open to the District Labour Court to find that the employee has not been 'dismissed unfairly.

However, there may be instances where failure by the domestic tribunal to apply a fair procedure, would be sufficient for setting aside its dismissal of a complaint, eg where no opportunity was given to deal with the question of the appropriate sanction to be imposed and where the misconduct was not so grave as to merit immediate and summary dismissal.

In the alternative, if I am wrong in the above stated view, then in a case where the employer has proved a fair reason for dismissal but has failed to prove a fair procedure, the District Labour Court would be entitled in accordance with s 46(1)*(c)*, not to grant any of the remedies provided for in s 46(1)*(a)* and *(b)* but to confirm the dismissal or to decline to make any order.'

[74] Masuku J in *Indongo* proceeded to state that:

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[3] *Indongo Auto (Pty) Ltd t/a Indongo Toyota v Iipinge* (HC-MD-LAB-APP-AAA-2021/00068) NALCMD 18 (27 April 2023) para 76 – 78.
[4] *Kamanya and Others v Kuiseb Fish Products Ltd* 1996 NR 123 (LC) at 127-128.

'[77] This position was confirmed by the Supreme Court in *Kahoro and Another v Namibia Breweries Ltd.*[5] There, the Supreme Court expressed itself as follows in endorsing the *Kamanya* principle:

"As I understand the position, *Kamanya* is authority for the proposition that even if an employer fails to prove that a fair procedure was followed leading to the dismissal, the court may (not must) refuse to hold a dismissal as unfair if the employer proves a valid and fair reason for such dismissal."

[78] The upshot of this, is that in a case where there may be a doubt or evidence that the dismissal did not follow a fair procedure, the court may, that notwithstanding, hold a dismissal to be in order if there is a fair and valid reason for the dismissal.'

[74] Applying the above *Kamanya* principle to the present matter, I find that the evidence led against the second responded established that the second respondent received money from Mr Hamadila; Mr Jacobs Shikongo and Mr Sackey Shilunga for payment for their accounts. I further find that the second respondent committed an act of dishonesty when she misappropriated the said money received from customers. I further find that the second respondent brought the name of the appellant into disrepute when the accounts of the said customers were suspended despite being paid for. The second respondent further failed to issue receipts for payments received in contravention of the Treasury Policy. These are all dismissible offences as per the Disciplinary Code.

[75] I find that each of the above contraventions carry with them an element of dishonesty on the part of the second respondent. It is, therefore, my finding that when the arbitrator found that, on a balance of probabilities, the second respondent transgressed the rule, he literally found that the second respondent was dishonest with the employer. In my view, the dishonesty on the part of the respondents (second respondent included) was at the very least two-phased in that: the respondents were dishonest when they received the money from the customers for payment of accounts without issuing them with receipts for the payment made, thus implying that the money is allocated to the concerned accounts only for the accounts to be

[5] *Kahoro and Another v Namibia Breweries Ltd* 2008 (1) NR 382 (SC) 394 para 40.

suspended for non-payment; and the respondents were further dishonest when they misappropriated the money paid by the customers for personal purposes.

[76] Dishonesty has the capacity to break a relationship, and an employment relationship is built on honesty and trust. Employees and employers are expected to act honestly towards each other in order to advance their relationship. Dishonesty is hardly tolerated as it has a sharp edge capable of cutting through the bone of an employment agreement and break it to pieces.

[77] I find that dishonesty, in the circumstances of this matter, calls for dismissal, therefore, despite the procedurally irregularity referred to above committed by the chairperson in respect of the second respondent, this is a matter befitting of applying the *Kamanya* principle due to the presence of a valid and fair reason being proven.

Inconsistency

[78] The arbitrator further found that the offences committed by the respondents appear in the appellant's Disciplinary Code as serious offences for which first offenders may be subjected to a dismissal or a final written warning. The arbitrator found that the sanction of dismissal meted out against the respondents was applied by the appellant inconsistently. This was premised on the evidence that another employee of the appellant, a certain Mr Sasele, committed a similar offence was but received a lesser penalty than dismissal.

[79] This court in *Standard Bank Namibia Ltd v Gaseb*,[6] had occasion to consider the principle of consistency in the disciplinary processes of the employees by the employer and remarked as follows:

'[8] In *Southern Sun Hotels Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC) [at para 10] the following was said in relation to the issue of inconsistency by van Niekerk J.

[6] *Standard Bank Namibia Ltd v Gaseb* 2017 (1) NR 121 (LC) 12-129.

"The legal principles applicable to consistency in the exercise of discipline are set out in item 7(b)(iii) of the *Code of Good Practice: Dismissal* establishes as a guideline for testing the fairness of a dismissal for misconduct whether 'the rule or standard has been consistently applied by the employer'. This is often referred to as the "parity principle", a basic tenet of fairness that requires like cases to be treated alike. The courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires that an employee apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example *Gcwensha v CCMA & Others* [2006] 3 BLLR 234 (LAC) at paragraphs [37] – [38]). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to a different treatment, usually in the form of a disciplinary penalty less severe than that imposed to the claimant (see *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2001] 7 BLLR 840 (LC) at paragraph [3]). Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, *inter alia*, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors."

[25] Finally, I am also considering the case of *Rosh Pinah Corporation (Pty) Ltd v Dirkse* (LC 13/2012 [2015] NALCMD (13 MARCH 2015) in this regard. In the headnote of his judgement, Hoff J articulated the principle of consistency in disciplinary fairness; he also formulated a qualification on the parity principle, in aid of an employer who wants to overcome a consistency challenge as follows:

"Unfair labour practice – To treat employees, who have committed similar misconduct differently, is as a general rule, unfair. Consistency is simply an element of disciplinary fairness and every employee must be measured by the same standards. It is the perception of bias inherent in selective discipline which makes it unfair. Unfair disciplinary action short of dismissal amounts to an unfair labour practice. In order to overcome a consistency challenge the employer must be able to show that there was a valid reason for differentiating between groups of employees guilty of the same offence. Onus of proof in allegation of

unfair labour practice rests on employee to prove not only the existence of the practice but also that it was unfair."'[7]

[80] The above remarks, in my view, form a solid foundation of the consistency in the application of the legal principles at the workplace. Employees who are similarly circumstanced should receive equal treatment. Similar penalties should be applied to offenders who find themselves in similar circumstances. The onus is on he who alleges inconsistency, like the respondents in the present matter, to prove such inconsistency.

[81] In *casu,* save for alleging that a certain Mr Sasele was convicted of a similar offence to theirs, the respondents failed to prove similar circumstances of their matter compared to that of Mr Sasele. The details of the nature of the offence allegedly committed by Mr Sasele were not brought to the hearing. The number of charges on which Mr Sasele was allegedly convicted of is also unknown. In my view, the respondents made bare allegations of inconsistent application of the Disciplinary Code without evidence to substantiate their claim.

[82] I find that the arbitrator committed an irregularity in law when he found, without evidence to substantiate the finding, that the appellant applied the Disciplinary Code inconsistently in comparison of the respondents' matter to that of Mr Sasele.

[83] As I draw this judgment towards the finishing line I consider the argument advanced by Ms Nyatondo that the arbitrator cannot be faulted for finding that the respondents were dismissed while they were on leave contrary to the Act. Indeed the arbitrator found that the respondents were dismissed while they were on leave and thus in contravention of s 30(5) of the Act. This finding by the arbitrator constitutes an irregularity as s 30(5) read with s 30(1) makes it plain that s 30(5) provides for termination of employment by notice.

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[7] *Rosh Pinah Corporation (Pty) Ltd v Dirkse* (LC 13/2012 [2015] NALCMD (13 March 2015).

[84] The respondents' employment was not terminated by notice, to the contrary, their employment was terminated subsequent to being found guilty of misconduct emanating from a disciplinary hearing where dismissal was recommended. In any event, the evidence on record is that the leave applications of the respondents were not processed, therefore, strictly speaking, the respondents were not on approved leave. I find that the finding of the arbitrator is wrong in law.

Conclusion

[85] In view of the foregoing conclusions and findings, I hold the view that the disciplinary proceedings held, were in respect of the first respondent procedurally and substantively fair, whilst in respect of the second respondent the proceedings were substantively fair.

[86] I find, in further consideration of the nature of the charges that the respondents were convicted of; the presence of the element of dishonesty in the offences convicted of; the prescribed penalty of dismissal provided for in the Disciplinary Code; the failure by the respondents to prove the alleged inconsistent application of the Disciplinary Code, that the dismissal was fair. I, therefore, find that dismissal of the respondents is the appropriate sanction in the circumstances of this matter.

[87] In the premises, I find that the appeal must be upheld.

Costs

[88] In keeping with s 118 in the Act, none of the parties sought costs from the other in the event of succeeding. As a result there will be no order as to costs.

Order

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

1. The respondents' late filing of the grounds of opposing the appeal is condoned.
2. The appellant's appeal succeeds.
3. The arbitration award delivered by the arbitrator on 6 December 2022 in as far as it provides that the dismissal of the first respondent was procedurally and substantively unfair, and that the dismissal of the second respondent was substantively unfair, is hereby set aside.
4. There is no order as to costs.
5. The matter is removed from the roll and is regarded as finalised.

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O S Sibeya

Judge

APPEARANCES

FOR THE APPELLANT:	P Muluti Of Muluti & Partners Legal Practitioners, Windhoek
FOR THE 1ST & 2nd RESPONENTS:	S Nyatondo Of Susan Nyatondo Inc, Windhoek