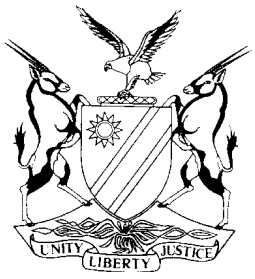

CASE NO.: LCA 50/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WILDERNESS AIR NAMIBIA (PTY) LTD **APPELLANT**

and

LEON JANSE VAN RENSBURG **RESPONDENT**

CORAM: MILLER, AJ

Heard on: 17 February 2012, 02 March 2012

Delivered on: 04 April 2012

JUDGMENT:

MILLER, AJ: [1] The appellant an air charter operator employed the respondent as a pilot.

[2] On 09 May 2010 the respondent was the pilot of one of the appellant's aircraft with registration number V5-ELE. There were twelve passengers on board of the aircraft. At approximately 14h40 on that day the respondent was to depart from the Epacha airstrip. His was not the only aircraft departing at that time.

[3] One Michael Brasler who piloted an aircraft with registration number V5-MKR and with four passengers on board was also about to depart.

[4] Apparently it was agreed between the pilots before take off that they will use runway 29. Brasler however, due to a change in wind direction changed his mind and proceeded to take off using runway 11. His was the first aircraft to take off.

[5] During the course of the take off and while the Brasler aircraft was travelling on the runway at high speed, the respondent taxied his aircraft into the runway in front of Brasler's aircraft. A collision between the two aircraft was narrowly avoided, because Brasler performed an evasive manoeuvre, forcing his aircraft into the air.

[6] It was common cause, firstly that the onus of visually checking that the runway is clear prior to entering it rests with the pilot who wants to taxi his aircraft onto the runway. Secondly it was common cause that the respondent did not look to his right before he entered the runway, and had he done so he would in all probability have seen Brasler's aircraft busy taking off.

[7] Following this incident the appellant instituted disciplinary proceedings against the respondent.

[8] Four charges were referred against him. They were:

1. Gross negligence.
2. Failure to comply with safety regulations.
3. Any other serious deviation from company policy and standards.
4. Offending client.

[9] The respondent pleaded not guilty to all the charges. Following a hearing, the chairman of the disciplinary hearing acquitted the respondent on the first charge. He found that the respondent was negligent but not grossly so.

[10] On the second charge the respondent was found guilty based on his failure to visually check that the runway was clear before he entered it.

[11] The respondent was also found guilty on count 3 and 4. The following sanctions were imposed:

"

> **Sanction:**
>
> I hereby recommend that the accused is issued with a **comprehensive final written warning** for **Failure to comply with Safety regulations** and **offending a client**. Secondly I recommend that the accused is issued with a **written warning** for **any other serious deviation from company policy and standards**.

> The final written warning needs to be accompanied by a counselling session with the accuser's supervisor, being Mr. M. Berry.
>
> I further recommend that Mr. Janse van Rensburg are grounded for a period of 3 weeks until he wrote an examination on the Namibian Aviation Law on the 16th of August and a examination on the Safety regulations and Standard Operating procedures of Sefofane Air charters the following week on the 23rd of August 2010. He then will fly after completing the exams for a period of 6 months PICUS (Pilot in command under supervision) with bi-monthly reports on his progress. After the 6 months expired he will be submitted to a route check and proficiency check after which he will be allowed to go back on line again.
>
> The mitigating factors that were taken into consideration was the fact that Mr. Janse van Rensburg had no previous disciplinary actions against him, his amount of flight hours, his length of service and the fact that he still bound by a contract to Sefofane.
>
> This concludes the hearing, the accused ware again reminded of his rights of appeal within 4 days against the outcome of this hearing. The hearing was adjourned at 17h00."

[12] The respondent not satisfied with the outcome of the hearing, lodged an appeal against the findings and the sanction imposed. That appeal was dismissed.

[13] Following the dismissal of the appeal the respondent initially decided to write the examinations imposed as part of his sanction. The respondent did not achieve the required pass mark of 75%, achieving marks of 66% and 53%

respectively in respect of each examination he wrote. As a consequence thereof the appellant did not permit the respondent to fly any of its aircraft.

[14] This prompted the respondent to file a complaint with the Labour Commissioner alleging that the appellant's sanction constituted an unfair labour practice. He claimed in addition payment of overtime in an unspecified sum.

[15] A protracted arbitration hearing ensued. At the conclusion thereof the arbitrator made the following ruling with regard to the merits of the respondent's conviction:

> "
>
> **Ruling:**
>
> After careful analysis of the evidence I rule that applicant was wrongly convicted of the second, third and fourth charge. This charges were wrongly phrased and seems not to be existent in the respondent company's disciplinary code of conduct. However I must indicate that Applicant cannot completely escape blame because he partially contributed to the incident. I must also indicate it is clear that applicant needs to be updated with Air Law Safety and Regulations. Furthermore, applicant cannot escape blame for not having attended the meeting because that is a clear cut sign of insubordination on his part."

[16] Having found that:

1. The respondent cannot escape blame for contributing to the incident which occurred.
2. The respondent needs to be "updated" with Air Law Safety and Regulations and;

3. The respondent was guilty of insubordination by failing to attend a meeting convened between the appellant and the client involved in the incident, the arbitrator thereupon made the following award:

"

Award:

Based on the above I decided to issue the following award:

10.1 The verdict and the recommendation of the chairperson dated 23rd July 2010 is hereby set aside and is substituted with the following order.

10.1.1 The applicant shall report for duty on the first working day following this award.

10.1.2 Within three (3) days applicant has reported for work the applicant's supervisor, Mr. Mark Berry, shall conduct and complete a counselling session with the applicant in relation to awareness and compliance with the Respondent company safety and operation manual and the Namibian Aviation Regulations.

10.1.3 Not later than two (2) weeks after the date of this award, applicant shall resume his ordinary flying duties, subject to the following conditions:

- The applicant shall fly PICUS (Pilot in command under supervision) and after three (3) months expire he will be submitted to a route check and proficiency check after which he will be allowed to go back on line again.

10.1.4 Applicant is entitled to overtime; therefore it ordered that applicant and the respondent's accountant shall meet within ten (10) days of the date

hereof in order to determine how many hours worked overtime and due to the applicant."

This Arbitration Award is final and binding on both parties and will be filed with the Labour Court in terms of section 87 of the Labour Act (Act 11 of 2007) to be made a Court Order.

[17] It is against this ruling and award that the appellant lodged an appeal to this court. I mention at this juncture that in the interim the respondent's contract expired and he is no longer employed by the appellant. I would have thought that this renders the proceedings academical. I was informed however that there is some other litigation still pending and that the outcome of these proceedings may be relevant to that.

[18] The arbitrator, as will be noted, gives no reason in his award why he deemed it expedient to alter the sanctions imposed upon the respondent by the appellant. It is also not easy to discern upon what basis the arbitrator, having found that the respondent was wrongly convicted on the three counts he was convicted on, considered it appropriate and proper to impose any sanction upon the respondent. Given the fact that it was common cause that the respondent failed to properly check visually that the runway was clear and in doing so contravened prescribed safety procedures, the arbitrator's finding that the respondent was wrongly convicted on count 2 is an error in law, inasmuch as the arbitrator did not have proper regard to the evidence before him. He clearly misdirected himself on that score.

[19] It is apparent in my view that the respondent was correctly convicted on count 2. At the hearing before me Mr. Mouton who appeared for the appellant, conceded that the conviction on count 3 was wrong. I need not deal with count 4 because I do not consider it necessary for the purposes of this judgment. The main issue around which the case revolved was the negligence of the respondent and count 4 was premised on that fact.

[20] What was before the arbitrator was whether or not the sanction imposed constituted an unfair labour practice. Nowhere can I find any indication how the arbitrator dealt with the issue. Absent also is a finding that the sanction was an unfair labour practice and on what basis he found that to be the case.

[21] What is clear is that the arbitrator accepted, despite his finding that the respondent was wrongly convicted, that the conduct of the respondent warranted some form of corrective measures to be taken by the appellant.
"In the process of determining the "fairness" or "unfairness" of a "labour practice", the relativeness of the particular allegedly unfair conduct must be considered in relation to its merits and all the relevant circumstances surrounding that conduct." ***Poolman: Principles of Unfair Labour Practice:*** Page 16.

[22] What needs to be considered in my view is firstly whether the measures taken were fair in the circumstances. This requires an objective approach. In addition the measures must be reasonable. Measures which are not reasonable will not be fair. In considering this aspect regard must be had to whether there were adequate factual grounds upon which the decision was

based. Secondly whether a reasonable procedure was followed and lastly whether the measures implemented were in themselves reasonable. ***United African Motor & Allied Workers Union v Fudens (SA) (Pty) Ltd 1983 (4) ILJ 212 (IC)***.

[23] Adopting this approach I find that the given nature of the incident and its possible consequences not only for the appellant but more importantly the passengers who travel on the appellant's aircraft, it was reasonable that some corrective measures had to be taken against the respondent.

[24] The decision not to permit the respondent to fly until such time as he fully complied with the measures put into place by the appellant does not strike me as unfair or unreasonable. To the contrary the measures taken are what a reasonable employer would do given the nature of the appellant's business.

[25] The issue of overtime can be disposed of readily. If the respondent claimed that overtime was due and payable, he should have tendered evidence as to what was due to him. This he failed to do or the arbitrator should have dismissed the claim.

[26] For these reasons I set aside the decision and award made by the arbitrator.

[27] The order I make in the result is that the appeal succeeds.

[28] There shall be no order as to costs.

_____

MILLER AJ

ON BEHALF OF THE APPELLANT:	Mr. Mouton
Instructed by:	Koep & Partners
ON BEHALF OF RESPONDENT:	Mr. Bard Ford
Instructed by:	Hohne & Company