

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2020/00059

In the matter between:

SHILONGO LEATHER WORKS CC

APPELLANT

and

MARIA M SCHEFFERS

1ST RESPONDENT

NDATEELELA NDAHAFAMUKWAYA

2ND RESPONDENT

THE LABOUR COMMISSIONER

3RD RESPONDENT

Neutral citation: *Shilongo Leather Works CC v Scheffers & Another* (HC-MD-LAB-APP-AAA-2020/00059) [2021] NAHCMD 23 (14 May 2021)

Coram: USIKU, J

Heard: 14 May 2021

Delivered: 14 May 2021

Flynote: Labour Law – Appeal against Arbitrator’s award – Dismissal – Employer bearing onus to prove both procedural fairness and substantive fairness of the dismissal – Court finding that arbitrator properly held that the dismissal was procedurally unfair.

Summary: The appellant appeals against an arbitration award in favour of the respondent to the effect that respondent's dismissal was procedurally unfair. Appeal dismissed.

ORDER

1. The appeal is dismissed.
 2. The arbitrator's award is amended to read as follows:
 - '(a) The applicant's dismissal was procedurally unfair.
 - (b) The respondent unlawfully deducted the applicant's salary.
 - (c) The respondent must pay the applicant an amount of N\$12 000 (being N\$ 5000 basic salary x 2 months plus N\$ 2000 unlawful deduction of salary).
 - (d) I make no order as to costs.
 - (e) The paid amount must be paid on or before the 14 June 2021, proof of which must be forwarded to the Office of the Labour Commissioner, Windhoek. The appropriate interest will accrue on the said amount if not paid by the date stipulated in the award of the same rate in terms of the Prescribed Rates of Interest Act 1975 (Act No. 55 of 1975).'
 3. I make no order as to costs.
 4. The matter is removed from the roll and regarded finalized.
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JUDGMENT

USIKU, J

Introduction

[1] This is an appeal by the appellant against an award by an arbitrator delivered on 29 September 2020. In the award the arbitrator found that the respondent's dismissal by the appellant was procedurally unfair and made an order for compensation in favour of the respondent.

Background

[2] The respondent, Ms Maria Scheffers, was employed by the appellant, Shilongo Leather Works, as a cleaner, as from 26 June 2017 to 30 April 2019, when she was dismissed from employment.

[3] On or about 05 February 2019 the appellant had a 'meeting' with the respondent concerning some unauthorized absence from work on the part of the respondent. The outcome of that meeting was that the respondent was informed that she was supposed to be dismissed, however, due to her plea for mercy she would not be dismissed. The appellant made it clear that should she be absent from work again, the respondent would be taken to have automatically dismissed herself without further notice or meeting.

[4] On or about 25 February 2019 the respondent's salary was increased from N\$3 000 to N\$5 000 with immediate effect.

[5] On or about 28 April 2019 the respondent was called by Ms Shilongo, a director of the appellant, and informed her that she had given false information to a colleague. Ms Shilongo alleged that the respondent had informed a colleague who was not feeling well on duty, on 26 April 2019, that Ms Shilongo would not allow her to be released to go to hospital. Thereafter the colleague fainted in the factory and an ambulance had to be called to take the colleague to the hospital. Ms Shilongo informed the respondent that an amount will be deducted from her salary to cover the ambulance service. The respondent denied the allegations of having furnished false information.

[6] On or about 29 April 2019, the respondent went to the appellant to collect her salary. She received her salary but it was reduced to N\$ 3000 (from N\$ 5000). The respondent got very unhappy and disappointed about the reduction of her salary. So she decided not to report for duty from 30 April 2019 to 03 May 2019 'because of the disappointment'.

[7] When she reported for duty on Monday, 06 May 2019, Ms Shilongo was very angry, and simply informed the respondent to bring back her work uniforms. She was dismissed and informed to return in a week's time after the appellant's has finalised

the paperwork regarding her dismissal. She returned later and was paid leave days for eight days in the amount of N\$ 1964.

[8] Dissatisfied with her dismissal, the respondent referred a dispute of unfair dismissal to the Labour Commissioner, on 06 June 2019.

Arbitration hearing

[9] At the arbitration proceeding, the appellant was represented by Mr Thomas Shilongo, ("Mr Shilongo") the General Manager of the appellant. Mr Shilongo and the respondent gave evidence under oath.

[10] The arbitrator, after having considered the evidence before her, found that:

- (a) after being absent from work, from 30 April 2019 to 03 May 2019, and when the respondent showed up for duty on 06 May 2019, she was simply informed by the appellant that she had automatically dismissed herself, as per the meeting held on 5 February 2019. There was no hearing prior to the dismissal of the respondent. The arbitrator therefore held, correctly in my view, that the respondent's dismissal was procedurally unfair;
- (b) there was valid ground to dismiss the respondent and that dismissal was an appropriate sanction for the transgression;
- (c) the appellant unlawfully deducted respondent's salary and that an award should be made to restore the respondent to the position she should have been had she not been unreasonably penalized;
- (d) the respondent stated that she was never paid her salary for April 2019, only got paid for leave days. I shall return to this aspect later on in this judgment.

[11] The arbitrator then decided that this is an appropriate case to award compensation in favour of the respondent to redress the unfair dismissal and also to make restitution in favour of the respondent in respect of the unlawful deduction to her salary. The arbitrator made an award in the following terms:

1. The applicant's dismissal was procedurally unfair.
2. The respondent unlawfully deducted the applicant's salary.
3. The respondent must pay the applicant an amount of N\$15 000 (being N\$5 000 basic salary x2 months) + N\$5 000 (unlawful deduction of salary).
4. I have not made an order as to costs.

5. The said amount must be paid on or before the 29 October 2020, proof of which must be forwarded to the Office of the Labour Commissioner, Windhoek. The appropriate interest will accrue on the said amount if not paid by the date stipulated in this award at the rate in term of prescribed Rates of Interest Act, 1975 (Act No. 55 of 1975).'

[12] Unhappy with the aforesaid arbitral award, the appellant now appeals to the Labour Court against the whole of the award.

The appeal

[13] The appellant appeals against the arbitral award on the following grounds:

- (a) the compensation made in favour of the respondent be set aside as it is too high and only leans in favour of the respondent,
- (b) the compensatory award is unfair, as it does not show any punishment against the respondent and seems to indicate that the appellant was solely at fault,
- (c) the dismissal of the respondent was not procedurally unfair,
- (d) the respondent does not deserve compensation as she did not suffer loss,
- (e) the reduction of the respondent's salary was not unlawful. The compensation of N\$ 5000 is too high for reducing the respondent's salary who committed misconduct, and
- (f) there is no reason for the respondent to be compensated in the amount twice her basic salary.

The respondent's position

[14] The Respondent filed a notice of intention to oppose the appeal. She however did not state her grounds on which she opposes the appeal and did not file any other documents.

Legal principles

[15] Section 33 (1) of the Labour Act, 11 of 2007, state that, an employer must not dismiss an employee:

- (a) without a valid and fair reason (substantive fairness) and ;
- (b) without following a fair procedure (procedural fairness).

[16] In regard to substantive fairness, the requirement entails that the employer must prove, on the balance of probabilities, that the employee was guilty of misconduct or that he/she contravened a rule. The rule contravened by the employee must be valid and reasonable.

[17] The requirements of procedural fairness include the right to be:

- (a) told the nature of the misconduct committed and to be afforded adequate notice prior to the disciplinary enquiry;
- (b) afforded opportunity to be heard and to call witnesses in support of any defence and to cross-examine witnesses called against you,
- (c) informed of the finding (if found guilty) and the reasons for the finding,
- (d) heard before penalty is imposed,
- (e) informed of the right to appeal etc.

[18] The foregoing principles are not absolute and are regarded as guidelines to determine whether an employee was given a hearing in the circumstances of each case.¹

[19] The test for a fair dismissal is therefore twofold 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.²

Analysis

[20] In the present matter, the court is required to determine, as a question of law, whether on the materials placed before the arbitrator, there was no evidence which could reasonably have supported the findings made by the arbitrator.³

[21] I am of the opinion that the arbitrator correctly found that the dismissal of the respondent was procedurally unfair. It is common cause that the respondent absented herself from employment without approved leave from 30 April 2019 to 03 May 2019.

¹ *Dominikus v Namgem diamonds Manufacturing* LCA 4/2016/ [2018] NALCMD 5 (23 March 2018).

² *Van Wyk v Telecom Namibia LTD* HC-MD-LAB-APP-AAA 2019/00075[2020] NALCMD 35 (11 November 2020) para 20.

³ *House and Home (Trading Division of Shoprite (Pty) Ltd v Majiedt and Another* 2013 (3) NR 333 (CL) para 6.

When she turned up on 06 May 2019 she was simply informed that she had automatically dismissed herself as per the outcome of the meeting held on 5 February 2019. The respondent was not charged or subjected to any form of disciplinary enquiry to determine her guilt or innocence. The arbitrator cannot be faulted for coming to the conclusion that the dismissal of the respondent was procedurally unfair.

[22] In regard to the compensatory award, the arbitrator had regard to the provisions of s 86(15)(e) of the Act and found that compensation is appropriate in the present case to redress the unfair dismissal. The arbitrator then proceeded and awarded the respondent compensation of salary equal to two months of the respondent's salary. I find no reason to fault the arbitrator's exercise of discretion on this aspect. I am of the view that the compensatory award of salary equally to two months of the respondent's salary is fair in the circumstances.

[23] Insofar as the unlawful deduction of salary is concerned, the arbitrator found that the respondent 'stated that she was never paid her salary for April 2019, only got paid for leave days'.⁴ I am of the opinion that this finding is not borne out by the evidence on record. In her evidence at arbitration, the respondent stated that on 29 April 2019 she went to her place of employment for her salary. She received her salary but it was 'deducted' and only received N\$3 000, since the appellant had deducted the ambulance fees. She was very unhappy with and disappointed by the deduction and as a result thereof she decided not to report for duty on the 30 April 2019 to 6 May 2019.⁵

[24] Since the respondent's monthly salary was N\$ 5 000 and she received N\$3 000 on 29 April 2019, then I am of the opinion that the respondent is only entitled to the restitution of the amount deducted, namely, N\$ 2000. On this aspect, I am of the opinion that the restitution of the amount deducted from the respondent's salary need to be amended to reflect N\$ 2000 (and not N\$ 5000). The arbitrator had directed the appellant to pay the compensation amount on or before 29 October 2020. Since that date has now passed, I am going to amend the date by which the full amount must be paid, to the 14th of June 2021.

⁴ Para 16 of the arbitration award.

⁵ Pages 15-16 of the transcribed arbitration record of proceedings.

[25] The appellant sought to argue that it had a right to reduce the respondent's salary, in the same manner as it had a right to increase her salary. I do not agree with that argument. Once an employer resolves to increase an employee's salary, the increased salary becomes the employee's condition of service and same cannot be changed unilaterally or without due process, meeting the requirements of procedural fairness. I am therefore of the opinion that the respondent is entitled to be refunded the amount which was unlawfully deducted from her April 2019 salary, namely N\$ 2000.

[26] In conclusion, on the evidence presented before the arbitrator, I am of the opinion that, (save for the aspect that is to be amended), the arbitrator's award cannot be faulted. The award is justified by the evidence that was led before her. For the foregoing reasons, the appeal stands to be dismissed.

[27] In the result I make the following order:

1. The appeal is dismissed.
2. The arbitrator's award is amended to read as follows:
 - '(a) The applicant's dismissal was procedurally unfair.
 - (b) The respondent unlawfully deducted the applicant's salary.
 - (c) The respondent must pay the applicant an amount of N\$12 000 (being N\$ 5000 basic salary x 2 months plus N\$ 2000 unlawful deduction of salary).
 - (d) I make no order as to costs.
 - (e) The paid amount must be paid on or before the 14 June 2021, proof of which must be forwarded to the Office of the Labour Commissioner, Windhoek. The appropriate interest will accrue on the said amount if not paid by the date stipulated in the award of the same rate in terms of the Prescribed Rates of Interest Act 1975 (Act No. 55 of 1975).'
3. I make no order as to costs.
4. The matter is removed from the roll and regarded finalized.

B USIKU
Judge

APPEARANCES:

APPELLANT:

Mr T Shilongo (In Person)

Windhoek

FIRST RESPONDENT:

Ms M Scheffers (In Person)

Windhoek