REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case no: HC-MD-CIV-ACT- OTH- -2020/00051

In the matter between:

ROSH PINAH CORPORATION (PTY) LTD **PLAINTIFF**

And

PETRUS MUZAZA **1st RESPONDENT**

JOSEPH WINDSTAAN **2nd RESPONDENT**

LABOUR COMMISSIONER **3rd RESPONDENT**

Neutral citation: *Rosh Pinah Zinc Corporation v Muzaza* -HC-MD-LAB-APP-AAA-2020/00051 [2021] NALCMD 41 (3 September 2021)

Coram:	TOMMASI J
Heard:	**22 January 2021; 16 April 2021 & 17 May 2021**
Delivered:	**03 September 2021**
Reasons released:	**06 September 2021**

Labour Law – appeal – failure to follow disciplinary code and procedure meticulously – chairperson failed to refer matter to be ratified by an approval authority as per Disciplinary code and procedure – procedure rectified by the subsequent appeal – decision ratified by highest authority of the appellant.

Labour Law – appeal – consistency element of disciplinary fairness and every employee must be measured by the same standards.

ORDER

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1. The appeal against the finding of the arbitrator that the sanction which was imposed by the appellant was not the appropriate sanction for this transgression is dismissed.
2. The order that the appellant must pay the respondent back pay for the whole period of dismissal (being 16 July 2019 to 15 September 2020) and the order for interest are hereby set aside.
3. The order for reinstatement in the position in which he would have been had he not been so dismissed is confirmed.
4. The respondent must pay the wasted costs occasioned by the late filing of the ground of apposition.
5. No costs order is made.

REASONS

TOMMASI J

[1] This is a Labour Appeal. The appellant appeals against the arbitrator's award delivered on 4 September 2020 in which he found that the appellant had dismissed the respondent procedurally unfairly. The appellant is also appealing against the award of the arbitrator that the appellant must re-instate the respondent in the position he would have been had he not been so dismissed, namely retrospectively to the date of his dismissal (16 July 2019) and further order that the appellant must

pay the respondent for the who period of dismissal up to and until 15 September 2020. The appeal was opposed.

Grounds of appeal

[2] The grounds of appeal are that the arbitrator erred in law in:

(a) Finding that the respondent was dismissed procedurally unfairly, seemingly because:
    (i) written statements had allegedly not been taken from the appellant and all the witnesses;
    (ii) The appellant had allegedly not provided al written statements to the respondent.
    (iii) The chairperson had not been appointed from outside the organization
(b) Seemingly finding that the chairperson was biased and did not follow the principles of natural justice.
(c) Over emphasising the appellant's disciplinary code and procedure in the circumstances of the case.
(d) Awarding the respondent losses of 14 months, in circumstances where he did not prove that he had suffered or was entitled to such losses.

[3] The respondent was given a notice of a disciplinary hearing on 21 June 2019. The hearing was to take place on 24 June 2019. The respondent was charged to have been unfit for service as a result of the use of drugs or intoxicating substances. on 6 and 10 June 2019. The respondent on both days tested positive for alcohol which was over the legal limit. The respondent pleaded guilty at the hearing. The chairperson reserved her decision in respect of the sanction to be imposed. The chairperson on 1 July 2019 dismissed the respondent with immediate effect. The respondent appealed this decision but the dismissal was confirmed on appeal. It was common cause that the respondent was employed by the appellant as a full time Safety and Security Representative.

[4] The arbitrator concluded that the dismissal of the respondent was unfair and therefor invalid within the meaning of section 33(1)(b)(ii) which provides that an employer must not, whether notice is given or not, dismiss an employee-without following, subject to any code of good practice issued under section 137, a fair

procedure. He ordered the appellant to re-instate the respondent in the position he would have been had he not been so dismissed, i.e. retrospectively to date of his dismissal which is 16 July 2019. The appellant was further ordered to pay the respondent back pay for the whole period of dismissal i.e. from 16 July 2019 to 15 September 2020 and that payment should be made on the normal payday. The appellant was further to activate the terms and conditions of employment of the respondent as if there was no dismissal.

[5] The first ground of appeal is that the arbitrator found the respondent was dismissal was procedurally unfair because: no written statement was taken from the appellant and all the witnesses; the appellant allegedly failed to provide all written statements to the respondent; and the appellant did not appoint a chairperson from outside the organisation.

[6] The respondent pleaded guilty to the charge. The reports showing he tested positive for alcohol were disclosed to him and he appended his signature thereon. There was no need for witnesses' statements as there was no dispute raised in respect of the reports. This failure insofar as it was found to have been procedurally unfair was clearly incorrect.

[7] The arbitrator however did not conclude that the procedure was unfair because it was an internal chairperson but concluded that the chairperson could not have dismissed the appellant as she was not the authorising authority. He stated the following:

'Secondly, the code refers to "Dismissal Depending on the seriousness, nature and circumstances of a particular offence, even a first offence can result in summary dismissal. All cases of dismissal must be ratified by an approval authority" In this matter, the applicant was dismissed by the Chairperson of the disciplinary hearing without ratification by an approval authority and the approval authority is not defined in the Disciplinary Code, because chairperson of the disciplinary hearing regarded herself as the approval authority in terms of the previous version of the Disciplinary Code not exhibited. The chairperson cannot be the approval authority if the decision of the chairperson must be ratified by the approval authority.'

[8] Paragraph 6.4 of the appellants Disciplinary Procedures provide that all cases of dismissal must be ratified by an approval authority.

[9] Counsel for the appellant submitted that the disciplinary procedure is a guideline to assist management in applying disciplinary measures and that it is emphasised in the document that the procedure does not prescribe rigid rules which have to be slavishly applied. Counsel referred to other sections of the disciplinary code which indicate that the chairperson has a choice to decide which sanction to impose or to refer the matter to the authorising authority. He further submitted that this was in any event remedied on appeal where the decision of the chairperson was ratified by the highest authority. Counsel for the respondent argued that failure to meticulously follow the appellant's disciplinary procedure is fatal.

[10] The directive for the chairperson to refer a dismissal for ratification to an approval authority is clear. Paragraph 10.3.2, 10.3.3 and 10.3.4 of the document titled "Disciplinary Procedure" does not give the chairperson a choice but merely states that in cases other than a dismissal the chairperson must impart the kind of disciplinary steps that will be taken and in cases of dismissal, the chairperson must inform the employee that dismissal will be recommended for ratification by the approval authority. The provision is clear and 4.3.3 in the same document states that the procedure ought to be followed meticulously.

[11] The submission that the decision of the chairperson was ratified by the appeal process has merit. In *Kamanya and Others v Kuiseb Fish Products Ltd 1996 NR 123 (LC)* it was held that the appeal itself would correct the procedure and/or result of the mutual enquiry, consider the issues de novo and would come to its own decision either on the existing evidence, or on new evidence adduced at the rehearing and further that the objective of the law was to maintain the right of the worker not to be unfairly dismissed, not the right to have two hearings, each of which must be fair. The arbitrator in this respect erred in law by concluding that the failure to refer the matter for ratification by the approval authority rendered the disciplinary hearing procedurally unfair.

[12] A further ground of appeal is that the arbitrator erred in law when he concluded that the chairperson was biased and failed to follow principles of natural justice. There is no indication that these were the conclusions reached by the arbitrator. He merely refers to the law pertaining to bias, the requirements for a domestic tribunal to adopt a procedure which would afford a person a proper hearing and how these principles are applied in a domestic enquiry (disciplinary hearing); and the need for the employer to respect the rules of natural justice and to act fairly. There was no finding that the chairperson was biased or that the chairperson failed to apply the principles of natural justice.

[13] The fourth ground is that the arbitrator over emphasised the appellant's disciplinary code and procedure in the circumstances of the case and that dismissal was not the appropriate sanction for this transgression. The arbitrator had this to say in this regard:

'…where there are express contractual terms governing a disciplinary procedure as, for example contained in the employer's disciplinary code, it is no defence for an employer to contend that the alternative procedure that he followed was equally fair. An employer is accordingly entitled to insist that the employer abide by his contractual obligation to follow the provisions of the employer's own disciplinary code. The employer's refusal or failure to do so would amount to procedural unfairness. Thus once an employer has adopted a particular disciplinary code or suchlike rules and regulations, whether unilaterally or after negotiations with a trade union, he is obliged to stick to its provisions meticulously. An employer may for good reason, e.g. to attain equitable results, depart from the code and not follow it slavishly but he may not do so to the detriment of an employee'.

[14] In *Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 (SC) Hoff JA (Mainga JA and Smuts JA concurring) at page 1025 – 1026, paragraph 76 - 77 the following is stated:

'In the present matter it appears that an agreement on industrial relations policies and procedures had been incorporated, by reference, into appellant's code of conduct. In the matter of *City Council of Windhoek v Pieterse,*[1] the Labour Court referred to a work by the authors Johan and Ronell Piron,[2] to the effect that where an 'employer had introduced certain procedural standards to be followed prior to dismissal, the employer will normally be

[1] *City Council of Windhoek v Pieterse* 2000 NR 196 (LC) at 200.
[2] Johan & Ronell Piron Managing Discipline and Dismissal at 200E.

held to those self-imposed standards'. Reference was also made to decisions to the effect that such self-imposed procedural standards remain guidelines rather than binding rules.

I agree with the observation[3] that a 'court should guard against an elevation of a disciplinary code into an immutable set of commandments which have to be slavishly adhered to'. I also agree that where there is a departure from such a code it should not be to the detriment of an employee. In my view, the overriding consideration should be whether the employer had complied with, in the particular circumstances of the case, a fair procedure.' [My emphasis]

[15] Further in *City Council of Windhoek v Pieterse, supra*[4] the court also referred to Riekert's Basic Employment Law 2nd ed and cited the following at 92 - 3:

'It is important to note that once an employer adopts a particular disciplinary code, whether unilaterally or after negotiation with a trade union, he is obliged to stick to its provisions meticulously. While he may depart from it in order to favour an employee (which is in itself unwise: see below) he may not depart from it to the detriment of an employee'

[16] It is evident that the arbitrator subscribed to the principles as set out by the above mentioned learned authors. The arbitrator concluded that the procedures to a disciplinary hearing were partly followed; and the procedure on which the disciplinary code of the respondent was applied amounts to procedural unfairness. He concludes as follows:

'In the first instance, the disciplinary code of the appellant did not provide for a combination of charges and/or incidents, because every charge to be determined (sic) on its own merits. The code clearly stipulates that the disciplinary procedure must be followed meticulously, therefore the first incident should have been heard within the prescribed period and the absence of the supervisor for sick leave cannot be regarded as an excuse, because she was represented at the second incident as testified. The two incidents cannot be regarded as similar as per the decrease and increase readings plus the irregularity reports exhibited, although the charge are (sic) the same as per the disciplinary code, the incidents ought to be treated as separate charges as a result of their own merits, therefore combination of the two incidents as one charge is unfair.'

[17] Paragraph 10.2.3 of the disciplinary code provides that the notice of a disciplinary hearing must be fully completed and handed to the employee within a

[3] By Silungwe P at 201B – C
[4] At page 200

reasonable period before the hearing takes place. A minimum of 48 hours is recommended as a reasonable period. The requirement is not that the hearing must take place within 48 hours but that the employee must be given notice of at least 48 hours before the hearing takes place. The failure by the respondent to charge the employee separately for the two incidents cannot be said to be unfair without the necessary qualification that by doing so was it detrimental or prejudicial to the respondent. It was not determined how the joinder of the charges or failure to treat it separately was detrimental to the respondent. It is after all the objective of the law to maintain the right of the worker not to be unfairly dismissed.[5]

[18] The disciplinary code makes provision for disciplinary steps to be applied progressively under normal circumstances but also makes provision for summary dismissal even in the event of a first offence depending on the seriousness, nature and circumstances of a specific offence. The arbitrator held the view that the dismissal was not an appropriate sanction for the transgression as per the disciplinary code of the respondent and that appellant ought to have applied the progressive disciplinary steps as per the code of conduct. *Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 578 (LAC) ([1999] 2 BLLR 108)*. In *Namdeb Diamond Corporation (Pty) Ltd v Gaseb,supra a*t paragraph 90 Hoff JA stated the following

> 'In Nampak Corrugated Wadeville v Khoza[6] the South African Labour Court held (at 584A) that a court should not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction.'

[19] The disciplinary code makes provision for summary dismissal even in the event of a first offence. In light hereof it is presumptuous to assume that the respondent would have received a written warning on the first occasion and a final written warning on the second. The second offence committed so soon after the first one and the fact that the respondent was a full time Security Representative who was responsible in ensuring compliance with safety requirements of the appellant, motivated the appellant to consider dismissal although he offended only twice. This is a valid reason for dismissal given the environment and the importance of safety in

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[5] *Kamanya and Others v Kuiseb Fish Products Ltd, supra*
[6] *Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 578 (LAC) ([1999] 2 BLLR 108)*

the workplace of the appellant. The arbitrator incorrectly concluded that dismissal was not the appropriate sanction for this transgression.

[20] The arbitrator concluded further that the appellant did not apply the same sanction in other cases of persons who transgressed the same rule as the witness of the respondent testified that a D2 level officer was dismissed on the third transgression meaning that the appellant applied the progressive positioning of the disciplinary measures as per the Disciplinary Code i.e. that the sanction imposed was not consistent with previous similar cases.

[21] This court, despite having found that the arbitrator erred in concluding that it was not an appropriate sanction for the offence, must consider whether the arbitrator erred when it concluded that the dismissal was an unfair sanction in light of the disciplinary steps taken by the appellant in other cases.

[22] Counsel for the appellant submitted that none of the cases referred to by the respondents were comparable to the case of the respondent. None of the cases mentioned involved an employee who was employed as a full time Safety Officer responsible for awareness training of all mine employees including training on the use of alcohol. None of the other cases shows that the offender offended within such a short period of time. Counsel for the respondent argued that this issue of inconsistency was raised from the outset of the arbitration proceedings so that the employer was put on proper and fair terms to address it. Referring to *SA Police Services v Safety and Security Sectoral Bargaining Council and Others*[7] arguing that once an employee has pertinently put the issue of consistent treatment in issue, the employer has a duty to rebut such allegation. It was further submitted that no statement or evidence was presented by the appellant to rebut such an allegation.

[23] In *Standard Bank Namibia Ltd v Gaseb and Another 2017 (1) NR 121 (LC)* the court held that that the principle of consistency when imposing disciplinary sanctions on employees was part of our law. The authorities referred to make it clear

[7] *SA Police Services v Safety and Security Sectoral Bargaining Council and Others* [2013] ZALCJHB JR 2008/1151

that the employer could only overcome a challenge of inconsistency if there was a valid reason for differentiating between employees guilty of the same offence.

[24] The disciplinary code and procedure of the appellant in paragraph 4.3.2 states as follows:

'Discipline must be enforced uniformly, not only at sectional or departmental level but throughout the enterprise. One of the surest ways of undermining discipline is to take disciplinary steps against some employees while other are allowed to break rules with impunity. Inconsistency impedes the principal of fairness.'

And further in 4.3.4

'The maintenance of a healthy balance between uniformity and fairness must always be pursued. When disciplinary action is considered, an attempt must be made always to treat an employee concerned fairly but without impairing uniformity'

The disciplinary code and procedure (paragraph 10.3.3) further requires of the chairperson to take into consideration *inter alia,* how similar offences were treated in the past.

[25] The chairperson took some time to deliberate on the sanction to be imposed and when she returned with the verdict she stressed that he had shown no remorse by testing positive again after 4 days and that he was in a position where he must lead others according to the company's safety rules, regulations and policies. No indication was given that she had considered how similar offences were treated in the past. As already indicated above the respondent lodged an appeal and one of the reasons for the appeal was the following:

'The company is inconsistency (sic) in dealing with similar offences. (Some senior positions employees tested positive were not dismissed)'

The response hereto on appeal was as follows:

'I have consulted with ER regarding senior employees testing positive for alcohol and not being dismissed. There has been a case of a D2 person being dismissed for alcohol on the third positive, but there is no evidence of senior employees testing positive more than once, but for the one of the dismissal.'

[26] In *Namibia Wildlife Resorts Limited v Iilonga NLLP 2013 (7) 251 LCN* ,Hoff J, as he then was stated as follow in paragraph 6:

'An employee seeking to rely on the inconsistent application of discipline by the employer must mount a proper challenge. This in turn requires evidence of other similar cases which attracted different and less severe disciplinary sanctions to warrant the inference that the employer had been inconsistent.'

[27] The chairperson was questioned during cross examination in respect of other employees on the same level. Objections were raised and it was argued that questions regarding this person should be taken up with Mr Bergh who considered the appeal. The same objection was lodged when the other witnesses for the appellant testified. The union representative of the respondent testified that he raised the issue of inconsistency on appeal and that Mr Bergh, pointed out that the D2 officer was dismissed after he committed the third offence. He testified that it was evident that in his/her case there was progressive application of disciplinary steps. Mr Bergh who represented the appellant in the appeal hearing has full knowledge of the identity and position of this person. He was however not called to testify by the appellant. There was therefore no rebuttal of the evidence adduced by the respondent that the sanction was not consistent with a previous similar case. The employer was called upon to show that there was a valid reason for differentiating between the two cases.[8] In the absence of any evidence adduced which indicated that this case was distinguishable from that of the respondent, the arbitrator was justified in concluding that the sanction which was imposed was not consistent with that of the D2 level officer and that the dismissal for this reason was unfair.

[28] The final ground is that the arbitrator erred in law by awarding the respondent losses of 14 months, in circumstances where he did not prove that he had suffered or was entitled to such losses. The counsel for the appellant submitted that there was no evidence presented by the respondent in respect of any damages that he suffered. This is borne out by the record. The salary advice forms part of the exhibits but the respondent failed to testify that he suffered any loss.

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[8] See *Rosh Pinah Corporation (Pty) Ltd v Dirkse* [2015] NALCMD 4 I (LC 13/2012; 13 March 2015) paragraph 81

[29] In *Namdeb Diamond Corporation (Pty) Ltd v Gaseb, supra* Hof JA has the following to say in this regard at page 1029 para 98:

'In *Springbok Patrols (Pty) Ltd t/a Namibia Protection Services v Jacobs and Others*,[9] (an appeal in terms of s 89 of Act 11 of 2007) the principle was once again emphasised that where a party seeks to claim an amount owing to him or her under the Act, he or she must not only plead how that amount arose but also lead evidence to prove such an amount. In the present case, the respondent did not even begin to allege that he has suffered any damages (or is entitled to compensation as the court a quo found). The onus of proof of any claim of damages or compensation that the respondent might have had as well as the duty to adduce evidence on such claim, rested with the respondent'.

[30] The arbitrator in this regard erred in law by awarding damages to the applicant which have not been proven and the award stands to be set aside. Counsel for the appellant submitted lengthy arguments on why the award for re-instatement ought to be set aside. This was however not raised as a ground of appeal and neither did the appellant adduce any evidence to the effect that re-instatement in the same position would not be possible or that his re-instatement would be a 'recipe for disaster'.

[31] In the premises the following order is made:

1. The appeal against the finding of the arbitrator that the sanction which was imposed by the appellant was not the appropriate sanction for this transgression is dismissed.
2. The order that the appellant must pay the respondent back pay for the whole period of dismissal (being 16 July 2019 to 15 September 2020) and the order for interest are hereby set aside
3. The order for reinstatement in the position in which he would have been had he not been so dismissed is confirmed.
4. No costs order is made

[9] Unreported judgment of Labour Court per Smuts J in [2013] NALCMD 17 (LCA 702/2012; 31 May 2013).

M.A TOMMASI,

Judge

APPEARANCES:

APPELLANT:	Mr K Marais of Engling, Stritter & Partners
RESPONDENT:	Mr C Umali of AngulaCo Inc