CASE NO. LCA 44/2008

REPORTABLE

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

WINDHOEK OBSERVER PUBLISHERS (PTY) LTD
APPELLANT

and

ALVA MUDROVIC
RESPONDENT

CORAM: HOFF, J

Heard on: 06 March 2009

Delivered on: 14 October 2011

JUDGMENT

HOFF, J: [1]The respondent was employed by the appellant. The respondent was found guilty on a charge of refusal and/or failure to work stipulated working hours on various occasions during a disciplinary hearing chaired by a Mr Roberts on 22 May 2005. The respondent was issued with a final written warning. Mrs E Smith, the sole owner of the appellant, on

behalf of the appellant on 30 May 2006 issued a letter of termination of service to the respondent.

On 31 May 2006 the respondent appealed against her dismissal on the grounds that such dismissal was procedurally unfair and that the sanction of dismissal was inappropriate or harsh punishment. The appellant on 14 June 2006 informed the respondent that it did not have an internal appeal procedure and invited the respondent to approach the district labour court.

[2] The respondent subsequently filed a complaint on the basis that she has unfairly been dismissed claiming *inter alia* re-instatement, loss of outstanding remuneration due to the unfair dismissal, all outstanding leave days, and a cost order against the appellant in terms of section 20 of Act 6 of 1992 for the frivolous and vexatious conduct by the appellant.

[3] The chairperson of the district labour court found that the dismissal of the respondent was unfair and not in compliance with the provisions of section 45 of the Labour Act 6 of 1992 and made the following orders:

(a) the dismissal of the complainant on 31 May 2006 is set aside and replaced with a final written warning;
(b) the respondent is ordered to pay the complainant an amount of N$110 143.66. N$243 000.00 (18 months salary minus N$132 856.34 which she earned at New Era) as compensation for her loss of income and damages as a result of her unfair dismissal;
(c) the request for outstanding leave and severance (pay) cannot be entertained because it was not included in the particulars of the complaint;
(d) the respondent is ordered to pay the cost of suit in terms of section 20 of the Labour Act, because it promised the complainant the right to an appeal hearing and subsequently denied it without a proper explanation. There is no reason why the respondent could not have appointed an independent

appeal chairperson. Its actions in the circumstances are vexatious and aimed at frustrating the complainant;

(e) the above payment should be made to the representative of the complainant on or before 29 February 2008. Interest at a rate of 20% per annum shall be added to any outstanding amount not paid before 29 February 2008.

[4] The appeal lies against the finding and order of the district labour court.

[5] The grounds of appeal filed were set out as follows:

"1. That the learned Chairperson erred in law and/or on the facts in finding that the respondent was dismissed unfairly.

2. That the learned Chairperson erred in the law and/or on the facts in failing to consider the litany of previous similar offences committed by the respondent.

3. That the learned Chairperson erred in law and/or on the facts in failing to consider that it is common cause between the parties that the respondent had been found guilty on similar charges in October 2005.

4. That the learned Chairperson erred in law and/or on the facts in failing to properly consider that corrective and/or educational measures taken in the past had no effect on the respondent.

5. That the learned Chairperson erred in law and/or on the facts in failing to considered that corrective action repeatedly taken in the past by way of warnings, both verbal and written, had no effect on the respondent.

6. That the learned Chairperson erred in law and/or on the facts in finding that a final written warning was the appropriate sanction under the circumstances.

7. That the learned Chairperson erred in law and/or on the facts in finding that the outside Chairperson (who was not the employer) had the mandate to finally decide about a warning/dismissal.

8. That the learned Chairperson erred in law and/or on the facts in failing to consider that the persistent time-keeping offences committed by the respondent were considered by the appellant to be serious.

9. That the learned Chairperson erred in law and/or on the facts in failing to find that, considering the respondent's history of time-keeping offences, her dismissal was justified and fair.

10. That the learned Chairperson erred in law and/or on the facts in finding that the respondent had proved losses amounting to N$110 143.66.

11. That the learned Chairperson erred in law and/or on the facts in failing to consider that the respondent was only unemployed for a period of three months.

12. That the learned Chairperson erred in law and/or on the facts in any event, in failing to find that the circumstances of the case warrant no more than a nil award.

13. That the learned Chairperson erred in law and/or on the facts in any event, in failing to consider that the respondent had additional income during the period that she was unemployed.

14. That the learned Chairperson erred in law and/or on the facts in failing to consider that the respondent, prior to the hearing, contemplated terminating the employment relationship, therefore the learned Chairperson erred in calculating her losses on the entire period from date of termination of employment to date of judgment.

15. That the learned Chairperson erred in law and/or on the facts in finding the appellant liable for costs in terms of section 20 of the Labour Act, Act 6 of 1992."

[6] It was submitted by Ms van der Westhuizen who appeared on behalf of the respondent in this appeal that the issues to be decided are the following:

(a) did the employer (appellant) have the authority to dismiss the employee (respondent) in the light of an independent chairperson already having imposed a sanction ?

(b) if the answer to (a) is affirmative, was dismissal an appropriate sanction in the circumstances ?

(c) if the answer to (b) is negative, was an award for damages in the amount of N$110 432.66 and costs an appropriate award ?

[7] It is common cause that the respondent had previously on 31 October 2005 during a disciplinary hearing presided over by a Mr Kauffmann been convicted of *inter alia* refusal to work stipulated work hours. Mr Kauffmann during the proceedings in the district labour court testified on that previous occasion he recommended as a sanction a written warning and that this recommended sanction was conveyed orally to the respondent personally.

It is further common cause that there is no record or documentary proof of this recommended sanction. It is common cause that no record of a previous written warning was introduced as aggravating circumstances before Mr Roberts pronounced the sanction of a final written warning in the second disciplinary hearing.

The respondent disputes that she was notified of the written warning she allegedly received during the first disciplinary hearing. Mrs Smith confirmed that she never issued such written warning. The respondent did not dispute that she was present when Mr Kauffmann delivered his verdict of guilty.

Respondent on 5 December 2005 filed an appeal against the verdict of guilty pronounced during the first disciplinary hearing which appeal was subsequently withdrawn by the respondent.

[8] On 4 November 2005 the appellant sent out a memorandum to al staff members which *inter alia* contains the following warning:

> "Working hours will have to be strictly adhered to, with such working hours as being stipulated by the direct supervisor."

[9] All the staff members including the respondent acknowledge receipt of this memorandum.

[10] The appellant recorded the late arrival times of the respondent for the months of November 2005, December 2005 and January 2006 until May 2006 after it appeared that respondent refused to abide by the stipulated working hours. During this period respondent was late on sixty six days. During this period respondent had also been warned for being found sleeping at work.

[11] There is a dispute whether the chairperson Mr Roberts had the mandate only to make a recommendation of the appropriate sanction to the appellant or whether he indeed could himself impose an appropriate sanction.

[12] Mr Roberts testified that he had assumed that he had to take the final decision regarding an appropriate sanction since he had never previously where he had provided at disciplinary hearings been required to only make a recommendation. He further testified that he would not find it strange if a chairperson at a disciplinary hearing would be required to make a

recommendation only because he was aware of other instances where chairpersons were asked only to make a recommendation regarding an appropriate sanction.

Mr Roberts testified that he had not been asked to make a recommendation only.

[13] Mrs Smith the sole shareholder of the appellant testified that she had the final decision as to the fate of an employee. The chairperson of the first disciplinary hearing Mr Kauffmann corroborated her testimony in this regard.

[14] Mr Dicks who appeared on behalf of the appellant referred to *Jamafo* o.b.o. *Nero and Pick 'n Pay (2007) 28 ILJ 688 (CCMA)* where it was held that an employer may dismiss an employee even though the chairperson of a hearing had recommended otherwise. On 692 A – C with reference to the matter of *Tshishonga v Minister of Justice & Constitutional Development and Another (2006) 27 ILJ 1541 (LC); [2006] BLLR 601 (LR)* the following was said by Van Staden C:

> "The above, in my view, settles the principle that an employer may dismiss an employee even though the chairperson of a hearing had recommended otherwise. It must also be borne in mind that unless an employer appoints the chairperson of a hearing as its agent, it is not bound by the decisions of the chairperson. At best the chairperson can make recommendations. The fact that senior management does not agree with such a finding does not necessarily render a subsequent dismissal unfair. It is ultimately the employer and the chairperson that decides whether to dismiss or not.
> The only other question is whether applicant's dismissal was fair."

[15] It was therefore submitted that even if Mr Roberts was under the impression that he could take the final decision and not only make a

recommendation, this did not derogate from Mrs Smith's prerogative to take such decision as the only director and shareholder of the appellant.

[16] Mrs van der Westhuizen submitted that where there is no procedure in place for the review of a chairperson's decision in a disciplinary hearing, the employer is not allowed to do so.

If however such procedure does exist, the employee should at least be granted an opportunity to make representations to such reviewing official before a final decision is made.

This Court was in this regard referred to the matter of *Mubita v Namibian Broadcasting Corporation NLLP 2004 (4) 114 NLP* as authority for such a contention.

From a reading of this judgment (at 116) it appears to me that the remarks by the Court were *obiter*.

[17] Another matter which seems to support the contention that where there is no appeal or review procedure in place an employer may not overturn the decision of the chairperson of the disciplinary hearing is *TransNamib Holdings Limited v Carstens 2004 (4) NLLP 209 NLC* at *215* where Hannah J said the following:

> "Not only was the respondent twice found not guilty on the charges brought against him, not only was he not afforded the opportunity to make representations to the Reviewing Officer but no provisions existed in applicant's disciplinary rules for a review of a finding favourable to an employee. Even the appeal lodged by the respondent received no attention. Insofar as the applicant now contends that this "pending" appeal had the effect of deferring the jurisdiction of the District Labour Court because the respondent had not exhausted all his internal remedies

> I hold that due to the applicant's inaction the appeal must be deemed to have lapsed."

[18] The chairperson in the district labour court found an authority of the *Mubita* and *TransNamib* matters *(supra)* that Mrs Smith was not competent to impose a sanction after Mr Roberts an independent person had already imposed a sanction.

[19] The chairperson in the district labour court on p. 376 of the record, paragraph 17 expressed himself as follows:

> "Despite these procedural irregularities, which made the process unfair and untenable the court has nevertheless considered whether there was a valid and fair reason for the dismissal of the complainant. This Court found that on the evidence presented by both parties that the sanction of a final written warning is appropriate in the circumstances, taking into account that the respondent did not prove the outcome of the previous disciplinary hearing on a balance of probabilities."

[20] The chairperson in the district labour court stated that the respondent had conceded that she had correctly been found guilty on the first charge (refusal and/or failure to work stipulated working hours on various occasions), by the chairperson, Mr Roberts during the second disciplinary hearing.

[21] If the chairperson in the district labour court meant with "did not prove the outcome of the previous disciplinary hearing" referred to the *sanction* allegedly imposed then he is correct. However it is common cause that the respondent had been *found guilty* in the first disciplinary hearing of "refusal and/or failure to work stipulated working hours".

[22] In the light of the fact there was no appeal procedure in place at the applicant, I am of the view that the appellant acted arbitrarily and unfairly when dismissing the respondent without firstly informing respondent of her intention to review the sanction imposed by Mr Roberts, and secondly, not affording the respondent an opportunity to make presentations before coming to a final decision.

[23] Even in *Jamafo (supra)* referred to as authority that an employer is not bound by the sanction imposed by the chairperson in a disciplinary hearing, fairness is a crucial consideration. The facts in *Jamafo (supra)* are however distinguishable from the facts in the matter under consideration.

In *Jamafo* during a disciplinary enquiry and employee was *inter alia* issued with a final written warning. When the matter later came to the attention of senior management a *second disciplinary hearing* was convened and the employee was dismissed.

In this appeal it is common cause that no such second disciplinary hearing was held but that the appellant unilaterally dismissed the respondent.

It is in this context that it was held in *Jamafo* that an employer may dismiss an employee even though the chairperson of a hearing had recommended otherwise.

[24] Also in *Nampak corrugated Wadeville v Khoza (1999) 20 ILJ 578* the South African Labour Appeal Court held at 584 A that a court should not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction.

[25] What are the consequences presently where the appellant had acted arbitrarily and unfairly in dismissing the respondent ?

[26] Mr Dicks submitted that the district labour court sat as a court of first instance and that the proceedings before it constituted a re-hearing of the informal proceedings at the disciplinary hearing.
He further submitted that the chairperson of the district labour court failed to consider the provisions of sections 46 (4)(a)(iii) and 46 (4)(b)(ii) of the Labour Act, Act 6 of 1992 which reads as follows"

> "46(4) In considering –
>
> (a) whether an employee has been dismissed unfairly or whether any disciplinary action has been taken unfairly against such an employee, the district labour court shall have regard –
>
> (iii) to the conduct and capability of the employee concerned during the period of his or her employment."

and

> (b) the nature of an order to be made in the event of the district labour court finding that the employee concerned has been dismissed unfairly or that disciplinary action has been taken unfairly against such an employee, the district labour court shall have regard –
>
> (ii) to the circumstances in which an employee concerned has been dismissed or such disciplinary action has been taken against such employee, including the extent to which such employee has contributed to or caused his or her dismissal or disciplinary action."

[27] In *Kamanya & Others v Kuiseb Fish Products Ltd (1996) 17 ILJ 923* the Labur Court of Namibia as per O'Linn J at 925 J – 926 B stated at following

regarding the nature of a subsequent disciplinary hearing or hearing in the district labour court:

> "After all, our Labour Act requires a fair hearing and a fair reason for dismissal, whether or not this was done in a single hearing or in the course of more than one hearing and irrespective of whether one of those hearings is labeled an "appeal" hearing. Surely much depends on the nature of the so-called appeal - … Furthermore, the appeal in terms of an employer's code can have in mind the setting aside of the proceedings of the initial disciplinary enquiry, precisely because such initial enquiry was unfair or even a nullity. Surely in such a case, the appeal itself corrects the procedure and/or result of the mutual enquiry, considers the issues de novo and comes to its own decision either on the existing evidence, or on new evidence adduced at the rehearing."

and continues at 926 E – H:

> "It should further be kept in mind that the hearing of the complaint by the District Labour Court is not only whether the *employer* held a fair hearing but whether *in fact* there was a fair reason for the dismissal. The District Labour Court hears all the evidence and arguments placed before it and decides the latter issue irrespective of what the employer's domestic tribunal found.
>
> Again it would be a travesty of justice if the District Labour Court is compelled to order re-employment or reinstatement or compensation to be paid by the employer, because the employer did not follow a fair procedure, but the District Labour Court is convinced that the employer has proved before it that there was a fair reason for dismissal. In such an instance it seems to me the District Labour Court would be justified, in accordance with s. 45 (1) read with s. 45 (3) to find that the employee has not been dismissed unfairly or that the disciplinary action has not been taken unfairly and that the complainant's dismissal must therefore be confirmed."

[28] Referring *inter alia* to sections 46 (4)(a)(iii), referred to *(supra),* the following appears at 927 G – I:

> "Having regard to the *procedure* used in the particular instance and in comparable circumstances, does not mean that the District Labour Court would not be entitled to reject the complaint if the *conduct* of the employee amounted to gross misconduct.
> 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'."

and at 928 the following appears:

> "In the alternative, if I am wrong in the abovestated 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."

[29] This principle (*supra)* where a court is asked to decide whether or not there was a fair procedure and a valid and fair reason for dismissal (in compliance with section 45(1)(a) of the Labour Act, 6 of 1992) if satisfied that the employer proved the existence of a valid and fair reason for a dismissal, refuse to order reinstatement or compensation, even if it is established that no fair procedure preceded the dismissal, was followed in the matters of *Kahoro and Another v Namibian Breweries Ltd 2008 (1) NR 382 (SC) at 390 – 391* and *Peace Trust v Beukes 2010 (1) NR 134 LC)* at *p. 152 – 153.*

[30] The proceedings in the district labour court was a rehearing of the charges preferred against the respondent in the second disciplinary hearing.

[31] Respondent does not dispute that on various occasions she arrived late at work. It appears from Exhibit E that the late arrivals varied between 5 minutes to 2 hours. It was submitted by Mr Dicks that during a seven month period (November 2006 until May 2007) the respondent arrived late fifty percent of the time.

[32] It is not disputed that the respondent was previously disciplined for arriving late, that she received written warnings, and that a memorandum was sent out (signed by respondent) which clearly stipulated that working hours will have be strictly adhered to. These corrective measures did not alter the respondent's pattern of late coming.
Late coming is a form of absenteeism.
See *Mthetwa and Capital Caterers (2007) 28 ILJ 1859 (CCMA).*

[33] John Grogan; Workplace Law 9th edition at p 184 stated the following in respect of time-related offences:

> "In assessing the fairness of a dismissal for absenteeism or unpunctuality the following factors are normally considered relevant: the reason for the employee's absence, the employer's work record, and the employer's treatment of the offence in the past.
>
> The onus rests on the employees to tender a reasonable explanation for their absence. To justify dismissal the courts require the absences to be of unreasonable duration or frequent enough to disrupt work. Absenteeism is viewed in a more serious light if the employee concerned was expressly instructed to report for duty at the time, and cannot offer an excuse, such as illness, to justify the failure to report for duty."

[34] I could find in the record no reason offered by the respondent for her repeated absenteeism. Furthermore in spite of the fact that respondent was

instructed to adhere strictly to working hours she continued to persist with her conduct of arriving late at work.

[35] In *De Beers Consolidated Mines Ltd vs Commissioner for Conciliation, Mediatron & Arbitration & Others (2000) 21 ILJ 105 at 1055* the South African Labour Court of Appeal as per Zondo AJP referred to with approval to the matter of *Toyota SA Motors (Pty) Ltd v Radebe & Others (2000) 21 ILJ 340 (LAC)* where the following appeared in para. 15:

> "Although a long period of service of any employee will usually be a mitigating factor where such employee is guilty of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal."

[36] It was further held in *De Beers (supra)* as per Conradie JA that it would be difficult for an employer to re-employ an employee who has shown no remorse. In addition the likelihood of an employee to repeat his misdemeanor is obviously also a factor to be taken into account when considering an appropriate sanction.

[37] A factor to be considered whether an employee has been dismissed unfairly includes the extent to which such an employee has contributed to or caused his or her dismissal (Section 46 (4)(b)(ii) of Act 6 of 1992).

[38] I am of the view that the respondent to a large extent contributed to her own downfall through her constant absenteeism. The presiding officer in the district labour court in his judgment stated that he has considered the conduct of the respondent with reference to the provisions of section 46 (4)(b)(iii) of Act 6 of 1992 in coming to an appropriate compensation award.

[39] It appears to me that he did not consider the provisions of section 46 (4) (b)(ii) in considering whether or not the respondent had contributed to or caused her dismissal.

[40] The chairperson in the district labour court did also not (he made no reference to it) consider the case of *Kamanya (supra)* and the principle enunciated therein as discussed *(supra*). Had he done so he might have come to a different conclusion. It appears to me the magistrate reasoned that because Mrs Smith followed no fair procedure in dismissing the respondent, for that reason alone the respondent had been dismissed unfairly.

[41] An important issue not considered by the chairperson in the district labour court is the undisputed fact that the respondent had a previous *conviction* for refusal and/or failure to work stipulated working hours.
Even if it is accepted the sanction of a final written warning had not been conveyed to the respondent at that stage the fact that respondent had been found guilty is an aggravating circumstance which could not have been ignored by the chairperson in the district labour court.

[42] The respondent in spite of this previous conviction should have been on her guard not to repeat the same transgression. Instead she chose to ignore this previous conviction. It is highly likely that the respondent would have continued with her unacceptable behaviour in spite of the final written warning imposed at the second disciplinary hearing.

[43] I am of the view (on the authorities referred to *(supra)* i.e. *Kamanya, Peace Trust* and *Kahoro*) that there was a fair and valid reason for the dismissal of the respondent in spite of the unfair procedure.

[44] The repeated absenteeism in the absence of any explanation or any plausible explanation in addition to the absence of remorse amounts to gross misconduct on the part of the respondent which justifies the dismissal of the respondent.

[45] I am not persuaded by the submission made on behalf of the respondent that appellant failed to show it suffered any detriment in respect of respondent arriving late. In my view the prejudice is obvious. The respondent was at the time of her dismissal employed as a "sub-editor proof reading" and it is not difficult to imagine the delay in meeting deadlines set for the publication of newspapers as a result of her absenteeism.

[46] In view of the reasons *(supra)* I am of the view that the chairperson in the district labour court misdirected himself on the facts as well as the law in confirming the finding of the chairperson of the second disciplinary hearing and awarding compensation in favour of the respondent.

[47] The chairperson also awarded costs against the appellant on the basis that appellant acted vexatiously by not appointing an independent appeal chairperson and thereby frustrating the respondent.

[48] I doubt that such a conclusion could be drawn under the circumstances. The respondent was informed that there existed no appeal procedure in the scheme of things at the appellant.
In terms of section 20 of Act 6 of 1992 no cost order may be awarded except in those instances where a litigant in initiating or opposing proceedings acted frivolously or vexatiously.

[49] The respondent instituted proceedings in the district labour court and the appellant was entirely justified in opposing such proceedings. There is no indication that the appellant in opposing these proceedings acted vexatiously.

[50] The question posed by Ms van der Westhuizen at paragraph [6] *(supra)* should be answered in the negative, because for the reasons provided this was not the only issue to be considered.

[51] I am therefore of the view that under the circumstances of this case that the respondent had not been dismissed unfairly and that the appeal should succeed.

[53] In the result the following orders are made:

1. The order of the chairperson of the district labour court replacing the dismissal of the respondent with a final written warning is hereby set aside.

2. The dismissal of the respondent is confirmed.

3. The compensation order of N$110 143.66 in favour of the respondent is set aside.

4. The cost order in terms of the provisions of section 20 of Act 6 of 1992 is set aside.

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HOFF, J

ON BEHALF OF THE APPELLANT: **ADV. DICKS**

Instructed by: **KOEP & PARTNERS**

ON BEHALF OF THE RESPONDENT: **ADV. VAN DER WESTHUIZEN**

Instructed by: **GF KÖPPLINGER LEGAL PRACTITIONERS**