**REPUBLIC OF NAMIBIA**

**IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**Case Number: HC-MD-LAB-APP-AAA-2020/00029**

**In the matter between:**

**NAMDEB DIAMOND CORPORATION** **APPELLANT**

**And**

**ISMAEL MUPETANI** **RESPONDENT**

**Neutral citation:** *Namdeb Diamond Corporation v Mupetani* (HC-MD- LAB-APP AAA-2020/00029) [2021] NALCMD 9 (16 March 2021)

**Coram:** RAKOW, J
**Heard**: 19 January 2021
**Order Delivered:** **16 March 2021**
**Reasons Delivered:** **19 March 2021**

**Flynote:** Labour Law – Labour Act No. 11 of 2007 - Arbitration award – Appeal against - Section 33 - Substantive and Procedural fairness – Procedure not followed - compensation of lost wages – Questions of Law - Section 89 – Reinstatement – Court's interference with an arbitrator's decision.

**Summary:** The respondent was employed by the appellant at the appellant's Southern Coastal Mine, and occupied a supervisory position of trust, by virtue of the employment agreement entered into between the parties. The respondent was quite

familiar with the appellant's policies and procedures as he had worked for the appellant for many years. Amongst these policies, was a prohibition from testing the appellant's security systems as such an act shall be deemed to be preparatory to an attempt to remove diamonds from the mine and such a person charged with this will face disciplinary action for making an attempt to remove contraband from the Mine.

The respondent was charged with contravening the appellant's policies and was subsequently dismissed. The matter went to the Labour Commissioner's office and an arbitrator ruled that the dismissal of the respondent was procedurally and substantively unfair. Amongst other things, the arbitrator ordered that the respondent be reinstated by the appellant in the position which he would have been in had he not been dismissed. The appellant then lodged an appeal against the arbitrator's decision.

*Held* that, dismissals of employees must be both substantively and procedurally fair. Held that, it was not clear to the court whether or not there was a proper pre-dismissal hearing as no record of the hearing was provided.

*Held* that, although the principles for a fair pre-dismissal hearing are not absolute rules, they should be regarded as guidelines to show whether the employee was given a fair hearing in the circumstances of each case.

*Held* further that, where an employer and employee enter into agreements regarding the terms upon which disciplinary hearings are to be conducted, the employer should procedurally adhere to those set terms.

*Held* that, even where an employer succeeds in proving that it had a valid and fair reason to dismiss an employee, the dismissal is deemed unfair if the employer fails to prove that it followed a fair procedure.

*Held* that, when it comes to the court interfering with an arbitrator's decision, the test is not whether or not the court agrees but whether the decision reached by the arbitrator regarding the fairness of the proceedings is one that a reasonable arbitrator could have reached.

*Held* that, the court can only interfere with the decision of an arbitrator if the court believes that the arbitrator came to a conclusion which no other reasonable arbitrator could have come to and in this instance it is not the case.

*Held* that, a question of fact is not appealable in terms of section 89(1)(a) of the Labour Act, 2007, it only allows for an appeal 'on any question of law'. Therefore the appellant cannot appeal on whether or not a dismissed employee mitigated his losses.

*Held* that, when making a decision with regards to reinstatement, courts must exercise their discretion judicially and should consider all the circumstances of the dismissal.

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**ORDER**

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1. The appellant's appeal against the finding by the arbitrator that the termination of employment of the respondent was not procedurally and substantively fair is dismissed.
2. The appellant's appeal against the order of the arbitrator that the respondent be reinstated in the position which he would have been had he not been so dismissed is upheld
3. The appeal against the order that the respondent is to receive back pay for the whole period of dismissal being 26 April 2018 till date of reinstatement is upheld
4. The order of the arbitrator regarding the reinstatement and back pay is replaced with the following order:
   4.1. The respondent is awarded compensation in that the appellant is ordered to pay the respondent 6 months' salary on or before 30 April 2021.
5. There is no order as to costs.
6. The matter is removed from the roll and is regarded as finalized.

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**JUDGMENT**

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RAKOW, AJ:

Introduction

[1] This is an appeal against an award made by the arbitrator, Mr Windstaan, in favour of the respondent delivered on 17 April 2020. His findings were that the dismissal of the applicant was both procedurally and substantively unfair. He then ordered that the respondent be reinstated by the appellant in the position which he would have been in had he not been so dismissed, therefore retrospectively to the date of his dismissal which was 26 April 2018. The appellant was ordered to pay the respondent's back pay for the period of the dismissal – being from 26 April 2018 until reinstatement and this payment was to be made on the normal payday. No order regarding costs was made. It was against this order that the appellant then lodged their appeal.

Background

[2] The respondent occupied the position of Metallurgy Plant foreman at the appellant's Southern Coastal Mine. This is a supervisory position and therefore a senior position of trust. He was further well acquainted with the appellant's policies and procedures. He initially started working as a training officer and one of the requirements governing the appointment was that the employee shall at all times act honestly and faithfully towards Namdeb, the appellant. He further undertook to strictly observe the security regulations of Namdeb and agreed that the relationship shall not only be subject to the terms and conditions of the employment agreement but also the provisions of the Act, any and all Namdeb policies, rules, regulations and procedures.

[3] One of these policies dealing with accessing the mine through the Security Detection System, the Scannex system, which happens almost daily, is the PO-SE-01 policy, or the policy dealing with possession and handling of unpolished diamonds. Section D of this policy reads as follows:

'….Employees exiting from the mine will be deemed responsible for all property found in their possession, or handed in by them at security. Employees are therefore reminded that the onus lies with them to ensure those articles in their possession or handed in by them, are free of contraband.'

'All articles leaving the mining area are subjected to security examination in terms of the Diamond Act 13 of 1999 as amended.'

'No hand carried articles must be taken through the exit passages…'

'Should it be reasonably suspected that a person is attempting to remove items from the Mine with the express purpose of testing the Security Detection System, such act shall be deemed to be preparatory to an attempt to remove diamonds from the area and such person will therefore face disciplinary action for making an attempt to remove contraband from the Mine'

[4] This policy is brought to the attention of the employees during their initial induction and from time to time during other trainings.

[5] On 9 April 2018 the respondent was exiting the mining area and had to pass through the Scannex system. An x-ray image taken from the respondent at 06h52 showed a dense, round, foreign object on the string of his string bag placed between his legs. This prompted the security personnel to direct him to a cubical to determine the nature of the foreign object they observed on the x-ray. Before placing him in the room, the room was cleared of everything including the single chair in the room to ensure that no suspicious objects were present. The respondent entered the search room and a search was conducted of all his belongings while he sat on the chair. The object that was seen on the x-ray could not be found.

[6] The respondent was taken through the Scannex system again and the foreign object previously witnessed, had disappeared. The respondent was returned to the Search Room and the security officer turned over the chair on which the respondent sat and found a ball of Prestik stuck to the frame of the chair. The respondent initially denied any knowledge of the Prestik. He was warned by the senior security officer that he is under investigation for contravening company policy PO-SE-01 – testing the security detection system. The respondent was then accompanied to his locker inside the mine and two similar pieces of Prestik were found inside his locker. He then explained that he used to Prestik to paste paper on the notice boards. About 4 hours later the respondent admitted that the Prestik belonged to him and he stuck it under the chair in the Search Room.

[7] He was subsequently charged with the contravention of company policy PO-SE-01 – testing of the security detection system and contravention of ER 4.4.6 – Breach of trust in that the employee's action caused a reasonable suspicion of dishonesty. A disciplinary hearing was held which was chaired by a certain Anthony Phillips, the Southern Coastal Mine Production Accountant, and the respondent was found guilty on both charges and it was recommended that he be dismissed. The respondent appealed to Rodney Feris, the acting Finance Manager who was the head of a department, who also confirmed the conviction as well as the respondent's dismissal. The respondent then further appealed the decision of Rodney Feris to the Disciplinary Review Committee, which upheld the respondent's conviction and dismissal. During the Arbitration hearing, it was pointed out that the initial hearing should have been heard by an official at the Head of Department level or above.

[8] It was submitted in court that the issue with the Prestik is that the appellant's security department does not permit it to be removed from the mine through the Scannex system as it is used by syndicates to remove diamonds from the mine. There was evidence lead of a certain Karel du Toit as to a number of arrests that have been made of persons trying to use Prestik to remove diamonds from the mine as it can easily be transferred from a hand-held object to another object when the suspect is searched. The respondent was also aware that Prestik was not permitted to go through the Scannex system and he stated it as such in his statement of 16 May 2018.

[9] The respondent explained that some weeks before the incident his vehicle was broken into and he lost some property as a result thereof. He then put posters up at the Scannex screening facility seeking information relating to the break in although this version was questioned by Karel du Toit. The respondent explained that he took down the posters while waiting to go through the Scannex system and discarded the posters in the dustbin but kept the Prestik in his hand. Somehow the Prestik was attached to the neck of his string bag which he put between his feet when he was passed through the scanner. When he was taken to the Search Room, he panicked as he understood that the Prestik putty was not permitted through the mine exit Scannex system and he then stupidly acted, unintended and unconsciously

defensive and still in a freaked out mode, and he hid the putty under the chair he sat on.[1]

[10] The evidence presented however is that the respondent was friendly, laughing and talking normally earlier that morning but when the prestik was found under the chair, he became quiet and uncomfortable. During the cross-examination of the respondent he relied heavily on his state of panic and 'sleep-walking mode' he went into as an excuse why he conducted himself in this manner. The respondent claimed that he made a mistake but he had a number of options that he could have done, for example Epafras Simon testified that if he declared the Prestik, no charges would have been brought against him. A certain Andreas Bock testified that when realizing his mistake, the respondent could have used one of the intercoms in the Scannex booth or in the holding area to alert the security that he had made a mistake. He could even have placed it in the dustbin, in the same dustbin where he disposed of the posters.

[11] Mr Windstaan, the arbitrator compiled a document titled arbitration award after hearing the matter. Whilst discussing the award, he summarizes the evidence that was presented to him extensively. During his evidence Karel du Toit dealt with two other instances where persons were found with objects and charged with similar offences, the one being a certain Webber, a Pretorius and a Beukes. Webber received a written warning while Pretorius was dismissed although found not guilty on criminal charges. Beukes was suspended and a warning letter addressed to the contractor by whom he was employed and the employer's permit withdrawn.

[12] During the hearing a certain Hennie van der Bergh from the HR office testified that he sourced Anthony Phillips who is the Cost Accountant and on band D, to chair the disciplinary hearing. The code that was used, the so called Green Book indicates that these type of cases will be heard by an official at the Head of Department level or above, and Anthony Phillips is not a head of department, but he understood the Green Book to be only a guide as band D employees can chair hearings and make recommendations for dismissal, they just do not make final decisions. For this he also referred to the Green Book, page 23. This witness also referred to a final synopsis by the presiding official of the hearing.

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[1] As per the respondent's statement to Epafras Simon on 16 May 2018 – record of proceedings Part A 41

Reasons provided for the ruling of the arbitrator

[13] In the abovementioned document Mr Windstaan then proceeds to discuss Procedural fairness. It seems that he recorded his findings as answers to random questions. The court is however not sure from where these questions emanate but it seems to be the questions the arbitrator felt needs answering in determining whether or not a fair procedure was followed.

'Was the original complaint received in writing by the applicant? – No otherwise it should have been exhibited like all the other documents that form part of the disciplinary action of the respondent and only charge sheet/notice of disciplinary hearing, Exhibit E of Appendix 1, page 72 has been exhibited as serving the purpose of original complaint, while the Disciplinary Code, section 5 point 5.1 clearly stipulates that the maintenance of discipline is strictly a function of line management. Officials of the Industrial Relations section should be available to assist line management at every state on such matters as the incidence and seriousness of offence, and any implications of proposed disciplinary action on industrial relations generally. As far as possible, they should, by discussion with the official hearing the case, ensure that disciplinary action and procedures are consistent in all departments and are conformity with the Disciplinary Code, therefore adhere to their Disciplinary Code, Section 2, point 2.3. Documentation and Procedure for Formal Complaints, 2.3.1 The supervisor handling a formal complaint must investigate the case with the assistance of the Industrial Relations Section and ensure that the relevant sections of the complaint are correctly completed within 24 hours of the offence having been committed or that supervisor is having become aware of the fact that an offence has been committed. The complaint form should be passed without delay to the Industrial Relations section or appropriate official, as the case may be, who should decide whether to:

(a) deal with it himself when the case falls within his authority, and/or;

(b) suspend the accused pending full investigation of the complaint (if this has not already been done)

(c) refer the complaint back to either the Human resources

The respondent have said after the complaint memorandum was discovered that first witness will come and explain and that it will be exhibited, but that has never materialized and makes the disciplinary hearing from the onset fatally flawed.

- Was the complainant fully investigated and all aspects of the investigation recorded in writing? No, only Final Investigation Report exhibited as Investigation Report by the respondent of Epafras Simon, Senior Security Officer, the Investigation Officer as Exhibit A of appendix 1, page 37-42

- Written statements taken down from respondent and all witnesses? No, the respondent represented by the witnesses and statements of the fifth and sixth witnesses of the respondent were not taken, because it seems that they were not called up for the disciplinary hearing.
- Applicant advised in writing of date, time and venue of disciplinary hearing? Yes, applicant received the charge sheet/notice of disciplinary hearing on the 08 May 2018, Exhibit E of Appendix 1, page 72
- Applicant to have reasonable time in which to prepare his defense and appoint his representative? The applicant received the notice of disciplinary hearing on the 09 may 2018 and the hearing scheduled for 16 May 2018 and the applicant represented by Mr. Savuka Mbidi, Full Time Shop Steward as per Exhibit J of Appendix 1, page 77.
- Applicant advised in writing of the full nature and details of the charge/s against him? No, in the first instance, the original formal complaint in writing was not received by the applicant within 24 hours of the offence being committed or the supervisor having become aware of the fact that an offience has been committed as per the disciplinary code, while the applicant should know the nature of the accusation against him in terms of the requirements of natural justice that have to be complied with during proceedings of a disciplinary hearing and only after 29 calendar days or 21 working days, the applicant received charge sheet/notice of disciplinary hearing that serves as formal complaint as stated by the respondent.
- Applicant given the opportunity to plead to the charge? Yes, applicant pleaded not guilty.
- Disciplinary hearing held? Yes, Synopsis of Hearing attached as per Exhibit J at Appendix 1, bundle of documents. Minutes of the disciplinary hearing indicating proceedings missing.
- Respondent put their case first, leading evidence and calling witnesses to testify? No document as prove on record, because the minutes of the disciplinary hearing not attached.
- Applicant is given opportunity to cross question witnesses? No document as prove on record, because the minutes of the disciplinary hearing not attached.
- Applicant leads evidence in his defense? No document as prove on record.
- Chairperson decides on guilt or innocence, based on the evidence presented by both parties and on the balance of probabilities. As per annexure J at Exhibit 1 (Synopsis of Hearing of Mr. Ismael Mupetami). That document cannot be regarded as presenting evidence by both parties and findings on the balance of probabilities recorded, only the minutes of the disciplinary hearing proves sufficient.
- Chairperson advises the applicant of his rights to appeal and to refer the matter to Appeal Committee. The applicant was afforded the opportunity to appeal and he exercised that right and appeal rejected.'

[14] Some other findings were also captured in this document. He found that there was perceived bias on the presiding officials of the disciplinary action, being the fact that the Chairperson of the Disciplinary Hearing, Chairperson of the Appeal Hearing and the Chairperson of the Disciplinary Review Committee consists of officials from the same Finance Department of the respondent and on account of the fact that bias need not only to be actual but the perception of bias also suffices. He discuss this finding as follows:

'Thus, courts will find bias to exist in the following circumstances: if any of the presiding officers of a disciplinary hearing is, for instance, involved in the proceedings as a complainant, a witness or an investigator, or in the preparation or formulation of the charges, or if any one of them has a personal interest in the outcome of the hearing. In addition, bias will be found to exist if any of the presiding officers has had a history of animosity or friction with the employee concerned. In short, the inquirer must act in good faith, and must also respect the rules of natural justice and act fairly.'[2]

[15] He further found that where there are express contractual terms governing a disciplinary procedure as, for example, contained in the employer's disciplinary code, it is no defense for an employer to contend that the alternative procedure that he followed was equally fair. An employee 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 or regulations – whether unilaterally or after negotiations with a trade union – he is obligated to stick to its provisions meticulously.

[16] It was further his finding that an employer may, for a 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. The respondent stated through its witnesses that the charge sheet/notice of disciplinary hearing serve the same purpose like the complaint memorandum that should have been received by the applicant within 48 hours after the offence has been committed and that has not be exhibited for a reason only known to the respondent.[3]

[2] See page 319 of the indexed bundle.
[3] See page 319 of indexed record.

[17] Mr Windstaan followed a similar process as alluded to earlier when discussing substantive fairness.

- Was a company rule, or policy, or behavioral standard broken? If so, was the applicant aware of the transgressed rule, standard or policy or could the employee be reasonably expected to have been aware of it? The applicant was aware of the rule as stipulated in the disciplinary code: Contravention of Company Policy PO-SE-01 as specifically related to Possession and Handling of Unpolished Diamonds, Diamond dealings and or found or handling contraband and not as Testing of Security Detection System therefore repeat when informed by the Investigation Officer and was aware of B reach of Trust – Define and specified.
- Has this rule been consistently applied by the respondent? No John H weber, Company No 241644, Waste Management Officer Retired at the respondent after charge with Testing of the Security Detection System and the fifth witness testified that Weber received final written warning.
- Is dismissal an appropriate sanction for this transgression? Yes as per the disciplinary code
- In other cases of transgression of the same rule, what sanction was applied? Document of dismissal forwarded and final written warning as of above not forwarded.
- Was the circumstances surrounding the breach of the rule also being considered? No, the conduct of the Security Officers was not corrective and investigative but retaliatory because the Security Officers did not mention what they are looking for at the search room. The Security Officers are there to secure law and order and that must be applied consistently as per the Disciplinary Code – Section 1, point 1.1. In any organization, disciplined behavior is essential for the well-being of the individual and the successful achievement of the organization's objectives. This requires a framework of rules so that all members of the organization know what is expected of them. Such rules are generally known as Disciplinary Code. Such a Code of Discipline must be just and uniformly administered to ensure that all individuals are treated in a fair and consistent manner.
- Was the nature of the job being considered? No document of proof on record, because the minutes of the disciplinary hearing not submitted as evidence indicating that it was not considered, although the respondent examined witnesses on the demeanor of the applicant after the twelve hour shift in the search room. It was found that the applicant was indecisive as a result of certain factors mentioned.
- Was the sanction being imposed be consistent with previous similar cases? No document of proof on record, because it is the first of this type (prestik as foreign object)

and it should have been exhibited if such incidences had been experienced, although the fifth witness mentioned without prove that similar incidences has been experienced.

The arguments

[18] During the arbitration hearing the respondent and his legal representatives were at pains to show that the appellant did not deal consistently with charges under policy PO-ES-01 and referred to a certain Mr. Webber, Mr. Nel, Michael Burger and Mr. Bock. However these inconsistencies happened during the year 2002. It therefore seems that the application of discipline after 2002 was consistent. The appellant disputed the allegations made by the respondent and his representative and explained that the matter of Mr. Webber was different as Mr. Webber was screened on three different days, each of these days some foreign object was noted and it was suspected that it is the zip of the jacket being worn by Mr. Webber. After the third time, they eventually found a small stone in the hem of the jacket worn by Mr. Webber. The matter was investigated and he co-operated fully at all times. It was found that he did not intend to test the system as he exited with the same object three times. After the Union complained, he was charged and given a final written warning. The other matters seemingly did not exist and a certain Mr. Pretorius was convicted and dismissed on a similar charge.

[19] The arbitrator found the respondent's dismissal to be procedurally and substantively unfair. In the arguments for the appellant, counsel set out the following issues as issues raised by the arbitrator and then their response to the said issues:

(a) An employer must complete a full procedural and substantive check list on disciplinary hearing to state that he has followed a fair procedure and has a good reason to justify dismissal – There is no such requirement in Namibian law.

(b) The original complaint in writing was not received by the applicant – there is no such requirement, in any event not in respect of the charges against the respondent.

(c) The respondent did not follow clause 2.3.1 of its disciplinary code – this clause finds no application as the respondent was charged with contravening

policy PO-SE-01 and breach of trust. These are offences relating to dishonesty under clause 4.4 of section 4 of the disciplinary code.

(d) The complaint was not fully investigated and all aspects of the investigated recoded in writing and written statements were not taken from the respondents witnesses- there were not issues which the arbitrator had to determine. In any event, these issues cannot impact on the procedural fairness of the respondent's hearing and his dismissal. If the matter is not fully investigated and all aspects of the investigation not recorded in writing, he or she will probably be acquitted. There is no requirement of procedural fairness that written statements must be taken from witnesses.

(e) The original formal complaint in writing was not received by the respondent within 24 hours of the offence being committed; he only received the charge sheet/notice of hearing after 29 calendar days – There is no requirement that the formal complaint in writing must be received by the respondent within 24 hours of the offence being committed. Section 2.3.1 of the disciplinary code – which finds no application here – simply places an obligation on the supervisor to see that the relevant sections of the complaint form are correctly completed within 24 hours.

(f) The respondent did not put his case first, lead evidence or call witnesses to testify, he was not given the opportunity to cross-examine witnesses, did not lead evidence in his defense and the appellant did not call witnesses to testify and the respondent was not given an opportunity to cross-examine these witnesses – the respondent was represented at his disciplinary hearing. He never raised an issue that the appellant did not put his case first, lead evidence or call witnesses to testify. There is absolutely no evidence to this effect and the arbitrator was not called upon to determine these non-issues. The record is replete with evidence that the appellant called at least five witnesses. The respondent had the opportunity to cross-examine them. He testified that he exercised all his rights as set out in the charge sheet. The arbitrator seems to have plucked these bald assertions from thin air. None of these issues were in dispute between the parties, nor were they placed before the arbitrator for determination.

(g) The presiding officials of the disciplinary hearing, the appeal and the disciplinary review committee consisted of officials from the same department and therefore were biased.- there is no stipulation in the Agreement on Industrial Relations and Policies and Procedures that hearing officials may not be from the same department. In fact where the first hearing official is at managerial level grade D1, his or her recommendation can be affected only with the written sanction of the relevant head of department as per clause 3.8.2 and 8.1 of the said agreement.

(h) The appellant failed to prove that the charge sheet, notice of disciplinary hearing and/or complaint memorandum was received by the respondent within 48 hours of the offence being committed – there is simply no such requirement – the hearing official concerned will hear the case within two full working days of receiving the complaint, where possible as per clause 2.3.4(a) of the agreement.

(i) The disciplinary hearing was chaired by the production accountant who is a D1 graded official – Anthony Phillips was the Production Accountant at Southern Coastal Mine, where the respondent worked. Grade D1 is a managerial position. Hearing officials with such grade may only make recommendations regarding dismissal, which must then be affected with the written sanction of the relevant head of department, which (sic) in this case was Rodney Feris. He considered, confirmed and effected Anthony Phillips recommendation. Rodney Feris was Acting Finance Manager at the time and therefore a head of department.

(j) The appellant withheld minutes of the disciplinary hearing or did not take minutes of the disciplinary hearing – the arbitrator made such a finding in thin air. There is no basis for such a finding. The fact that a synopsis of the hearing was entered into the record, does not mean that minutes were not kept. In any event, this was not an issue between the parties or one raised in any of the appeal procedures by the respondent.

[20] With regard to the complaint that the initial chairperson of the disciplinary hearing was not a head of a department, although he was on a management band,

this court was referred to *Riekert v CCMA and others*[4]where Nel AJ said the following at para 22:

' I am in agreement with the proposition that disciplinary codes are guidelines and that an employer will not necessarily be regarded as having acted procedurally unfairly if it did not comply with certain specific parts of its code. I do not believe that the fact that there is clear case law to the effect that disciplinary codes are guidelines can under any circumstance be understood by employers as meaning that they may chop and change the disciplinary procedures they have themselves set as and when they wish to….. When an employer does not comply with aspects of its own disciplinary procedures, there must be good reason shown for its failure to comply with its own set of rules. An employer must justify the non-compliance with its own code and, having regard to all the relevant circumstances, the employer bears the onus to satisfy the objective requirement that their conduct was substantially fair, reasonable and equitable. '

[21] It was further argued by the appellant that the respondent failed to proof his losses. The burden of proof to proof his losses is on the employee and the court was referred to *Pinks Family Outfitters (Pty) Ltd t/a Woolworths v Hendriks*[5] and to Hoff JA who cited with approval *Springbok Patrols (Pty) Ltd t/a Namibian Protection Services v Jacobs and Others*[6], in *Namdeb Diamond Corporation (Pty) Ltd v Gaseb*.[7]

[22] The appellant submitted that no evidence regarding his losses was produced and neither was it pleaded in his summary of dispute. The court in *Pinks Family Outfitters t/a Woolworths v Hendricks*[8] stated the following principles – the employee seeking losses has a duty to mitigate his or her damages, one of the trite principles in labour cases is that fairness and reasonableness form part of the relationship and that the interest of both parties should be considered and the position of the employer must also be considered when any award is made. None of these were done by the respondent and the arbitrator could therefore not make the award it made regarding damages.

[23] With regards the order to re-instate the respondent, it was argued that the arbitrator simply overlooked the respondent's dishonest conduct and as such found the trust relationship between the parties was unscathed and intact. It was further

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[4] [2006] 4 BLLR 353 (LC)
[5] 2010 (2) NR 616 (LC) at para 8.
[6] [2013] NALCMD 17 at para 12.
[7] 2019 (4) NR 1007 (SC).
[8] Supra.

argued that it is trite that our courts take a dim view of dishonest conduct. The court was referred to *Moses Rakolota v Telecom South Africa*[9] and *Anglo American Farms t/a Boschendal Restaurant v M Komjwayo*[10]*.* In *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*[11] the Labour Appeal Court observed that:

' … Where the relationship between an employer and its employee is of such a nature that, for it to be healthy, the employer must, of necessity, be confident that it can trust the employee not to steal its stock-in-trade and that confidence is destroyed or substantially diminished by the realization that the employee is a thief, the continuation of their relationship can be expected to become intolerable, at least for the employer. Thenceforth the employer will have to check continually whether the employee is being honest. That the thing stolen is of comparatively little value is not relevant; the correct test is whether or not the employee's misconduct has had the effect that the continuation of the employer/employee relationship has been rendered intolerable.'

[24] From these cases it is generally accepted that a conviction of dishonest conduct will usually be met with a summary dismissal. Counsel for the appellant further argued that there are cases like *SPCA v Terblanche*[12] where the court found the employee's dismissal unfair, yet set aside the District Labour Court's order of reinstatement as it found that the working relationship between the employer and the employee had irretrievably broken down. In *Shiimi v Windhoek Schlachterei (Pty) Ltd* [13]the labour court also found the employee's dismissal unfair but declined to order reinstatement, inter alia as the intervening period between the dismissal and delivery of judgement was three years. Also, as the evidence indicated that the relationship between the parties before the employee's dismissal had seriously deteriorated and re-employment would not be advisable.

[25] It was further argued that on the basis of these trite principles, the respondent should not have been reinstated by the arbitrator. In addition to those set out before, the following principles are applicable when considers the appropriateness of the sanction imposed by the appellant on the respondent. *In Country Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[14] the following was said:

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[9] CCMA 19 July 1990.
[10] (1992) 13 ILJ 573 (LAC) at 575.
[11] Supra.
[12] NLLP 1998 (1) 148 NLC at 156.
[13] NLLP 2002 (2) 224 NLC at 229.
[14] [1999] 20 ILJ 1707 (LAC).

‘ It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited, interference therewith is only justified in the case of unreasonableness and unfairness.’[15]

[26] For the respondent it was argued that the appellant impugns the arbitration award on appeal broadly on four grounds:

Firstly the appellant challenges what they term a ‘full and procedural check list of dubious origin’ presumably imposed by the arbitrator. They content that no such checklist exists within the appellant or in law.

Secondly, the appellant challenge the finding of the arbitrator that the respondent was dismissed procedurally unfair. Amongst others are a list of various procedural unfairness findings listed. On this aspect, the appellant argues that the findings listed in para 2 of the notice of appeal were not raised by the respondent and the arbitrator was not called to rule thereon.

Thirdly, the arbitrator erred in finding that the respondent was substantively dismissed unfairly. This ground is premised on the attack relating to six particularized findings.

Lastly, the appellant attacks the award relating to losses of income awarded to the respondent.

[27] It is further argued that in terms of clause 2.1 of the IR policy, when an offence is alleged to have been committed the “supervisor concerned will investigate” and either dismiss the matter or initiate a formal disciplinary hearing. In this instance the security department proceeded to investigate the matter and initiated a formal disciplinary hearing contrary to clause 2.1. It was also pointed out that in terms of the same policy clause 4.4.6 and 4.4.7 provides that the offence of breach of trust and contravention of the Company Policy PO-SE-01 shall be handled by officials at the level of Head of Department (HOD) and above, and Anthony Phillips, a production accountant, was appointed as chairperson of the hearing and

[15] Also see Commercial Bank of Namibia Ltd v Van Wyk NLLP 2004 (4) 250 WLC and African Personnel Services (Pty) Ltd v Simon Shipunda and Others (LCA 38/2011 and LC 57/2011)(31 July 2021) at 31 par 90.

he is not a head of department. Rodney Feris who heard the appeal of the respondent and Anthony Phillips supervisor, is also not a head of department.

[28] The court was referred to the matter of *Van Rensburg v Wilderness Air Namibia (Pty) Ltd*[16]) where the Supreme Court clearly points out what is understood regarding appeals that are limited to a question of law. O'Reagan AJA said:

'[44] If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be imperilled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review. It is this principle that the court in Rumingo endorsed,[22] and it echoes the approach adopted by appellate courts in many different jurisdictions.

[45] It should be emphasised, however, that when faced with an appeal against a decision that is asserted to be perverse, an appellate court should be assiduous to avoid interfering with the decision for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision-maker could have reached. '

[29] Regarding the argument that there is a 'checklist of dubious origin' which the arbitrator used, the court was referred to the matter *of Management Science for Health v Kandunugure*[17] where a list of minimum requirements were set out which must be met at a disciplinary hearing. The court has placed such a high value on procedural fairness that in many cases employees were granted compensation or even reinstated because of a lack of proper pre-dismissal procedures, even though the court was satisfied that there would otherwise have been a valid reason for the dismissal.[18] On behalf of the respondent it was argued that the arbitrator correctly considered all the relevant factors required in law to determine the fairness or otherwise of the procedure followed by the appellant in dismissing the respondent.

[16] (LCA 50/2011) [2012] NAHCMD 1 (21 September 2012).
[17] (LCA 8/2012 [2012] NALCMD 6 (15 November 2012).
[18] See SPCA v Terblanche NLLP 1998 (1) 148 (NLC); Shiimi v Windhoek Schlachterei (Pty) Ltd Nllp 2002(2) 224 NLC.

[30] With regards to the ground of appeal that the arbitrator erred in finding that the respondent was dismissed procedurally unfairly, under which various issues were referred to as not raised by the respondent and the fact that the arbitrator was not called to rule thereon. It was argued that the issue falls within the ambit of section 89(4) and (5) as it deals with a defect in arbitration proceedings and should therefore be subject to review of the proceedings and not appeal.

[31] The appellant further failed to comply with the IR policy which was an agreement between the parties and was considered by the arbitrator. These were:

'Clause 2.1: Provides that when an offence is alleged to have been committed, the supervisor of the respondent was to investigate the case and either dismiss the case, give verbal or written warning or initiate disciplinary enquiry. The respondent's matter was investigated by Security department, also not supervisor of respondent, thereby denying respondent his procedural rights to have the matter investigated by his supervisor who are steep into the working schedule and circumstances of respondents and exercised his discretion in terms of his powers as prescribed in clause 2.1.

Clause 2.3.1 provides that Supervisor respondent handling the matter must investigate the case with assistance of Industrial Relations Section and ensure completion of relevant section of the complaint form within 24 hours of offence, and pass it to Industrial Relations Section without delay, appellant failed to complete complaint form.

It is submitted that, a failure to complete complaint form denied respondent's procedural rights in terms of clause 2.3.2 which requires Industrial Relations Section to record in writing statement from accused (respondent) and for accused to be given an opportunity of naming his witnesses whom he thinks are necessary to ensure a fair hearing of his case.

the appellant also did not comply with clause 2.3.4 of the IR policy in that it requires a hearing to be conducted within two days of receiving a complaint. Clause 2.3.3 does not apply to the offence to which the respondent was charged.'

[32] The disciplinary procedure of the appeal is codified in the Agreement on Industrial Relations Policies and Procedures entered between the appellant and the Mine Workers Union of Namibia (IR Procedure) and in terms of this agreement, clause 1(4) states that the company and the MUN intends the agreement to be legally binding on them.[19] The arbitrator correctly applied the IR policy in that the chairperson of the disciplinary hearing was not a Head of Department who is in terms of clause 4.4.6 and 4.4.7 to hear matters where the complaint is about a breach of trust as well as the company police PO-SE-01 was contravened.

[19] See IR Procedure record on page 159 – 198.

[33] The court was referred to *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee*[20] where the respondent in that matter, Mr Coetzee's disciplinary hearing was also conducted by a person who was not on the level of head of department. Where Ueitele J said the following:

'There is another aspect which points to a fatal procedural irregularity. Aside from the dispute as to whether the Security Department was the correct entity to initiate and lead evidence, sub paragraph 4.4.6 of the appellant's disciplinary code provides as follows:

4.4.6. Breach of trust

Actions or conduct of an employee that cause a reasonable suspicion of dishonesty or mistrust and for which there exists extraneous evidence to prove a breakdown in the relationship of trust between the concerned employee and the Company. This will include a situation where the conduct of the employee has created mistrust which is counterproductive to the Company's commercial activities or the public interest, thereby making the continued employment relationship intolerable one. (Cases in this category will be handled by officials at the HOD [Head of Department] level and above, including the Managing Director). (Underlined for emphasis)

[40] There is no evidence before me that the Hearing Official, Mr. Bessinger, was a head of a department or above the level of a head of department. Mr. Bessinger thus had no authority to preside over the case where the respondent faced a charge of breach of trust. When he so presided he assumed powers that he did not have and everything that flowed from that was invalid.'

The arbitrator further found that on the record and evidence before him there is no evidence that shows that the appellant called witnesses during the disciplinary hearing; that the appellant did not put his case first, lead evidence or call witnesses; that the respondent called any witnesses.

[34] The third broad ground relating to the finding that no evidence was placed before the disciplinary hearing that the respondent was aware of the rule or company policy which was breached. The respondent was charged under clause 4.4.7 of the IR policy which relates to the possession and handling or rough or uncut diamonds. The arbitrator therefore correctly found that the charge brought against the

[20] (LCA 30/2015) [2016] NALCMD 45 (6 December 2016) para 39 – 40.

respondent relating to the testing of the security system is not the charge contemplated under clause 4.4.7. To proof the charge as put to the respondent, the appellant also had to proof that the foreign object which was brought into the x-ray booth was with the express purpose of testing the Security Detection System. They argue that this was indeed not proofed as the respondent explained the purpose for having the prestik with him, which relates to the posters put up by him after his motor vehicle was broken into.

[35] Regarding the second charge the breach of trust is defined in clause 4.4.4 of the IR policy as 'actions or conduct of an employee that cause a reasonable suspicion of dishonesty or mistrust and for which there exists extraneous evidence to prove a breakdown in the relationship between the concerned employee and the Company'. Two facts needs to be proved, one that there is a suspicion of dishonesty and the appellant must further produce extraneous evidence to prove a breakdown in the relationship of trust. Evidence that these two requirements were discussed were nowhere found in the findings of the chairperson of the disciplinary hearing, which makes the arbitrator's finding in this regard also correct.

[36] It was also argued on behalf of the respondent that the sanction was too harsh and that the offences which he was found guilty of did not merit a dismissal. The court was referred to *Sidumo v Rustenburg Platinum Mines Ltd* [21] which listed the factors which a commissioner (in South Africa) must consider when deciding on the fairness of a dismissal. It was argued that the arbitrator indeed considered these factors when he found that the respondent has been in the service of the applicant for over 30 years, he has a family depending on him as an employee, he is at an advance age just before retirement, he has not been found guilty of a similar offence during his tenure of 30 years, there is no evidence that the offence to which the employee is found guilty is such that it makes the employment relationship intolerable, the IR Procedure provide as a rule that disciplinary measures should be of a corrective rather than punitive nature and in terms of clause 3.8 of the IR Policy dismissal is the final sanction.

Discussion on substantively and procedurally fairness of proceedings

[21] [2007] 12 BLLR 1097 (CC).

[37] Labour Relations in Namibia are governed by the Labour Act[22], the section that is relevant to the dispute in this matter is s 33. That section reads as follows:

'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.

(2) ….

(4) In any proceedings concerning a dismissal-

(a) if the employee establishes the existence of the dismissal;

(b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.'

[38] Section 33 of the Labour Act, 2007 simply reinforces the well-established principle that dismissals of employees must be both substantively and procedurally fair. In the case of *Rossam v Kraatz Welding Engineering (Pty) Ltd*[23] it was held that:

'It is trite law that in order to establish whether the dismissal of the complainant was in accordance with the law this Court has to be satisfied that such dismissal was both procedurally and substantively fair.'

[39] In *Dominikus v Namgem Diamonds Manufacturing ,*[24] substantive fairness was explained as follows:

'[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

[22] Labour Act 2007, Act No. 11 of 2007.
[23] 1998 NR 90 (LC).
[24] *Dominikus v Namgem Diamonds Manufacturing* (LCA 4/2016) [2018] NALCMD 5 (23 March 2018) para 20.

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.'

[40] Prinsloo J in *Van Wyk v Telecom Namibia Ltd*[25] summarize the test for fair dismissal as follows:

'(T)he test for a fair dismissal is twofold. An employer must satisfy both requirements. Satisfying one requirement is not enough. If the employer fails to satisfy one leg of the test, he fails the test for fairness. I should add here that the issue of whether the employer satisfies the test for substantive but not procedural fairness, and the remedy of reinstatement, for instance, should not be granted has little to do with the fundamental issue of whether the dismissal was unfair in the first place. That consideration only relates to one aspect of what the court must consider, whether reinstatement is the appropriate remedy in the circumstances of the case or when the court has to consider the quantum of compensation. '

[41] The requirement of substantive fairness furthermore entails that the employer must prove that the employee was or could reasonably be expected to have been aware of the existence of the rule. This requirement is self-evident; it is clearly unfair to penalise a person for breaking a rule of which he or she has no knowledge. The labour court has stressed the principle of equality of treatment of employees-the so-called parity principle. Other things being equal, it is unfair to dismiss an employee for an offence which the employer has habitually or frequently condoned in the past (historical inconsistency), or to dismiss only some of a number of employees guilty of the same infraction (contemporaneous inconsistency).[26]

[42] In this instance it was not the case. The evidence before court is that the employer took transgressions of the policy PO-ES-01 very seriously as it hit to the heart of the business of the employer. There is also evidence that persons who previously "tested the system" were dismissed or if they were not directly employed by the employer, barred from the site and the contractor for whom they worked, contract was cancelled.

[43] Paker AJ in *Management Science for Health v Kandungure*[27] said the following:

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[25] (HC-MD-LAB-APP-AAA-2019/00075) [2020] NALCMD 35 (11 November 2020).
[26] SVR Mill Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2004) 25 ILJ 135 (LC).
[27] LCA 8/2012) [2012] NALCMD 6 (15 November 2012).

'In order for an employer to find that a valid and fair reason exists for the dismissal of his or her employee, the employer must conduct a proper domestic enquiry – popularly known as disciplinary hearing in Labour Law. And in that regard, the procedure followed need not be in accordance with standards applied by a court of law, but certain minimum standards which are set out in the next paragraph must be satisfied. A disciplinary hearing is required and necessary where the employer is considering any punishment under the Labour Act, particularly and especially dismissal. An exploratory or investigative meeting held between the employee and the employer – like as happened in the instant matter – is not enough as can be gathered from the minimum requirements set out in the next paragraph. It is after a proper disciplinary hearing has been held, as aforesaid, that the employer is able to determine whether he has a valid and good reason to dismiss the employee within the meaning of s 33(1) of the Labour Act.

[6] The minimum requirements are these: (a) The employer must give to the employee in advance of the hearing a concise charge or charges to able him or her to prepare adequately to challenge and answer it or them. (b) The employee must be advised of his or her right of representation by a member of his or her trade union or a co-employee. (c) The chairperson of the hearing must be impartial. (d) At the hearing, the employee must be given an opportunity to present his or her case in answer to the charge brought against him or her and to challenge the assertions of his or her accusers and their witnesses. (e) There should be a right of appeal and the employee must be informed about it. See Food & Allied Workers Union and Others v Amalgamated Beverages Industries Ltd (1994) 15 ILJ 630 (IC).'

[44] There was no record of the initial disciplinary proceedings produced. The only document produced was called a synopsis of the hearing. It is therefore impossible to determine whether the employee was advised of his right to of his right to challenge the assertions of his/her accusers and their witnesses. There is no indication as to what questions were asked to the witnesses called by the employer or whether there was any questions put to the employee as well as a clear verbatim record of the facts placed before the chairperson. The South African case of *Mahlangu v CIM Deltak*[28] further requires that dismissal can only be considered after a pre-dismissal enquiry was conducted.

[45] The requirements of a fair pre-dismissal hearing were identified as follows: the right to be told of the nature of the offence or misconduct with relevant particulars of the charge; the right of the hearing to take place timeously; the right to be given

[28] (1986) 7 ILJ 346 (IC).

adequate notice prior to the enquiry; the right to some form of representation; the right to call witnesses; the right to an interpreter; the right to a finding (if found guilty, he or she should be told the full reasons why); the right to have previous service considered; the right to be told of the penalty imposed (for instance, termination of employment); and the right of appeal (usually to a higher level of management). Although these principles are not absolute rules, they should be regarded as guide-lines to show whether the employee was given a fair hearing in the circumstances of each case. [29]

[46] Whether there was a proper pre-dismissal hearing is therefore not clear. A further procedural flaw is that the person who chaired the disciplinary hearing was not, as required in the IR policy, a head of department but an account manager, although he was on the D1 brand. Although it was argued for the appellant that this was not sufficient to make the process unfair, it has in the court's opinion a significant role to play in the fairness of the proceedings. The agreed terms between the employer and employees were that the hearings where charges of dishonesty and misconduct and contravention of policy PO-ES-01 were deliberated, should be chaired by a head of department. No reason was also put forward by the appellant as to why it was impossible to obtain a head of department to chair the specific disciplinary hearing. I find myself therefore in agreement with Ueitele J in *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee*[30]*.*

[47] The Labour Court has placed so high a value on procedural fairness that in many cases employees were granted compensation or even reinstated because of a lack of proper pre-dismissal procedures, even though the court was satisfied that there would otherwise have been a valid reason for the dismissal. According to Parker AJ the clear and unambiguous words of s 33(1)(a) and (b) of the Act, even where an employer succeeds in proving that he had a valid and fair reason to dismiss an employee, makes the dismissal unfair if the employer fails to prove that it followed a fair procedure.[31]

[48] In the case of *Rossam v Kraatz Welding Engineering (Pty) Ltd*[32] Karuaihe J said the following:

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[29] Bosch v T H U M B Trading (Pty) Ltd (1986) 7 ILJ 341 (IC)).
[30] Supra
[31]Collins Parker: Labour Law in Namibia, University of Namibia Press at 156.
[32] 1998 NR 90 (LC).

'It is trite law that in order to establish whether the dismissal of the complainant was in accordance with the law this Court has to be satisfied that such dismissal was both procedurally and substantively fair.'

Appeal on questions of law alone

[49] Section 89(1)(a) limits the jurisdiction of the Labour Court to appeals that raise questions of law alone. The locus classicus in dealing with this question is definitely the matter of *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd*[33]. *O' Reagan AJA* said the following

'[46] Where an arbitrator's decision relates to a determination as to whether something is fair, then the first question to be asked is whether the question raised is one that may lawfully admit of different results. It is sometimes said that 'fairness' is a value judgment upon which reasonable people may always disagree, but that assertion is an overstatement. In some cases, a determination of fairness is something upon which decision-makers may reasonably disagree but often it is not. Affording an employee an opportunity to be heard before disciplinary sanctions are imposed is a matter of fairness, but in nearly all cases where an employee is not afforded that right, the process will be unfair, and there will be no room for reasonable disagreement with that conclusion. An arbitration award that concludes that it was fair not to afford a hearing to an employee, when the law would clearly require such a hearing, will be subject to appeal to the Labour Court under s 89(1)(a) and liable to be overturned on the basis that it is wrong in law. On the other hand, what will constitute a fair hearing in any particular case may give rise to reasonable disagreement. The question will then be susceptible to appeal under s 89(1)(a) as to whether the approach adopted by the arbitrator is one that a reasonable arbitrator could have adopted.

[47] In summary, in relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognised to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where, however, the question of fairness is one where the law requires only one answer, but the arbitrator has erred in that respect, an appeal will lie against that decision, as it raises a question of law.

[33] Supra

[48] Finally, when the arbitrator makes a decision as to the proper formulation of a legal test or rule, and a party considers that decision to be wrong in law, then an appeal against that decision will constitute an appeal on a question of law, and the Labour Court must determine whether the decision of the arbitrator was correct or not.

[49] The advantage of the approach outlined above is that it seeks to accommodate the legislative goal of the expeditious and inexpensive resolution of employment disputes, without abandoning the constitutional principle of the rule of law that requires labour disputes to be determined in a manner that is not arbitrary or perverse. It limits the appellate jurisdiction of the Labour Court by restricting its jurisdiction in relation to appeals on fact and on those questions of fairness that admit of more than one lawful outcome to the question whether the decision of the arbitrator is one that a reasonable arbitrator could have reached. Other appeals may be determined by the Labour Court on the basis of correctness. In outline, then, this is the approach that should be adopted in determining the scope of appeals against arbitration awards in terms of s 89(1)(a).'

[50] From the above it must be clear that not all grounds of appeal raised in the current appeal are in terms of questions of law. It must further be understood that although the court in this instance might not agree with all the findings the arbitrator made, the test is not whether the court agree or not but whether the decision reached by the arbitrator regarding the fairness of the proceedings is one that a reasonable arbitrator could have reached. Again, it is not must have reach but could have reached. The court can only interfere with the decision of an arbitrator if the court is of the opinion that the arbitrator came to a conclusion which no other reasonable arbitrator could have come to and in this instance it is not the case.

The order of reinstatement retrospectively and compensation of lost wages

[51] The Labour Act, 2007 allows for any one of two remedies to be granted to a worker who has been unfairly dismissed namely: the employer may be ordered to reinstate the worker[34], or the employer may be ordered to pay to the employee compensation[35]. Upon a finding of unfair dismissal either one of the two remedies must be granted.

[34] See section (15) (d).
[35] See section (15) (e).

[52] I now turn to the criticism that the respondent did not place evidence before the arbitrator that he mitigated his losses. In terms of s 89(1)(a) of the Labour Act, 2007 a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of s 86 'on any question of law alone'. The question whether or not a dismissed employee mitigated his or her losses is a question of fact and is therefore not appealable. It follows therefore that the appellant cannot appeal on that ground to this court.

[53] Regarding the ordering of back pay or not, Parker J[36] has suggested that the following are factors which are important in deciding whether to order back pay or not, namely: The nature of the duty that the employee breached, the nature of the misconduct or other offence, how far the breach or misconduct has caused bad blood between the employer and the employee, the likelihood of the employee committing a similar breach or misconduct again if he was reinstated or whether because of the length of time that has elapsed between the date of dismissal and judgment of the court or award of the arbitrator, 'it will be unrealistic to treat the contract of employment between the parties as still being in force.'

[54] However, what does concern this court is the order for re-instatement, taken into account that the offences complained of was of a serious nature and relates to dishonesty. The misconduct of dishonesty was explained by Ueitele J in the matter of *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa* [37], quoting with approval what was stated by the South African Labour Court of Appeal as follows:

'[33] In the case of *Toyota SA Motors (Pty) Ltd v Radebe & Other* [38] the South African Labour Court of Appeal said that dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. It is now well accepted that in employment law, a premium is placed on honesty. It thus follows that, where an employee ruptures the trust reposed in, or expected of, him or her, such rupture may result in the termination of his/her contract of employment. This Court, in the case of *Foodcon (Pty) Ltd v Schwartz*[39] said:

[36] Namibia Beverages v Emily.
[37] (LCA 62/2013) [2017] NALCMD 27 (14 August 2017).
[38] 2000) 21 ILJ 340 (LAC) at 345F-H.
[39] An unreported judgment of Labour Court, Case No. LCA 23/98 [1999] NAHC 14 (delivered on 29 September 1999).

"In my view it is axiomatic to the relationship between employer and employee that the employer should be entitled to rely on the employee not to steal from the employer. This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee." '

[55] The remedy is in the discretion of the arbitrator in terms of s 85 (d) and (e) and that such discretion must be exercised judicially. The learned author in *Labour Law in Namibia* [40] states that in order for courts to exercise their discretion judicially when considering an order of reinstatement, they ought to consider all the circumstances of the dismissal.

[56] Prinsloo J summarized it as follows in *Van Wyk v Telecom Namibia*[41] when she says the following:

'(f)or instance, whether the dismissal is only procedurally unfair, ie whether the employer has a valid and fair reason to dismiss but does not follow a fair procedure before dismissing the employee. The court must also determine whether, by the nature of the conduct complained of, it could be said that mutual trust and confidence between the employer and employee have clearly disappeared beyond recall. The courts and tribunals will generally find that mutual trust between an employer and employee has been destroyed beyond repair in cases of fraud, theft and other dishonest acts, violent acts and willful damage to property of the employer.'

[57] She continues to state that:

'(f)urther, in *Nghiwete v Namibia Students Financial Assistance Fund (NSFAF)* it was stated that the Labour Commissioner might even, if he finds in favour of an employee, not order re-instatement as it is clear that the employer and employee relationship might have broken down as averred by the employer.'

[58] In Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & Others in discussing the reinstatement of an employee, the court said the following:

'It is important to note that to force an employer to reinstate his or her employee is already a tremendous inroad into the common law principle that contracts of employment

[40] Parker C.2012.Labour Law in Namibia. Windhoek: UNAM PRESS at 112.
[41] LTD (HC-MD-LAB-APP-AAA-2019/00075) [2020] NALCMD 35 (11 November 2020)

cannot normally be specifically enforced. Indeed, if one party has no faith in the honesty and integrity or loyalty of the other, to force that party to serve or employ that other one is a recipe for disaster. Therefore the discretionary power to order reinstatement must be exercised judicially.'

[59] The court therefore finds that there is enough evidence that the trust relationship between the appellant and the respondent was breached to such an extent that the discretion exercised by the arbitrator to order re-instatement cannot be said to have been exercised judicially, especially if one is to take into account that the respondent initially denied having any knowledge of the foreign object he carried with him, denied that he placed the prestik underneath the chair, did not inform the security personnel when they retook the x-ray and could not find anything that he removed the prestik from his bag and overall took a substantive amount of time to eventually admit having knowledge of the prestik. Offences in terms of policy PO-ES-01 are also seen in a very serious light.

[60] Having had regard to the consideration of facts and law above, I am of the considered view that the following order should be made, namely:

1. The appellant's appeal against the finding by the arbitrator that the termination of employment of the respondent was not procedurally and substantively fair is dismissed.

2. The appellant's appeal against the order of the arbitrator that the respondent be reinstated in the position which he would have been had he not been so dismissed is upheld

3. The appeal against the order that the respondent is to receive back pay for the whole period of dismissal being 26 April 2018 till date of reinstatement is upheld
4. The order of the arbitrator regarding the reinstatement and back pay is replaced with the following order:
    a. The respondent is awarded compensation in that the appellant is ordered to pay the respondent 6 months' salary on or before 30 April 2021.

5. There is no order as to costs.

6. The matter is removed from the roll and is regarded as finalized.

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E RAKOW

Judge

APPEARANCES

| | |
|---|---|
| APPELLANT: | Adv Dicks |
| INSTRUCTED BY: | Köpplinger Boltman<br>Windhoek |
| FIRST RESPONDENT: | Adv Nekwaya |
| INSTRUCTED BY: | Slogan Matheus & Associates<br>Ongwediva |