REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. HC-MD-LAB-APP-AAA-2021/00011

In the matter between:

LETSHEGO BANK OF NAMIBIA (PTY) LTD **APPELLANT**

and

NICOLA NATASHA BAHM **RESPONDENT**

Neutral citation*: Letshego Bank of Namibia v Bahm (*HC-MD-LAB-APP-AAA-2021/00011) [2022] NALCMD 2 (10 February 2022)

CORAM **: PRINSLOO J**
Heard : 22 October 2021
Delivered : 10 February 2022

Flynote: Legislation – Labour Act, 2007 – Labour law – appeal against an award of arbitrator – Appeal in terms of section 89 (1)(a) of Act 11 of 2007 – on questions of law alone – Respondent dismissed after disciplinary hearing – Arbitrator disagrees with the Chairperson of the disciplinary hearing orders reinstatement of the respondent and back pay – In appeal – the appeal upheld.

Labour Law – Dismissal - Employer/employee relationship - Dishonest conduct - Employer should feel confident it can trust an employee not to be in any way dishonest - Employee's dishonesty destroys or substantially diminishes confidence in the employer/employee relationship and has the effect of rendering the continuation of such relationship intolerable - Trust is the core of employment relationship - Dishonest conduct is breach of such trust - Such breach will justify dismissal.

Labour law – Dismissal - Substantive and valid reason must exist for dismissal. Dismissal – once a substantive and valid reason exist for a dismissal – court will not order reinstatement where an employee has clearly committed an act of misconduct.

Summary: The respondent was employed by the appellant as a Quality Assurance Clerk from 3 August 2010, in Windhoek, until her dismissal on 20 December 2018. The respondent was brought before a disciplinary committee for counts of dishonesty and unauthorised absence. She was found guilty on both charges and termination was recommended. Dissatisfied with the outcome, she appealed and the Chairperson of the appeal dismissed the appeal and confirmed the findings and recommendation of the Chairperson of the disciplinary hearing.

Dissatisfied again with the appeal Chairperson’s decision, the respondent referred a dispute of unfair dismissal to the Office of the Labour Commissioner. The arbitrator held that the respondent was procedurally and substantively unfairly dismissed. The appellant dissatisfied therewith approached this court for an order setting aside the award.

Held 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.

Held the test for a fair dismissal is therefore twofold and both requirements of substantive and procedural fairness must be met. If an employer fails to satisfy one leg of the test, he fails the test of fairness and the dismissal is liable to be held as unfair dismissal.

Held an employee's dishonesty destroys or substantially diminishes confidence in the employer/employee relationship and has the effect of rendering the continuation of such relationship intolerable. Trust is the core of an employment relationship and dishonest conduct is breach of such trust. It is immaterial that the employee has hitherto been a person of good character or that his/her breach of trust is a solitary act and such breach will justify dismissal.

Held no reasonable arbitrator, properly directed could have arrived at the conclusion that she did, given the entire matrix of the case. Her conclusion is considered to be perverse and should not, even with the greatest benevolence, be allowed to stand. It is therefore liable to be set aside.

Held the appeal succeeds.

ORDER

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1. The appeal is upheld.
2. The award issued by the Arbitrator, Ms.Hamukwaya, dated 25 January 2021, be and is hereby set aside.
3. The arbitrator's order shall read "The complaint is dismissed."
4. There is no order as to costs.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

Prinsloo J:

Introduction

[1] Serving before this court for determination is an appeal lodged by the appellant, Letshego Bank of Namibia (Pty) Ltd (hereinafter referred to as the "appellant") against an award issued by the Arbitrator, Ms. Ndateelela Ndahafa Hamukwaya on 25 January 2021. The award was in favour of the respondent, Ms Nicola Natasha Bahm (hereinafter the "respondent").

[2] The arbitrator found that the first respondent's dismissal was procedurally and substantively unfair and made the following award:

> '[32] In the results, I make the following order:
>
> 1. That the applicant's dismissal was procedurally and substantively unfair;
> 2. The respondent reinstates the applicant Ms Nicola Natasha Bahm in equal or comparable position she held effective **1st March 2021;**
> 3. The respondent pays the applicant an amount equal to the monthly remuneration she would have received had she not been unfairly dismissed;
> 4. Compensation calculated as follows: (N$12360,00 x 24 months) = **N$296640.00**
> 5. No order as to cost.
> 6. The said amount must be paid on or before the 25 February 2021, proof of which must be forwarded to the Office of the Labour Commissioner. Windhoek. The appropriate interest will accrue on the said amount if not paid by the date stipulated in this award at the same rate in terms of the Prescribed Rates of Interest Act, 1975 (Act No. 55 of 1775).'

Disciplinary proceedings

[3] The respondent, who was employed as a Quality Assurance Clerk at the appellant's Windhoek Branch, was brought before the appellant's disciplinary committee, chaired by Mr Gaya, an independent Chairperson.

[4] The events that led to the respondent being charged are as follows: The respondent applied for leave from her employer for the period of 29 August to 4 September 2018, which is common cause between the parties. On 5 September 2018, the respondent failed to report for duty. Mr Bonafide Chicka, the Quality Assurance Middle Manager, being the respondent's direct supervisor, contacted the respondent to enquire about her whereabouts. The respondent informed to Mr Chika that she had mixed up her dates and that she was under the impression her leave only ended on 5 September 2018.

[5] From the record it appears[1], the respondent was provided with a notification for disciplinary charge, which read as follows:

'Subject: Not reporting for work after being on leave
Staff member: Nicola Bahm
Details:
On 5 March 2018, Nicola did not report for work and the reason was that she thought she was still on leave.

Action: Nicola was requested instructed to work overtime to cover the 8 hours without claiming. This was done.

On 5 September 2018, Nicola did not report for work, the reason being that she thought she is still on leave. This is for the second time that this happens with the same reason.
It is required by the company for all staff members to report for duty 07:30 Monday to Friday unless the staff member is on leave.

Nicola committed an offence stipulated in the HR manual B10.2.2, page 8 (**unauthorised absence from work**).
A meeting will be set and communicated for disciplinary discussions in Ramona's Office.'

[6] On 6 September 2018, being what appears to be the same day the respondent was provided with the notification, the respondent reported for duty and was informed to attend a meeting with Mr Chika and Ms Ramona Coetzee, the Senior Manager. Ms Coetzee questioned the respondent as to why she had not

[1] Appeal Index Volume 1- 6. P. 99.

reported for work the previous day. The respondent replied that she “had mixed up her dates”. Ms Coetzee was not satisfied with the respondent’s response and on follow up questions the respondent informed Ms Coetzee that the real reason for her absence from work the previous day was due to the fact that she was assisting in returning hired wedding equipment from a wedding she attended over the weekend.

[7] After the meeting, Mr Chika forwarded a template to the respondent which she had to complete in the form of a statement which consisted of headings “why I was out of work” and “why I was not truthful in my explanations”. The respondent was also provided with the minutes of the meeting by Mr Chika, which she signed for on 7 September 2018. On 19 September 2018 the respondent was provided with a notice for disciplinary hearing, which she acknowledged receipt of by signing same on the same day, which reads:

‘Dear Ms Bahm,

You are hereby given notice to attend a disciplinary bearing on 1 October 2018 at 09H00, Letshego Head Office, 1st Floor Small Boardroom.

The alleged misconduct is as follows:

Charge 1:

Dishonesty

Whereby, allegedly, you made yourself guilty of dishonesty. You were absent without leave on Wednesday, 05th September 2018 and subsequently misrepresented the reason for your absence with the intention to deceive your line manager.

Now therefore, we have reason to believe that you made yourself guilty of dishonesty.

Charge 2:
Unauthorised absence

Whereby, allegedly, you made yourself guilty of unauthorised absence. You were absent without authorisation on Wednesday, 05th September 2018 and upon your return, failed to submit a reasonable explanation for such absence.

Now therefore, we have reason to believe that you made yourself guilty of unauthorised absence.

The above charges are regarded as serious and may result in dismissal, should it be proven to be correct on a balance of probability.'

The notification, *inter alia*, further provided the following:

'Your rights as an employee are as follows:

1. You have the right to receive adequate notice for the hearing.
2. You have the right to call witnesses in aid of your defense as well as cross-examine company witnesses.
3. You may be assisted by an interpreter if required, and should inform your supervisor and People Experience Division thereof at least a day before the hearing.
4. You may be represented by a fellow employee or by a workplace representative (shop steward) only (no outside representation).
5. Should you be found guilty, you are entitled to submit an appeal within five (5) working days after the hearing to the People Experience Division.
6. You have the right to be told the reasons in the event of a guilty finding.'

[8] The appellant had two witnesses during the disciplinary hearing, Mr Bonafide Chika, the direct supervisor to the respondent and Ms Ramona Coetzee, the Senior Manager. The respondent testified on her own behalf. At the end of the disciplinary proceedings, the respondent was found guilty on both charges and termination of her employment was recommended by the Chairperson of the disciplinary hearing. It is not clear from the record as to whether the respondent was provided with the outcome of the disciplinary hearing on 16 November 2018, being the date the outcome was signed by the Chairperson of the disciplinary

hearing. There is however a page[2] attached to the outcome indicating that the respondent has received the outcome and has been informed of her rights to appeal and that she understood the same.

[9] On 21 November 2018, the respondent was provided with a notice of termination dated 19 November 2018.[3] On 29 November 2018 the respondent lodged her appeal. The grounds of her appeal were as follows:

1. Flaws in the reasoning of the chairperson.
2. Evidence of failure to apply his mind.
3. Reliance on evidence not presented during hearing.
4. Sanctions imposed too harsh- substantive unfairness.

[10] At this juncture I wish to reiterate paragraphs mentioned by the appellant in her appeal under points 5, 6 and 7, which I will deal with in my analyses of the evidence before this court, which reads as follows[4]:

'5. It is common cause that the Appellant on 19 September 2018 received a notice to attend a disciplinary hearing scheduled for 01 October 2018.
6. The notice further informed the Appellant of the charges against her, being Unauthorized Absence and Dishonesty, to which she pleaded Not Guilty.
7. The appellant was duly informed of her rights to a fair disciplinary hearing.'

[11] The appeal Chairperson, Mr Cor Beuke, yet another independent chairperson, confirmed the findings and recommendation of the disciplinary hearing and dismissed the appeal on 14 December 2018. Dissatisfied with the outcome of the appeal, the respondent lodged a dispute of unfair dismissal with the Office of the Labour Commissioner.

<u>The arbitration proceedings</u>

[2] Supra, p. 213.

[3] Supra, p.214.

[4] Supra. p. 216.

[12] The arbitration proceedings took place on 26 June 2020, 17 September 2020 and concluded on 13 October 2020 before Ms Hamukwaya. According to the arbitrator the issue for determination before her was whether the dismissal of the respondent was procedurally and substantively fair and the appropriate relief thereof.

[13] The appellant testified on her own behalf and was represented by Mr Samuel Vies, who is the Deputy General Secretary from NAFINU, while the respondent called Mr Chika and Ms Coetzee as its witnesses and was represented by Mr Ahrend Keller, the People Relations Manager of the respondent.

[14] After reviewing the evidence and the applicable law, and the submissions advanced on behalf of the parties, the arbitrator came to the conclusion in para 27 of her ruling that she "failed to apprehend (sic) what exactly persuaded the chairperson to preside on a dishonesty charge, that is not contained in the charge sheet as provided in the respondent's disciplinary policy". The arbitrator further concluded that the appellant was procedurally and substantively unfairly dismissed in that the appellant was not charged with a charge of dishonesty and that the charge of dishonesty and its sanction bears no necessary nexus to the dispute at hand.

[15] As to the charge of unauthorised absence as per para 30 of her ruling the arbitrator concluded that "it is my respective view that on a balance of probabilities there was a justifiable reason based on the applicant's testimony as to why she did not report for duty on the 05 September 2018 (sic). Therefore, it is my finding that the respondent failed to discharge the onus placed on it to prove that there was a valid and fair reason to dismiss the applicant in the circumstance".

Grounds of appeal

[16] As previously stated, dissatisfied with the award, the appellant noted an appeal with this court on 10 February 2021 against the award by Ms Hamukwaya delivered on 25 January 2021. The grounds of appeal in the notice are as follows:

'The grounds of appeal (and further questions of law on the points of law are the following:

1. The arbitrator erred in law in finding that:
   1.1 it is undisputable that the respondent was at no point charged with dishonesty;
   1.2 she failed to apprehend what exactly had persuaded the chairperson of the disciplinary hearing to preside on a dishonesty charge;
   1.3 the appellant was not in compliance with its own policy;

   whereas the clear oral evidence and the charge sheet handed in as an exhibit in support thereof (Exhibit A) proved the direct opposite, namely that the first charge against the respondent was that of dishonesty.

2. The arbitrator committed a gross irregularity by ignoring the clear, direct and admissible evidence that the respondent was indeed charged with dishonesty and finding that it is undisputable that the respondent was at no point charged with dishonesty.

3. The arbitrator erred in law in finding that the respondent had a justifiable reason not to report for duty on 5 September 2018 and that the respondent had failed to discharge the onus to prove that there was a valid and fair reason to dismiss the applicant, in the circumstances where the respondent;

   3.1 herself had chosen dates and applied for leave specifically for the period 29 August to 4 September 2018;

   3.2 initially gave the excuse that she had mixed up the dates, but after further questioning provided an entirely different excuse for her absence, namely that she had utilised the day of 5 September 2018 to return hired wedding equipment;

   3.3 subsequently recorded this latest explanation in writing to her employer, admitted she was not truthful and apologized for her absence from work;

   3.4 had previously, March of the same year, faced discipline because of a similar 'mistake' as to the leave she applied for.

   No reasonable arbitrator could have reached a conclusion on the evidence.

4. The arbitrator erred in law in failing to find that the evidence proved that the respondent's dishonest conduct irreparably damaged the employment relationship, and in refusing reinstatement.

5. The arbitrator erred in law in failing to find that the respondent had not proved her losses.'

Grounds of opposition to the appeal

[17] The grounds of opposition read as follows:

1. 'The arbitrator was correct in finding that the Respondent's dismissal was both procedurally and substantively unfair.

2. As a result of the Arbitrator's finding that the Respondent's dismissal was substantively and procedurally unfair, the Arbitrator was correct to award compensation and reinstatement. The Arbitrator was correct to award the Respondent with compensation because there was evidence that the Respondent made efforts to find other employment.

3. The arbitrator was correct in finding that the Appellant did not comply with its policy, rendering the dismissal procedurally unfair. The evidence shows that the Appellant did not comply with B10.8.2 and B10.9 of its policy. Compliance with these provisions would have given the Respondent a better opportunity to present her case and thus an outcome of the disciplinary process.

4. With further regard to procedural fairness, the Arbitrator should have found that Appellant violated the principles of natural justice in the manner in which it obtained evidence against the Respondent. The Respondent was clearly pressured to signing a statement/statements that are untrue. The evidence shows that the Appellant was not aware of the consequences of these statements and should have been warned.

5. The arbitrator was correct in finding that the Appellant failed to discharge its onus to prove there was a valid and fair reason to dismiss the appellant. Although the dishonesty charge was not considered by the Arbitrator, the Appellant failed to prove that the Respondent was guilty of dishonesty. In fact, the evidence shows that the

Respondent was not dishonest, more specifically that the two reasons she gave for being absent on 5 September 2019 were true.

6. The arbitrator was correct in finding that the relationship between the Appellant and Respondent was not irreparably damaged. The Respondent mixing dates up would not have the effect of irreparably damaging the employment relationship. Furthermore, because the Respondent was not dishonest, the employment relationship could not have been damaged (although the dishonesty charge was not considered by the Arbitrator).'

Issue for determination

[18] There is, principally one issue to be resolved, namely, whether the respondent was indeed charged with dishonesty and the further issue to be determined is whether there is any merit in the rest of the grounds of appeal raised by the appellant and in respect of which the appellant contends that the arbitrator erred in issuing the award in question.

Arguments

[19] Mr Maasdorp, for the appellant, argues that the arbitrator made a fundamental mistake by finding that the respondent was not charged with dishonesty. The insupportable finding led to the illogical conclusion that the disciplinary Chairperson could never have found the respondent guilty of dishonesty.

[20] Mr Maasdorp argues that the appellant squarely attacked the finding that the appellant has not charged the respondent with dishonesty. Presumably because this finding cannot be supported in any way from material on record, including evidence of the respondent herself. It appears that the respondent accepts that this challenge is on firm footing as she has not offered any dispute on this issue in the grounds of opposition.

[21] Mr Maasdorp argues that the arbitrator never grappled at all with the mutually destructive versions presented by the parties. The arbitrator never made any credibility findings and in the circumstances it is up to this court to assess the

evidence before the arbitrator, employing the methods laid down and referred this court to the matter of *Cupido v Edgars Stores Namibia Limited* [2018] NALCMD 25.

[22] Mr Maasdorp argues that the core issue on substantive fairness is what transpired on 5 and 6 September 2018. Counsel submitted that the objective facts clearly show that Mr Chicka's version is more probable. The respondent's version is that when she spoke to Mr Chicka telephonically on 5 September 2018 when he informed her that she could simply come in the next day and apply for leave. Mr Chicka denies that he ever said that to the respondent. In fact he told her to come in to work on the 5th already, which the respondent did not do. Mr Chicka was in any event hesitant to accept the respondent's explanation for her absence from work as it was too similar to an explanation advanced during March 2018 when the respondent also did not pitch for work. Counsel pointed out that incident of absenteeism in March 2018 and the reason being the same is undisputed. Counsel further argued that the meeting on 6 September 2018 is also undisputed and at no stage during that meeting did the respondent indicate that an agreement was reached between herself and Mr Chicka regarding her return to work on the next day only. Counsel submitted further that the fact that the appellant never approved an application for leave for the 5th of September 2018 and that the appellant charged the respondent for dishonesty very shortly after she returned to work is undisputed. It is further undisputed as to what transpired at the meeting.

[23] Mr Maasdorp argues that the appellant's version is more plausible and the witnesses more credible. Firstly, no reason was advanced why the appellant's witnesses would lie under oath about the respondent just to implicate her. In addition, Counsel argues that the respondent's version is fatally undermined by her evidence about her signatures on the damning documents. The respondent's attempt to distance herself from her own actions whenever the shoe pinched, is found throughout the respondent's evidence in that she denied ever having read the charge sheet although she signed for it; she denied that her rights were explained to her; she denied she understood her rights; she denied that she approved the submissions at the disciplinary hearing made on her behalf and the appeal also filed on her behalf.

[24] Mr Maasdorp submits that the appellant's version of the material events of 5 and 6 September 2018 are supported by objective documentary evidence and by the general probabilities. It is Mr Maasdorp' s submission that the only way the respondent's version is to be believed is if the court accepts her theory that everyone lied under oath at the arbitration and had been lying and setting her up since 5 September 2018. Counsel however submits that there is no support at all for this proposition and as a result the appellant's appeal against the finding of substantive fairness should be upheld.

[25] As regard to the issue of procedural fairness, Mr Maasdorp argues that a disciplinary code need not be slavishly followed. The key question remains whether the hearing was fair to the employee in an overall conspectus and referred this court to the Supreme Court matter of *Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 SC at para 77.

[26] Ms. Mondo, on behalf of the respondent argues that the employee's dismissal was procedurally unfair because the employer did not comply with clause B10.8.2 of its disciplinary code. Therefore the arbitrator was correct in finding that the appellant did not comply with its policy, rendering the dismissal procedurally unfair. Ms Mondo argues had the appellant complied with its policy it would have afforded the respondent a better opportunity to present her case and thus possibly secure a positive outcome in the disciplinary hearing.

[27] Ms Mondo argues that if the appellant was of the view the respondent had committed the misconduct of dishonesty, it should have notified her of the intention to charge her with dishonesty through the notice of disciplinary charge that is issued in terms of B10.8.2 instead the employer only notified her of the absenteeism charge. The purpose of clause 10.8.2 is evident in clause B10.9 which is to give the employee an opportunity to provide a statement or explanation regarding the intended charge.

[28] Ms Mondo submits that the failure by the employer to issue a notice in terms of the dishonesty was unfair because it denied the respondent the opportunity to give an explanation or provide a response to the intended charge. Ms Mondo further submits that the dismissal was procedurally unfair because of

the manner in which the appellant obtained evidence against the respondent, specifically the statement setting out why she was untruthful.

[29] Ms Mondo submits that when an employee has an employment contract, whether express or implied, that contract contains an unspoken covenant of good faith dealing. This means that an employer owes an employee a duty to act in good faith and to deal fairly with him/her. The covenant goes both ways, meaning the employee has the same duty to the employer. Good faith means dealing with each other honestly, openly and without misleading each other. I agree with Ms Mondo in this regard.

[30] As regard to the issue of substantive fairness, Ms Mondo, interestingly conceded that the respondent was charged with dishonesty, which apparently only appeared in the notice she received to attend the disciplinary hearing. Ms Mondo submits that in the event that the court finds that evidence was led on the charge of dishonesty and that the issue was considered, the court cannot ignore the facts that the arbitrator was correct in finding that the appellant failed to discharge its onus in proving that there was fair reason to dismiss the employee, albeit for different reasons.

[31] Ms Mondo submits that it is evident that the respondent wrote the statement on the instructions of her supervisor because he sent her a template with the headings “why I stayed out of work” and “why I was not truthful in my explanation” and in addition the supervisor informed her what to write. Ms Mondo submits the respondent was under pressure in the meeting and had she not been under pressure she would not have felt the need to expand on her reasons being absent by informing Ms Coetzee of what she was attending to on the day in question.

[32] Ms Mondo in conclusion submits that it is not in dispute that the respondent was absent without leave being approved and the reason was that she mixed up her dates. Counsel submits that it can in certain instances be accepted as a valid reason, considering that the intention was not to stay away from work, further considering the human condition of forgetting (or forgetfulness). In addition, Ms Mondo submits that even if it’s not an acceptable reason, the offence of absenteeism in itself is a minor offence in the appellant’s code and the appropriate

sanction would have been a verbal reprimand or warning or a written warning depending on the circumstances. Therefore there was no valid reason to dismiss the respondent.

Legal Principles

[33] Before I consider the issues which I am called upon to decide in this appeal, I will briefly set out the legal principles governing those issues.

[34] Section 33 of the Act provides for the law on unfair dismissal. 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.'

[35] Section 33 of the Act simply reinforces the well-established principle that dismissals of employees must be both substantively and procedurally fair.[5]

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[5] *Dominikus v Namgem Diamonds Manufacturing* (LCA 4/2016) [2018] NALCMD 5 (23 March 2018) para 20.

[36] In *Dominikus v Namgem Diamonds Manufacturing,*[6] 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 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.'

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

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

[38] The a foregoing principles are not absolute and are regarded as guidelines to determine whether an employee was given a fair hearing in the circumstances of each case.[7]

[39] The test for a fair dismissal is therefore two-fold and both requirements of substantive and procedural fairness must be met. If an employer fails to satisfy one leg of the test, he fails the test of fairness and the dismissal is liable to be held as unfair dismissal.[8]

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[6] Ibid.

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

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

[40] An arbitrator who is tasked with a duty to determine a dispute concerning alleged unfair disciplinary action or unfair dismissal must accordingly make a finding of whether or not the employer had a valid and fair reason for the disciplinary action and whether a fair procedure was followed in imposing the disciplinary action. If the arbitrator finds that there was no valid or fair reason for the disciplinary action, or that the process followed was unfair, the arbitrator must uphold the unfair labour practice or the unfair dismissal challenge. If on the other hand the arbitrator finds that there was a valid and fair reason for the disciplinary action and that a fair procedure was followed in imposing the disciplinary action the arbitrator must dismiss the complaint.[9]

[41] In the matter of *Foodcon (Pty) Ltd v Amoyre Schwartz*[10] the court held that:

'Employer should feel confident that it can trust its employee not to steal or in any way to be dishonest. An employee's dishonesty destroys or substantially diminishes confidence in the employer/employee relationship and has the effect of rendering the continuation of such relationship intolerable. Theft is theft regardless of value of item stolen. Trust is the core of employment relationship and dishonest conduct is breach of such trust. It is immaterial that the employee has hitherto been a person of good character or that his/her breach of trust is a solitary act and such breach will justify dismissal.'

[42] I now turn to deal with the relevant provisions of the disciplinary code of the appellant.

'B10 – Disciplinary procedures

…Notwithstanding the classification of offences, the Company reserves the right to impose an appropriate sanction, including termination of employment, in the event of any breach of discipline, or unacceptable behaviour, taking into consideration the nature and circumstances of the offence, intent, the effect of the breach of discipline or unacceptable behaviour, on the Company, and the employee's prior record of behaviour.

B10.2.2 Minor offences include:

a) …and other unauthorised absence from duty.

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[9] *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa* (LCA 62/2013) [2017] NALCMD 27 (14 August 2017).

[10] *Foodcon (Pty) Ltd v Amoyre Schwartz* LCA 23/98.

B10.2.3 Serious offences include:

f) Habitual or continued absenteeism, late coming or unauthorised absence from work after prior warning.

B10.2.4 Dismissal offences include:

k) …wilful dishonesty against the Company,

B10.8 Disciplinary Procedures

B.10.8.1. Immediately when a manager becomes aware of an offence committed by an employee, or such offence has been reported by a supervisor, the manager shall take such steps as are necessary to establish whether the employee has a case to answer.

B10.8.2 If the manager is satisfied that the employee has a case to answer to, the employee shall be notified in writing of the nature of the alleged office, the time, date and place it was alleged to have taken place, and the breach of the disciplinary code alleged to have been committed.

B 10.8.3 Upon conclusion of the investigation, the manager shall either inform the employee that the investigations has been completed and the matter shall not be pursued further, or arrange with the Manager Admin Finance to arrange for a Disciplinary hearing within five working days, and shall notify the employee if the charge, place, time and date of the hearing.'

Discussion

[43] Having dealt with the applicable legal principles, I will now deal with determining the issues I am called upon to determine under three headings, firstly, the dishonesty charge, the procedural aspect in conjunction with the appellant's disciplinary code and lastly the substantive fairness aspect.

Dishonesty

[44] It is the view of the arbitrator that she could not understand what persuaded the Chairperson of the disciplinary hearing to consider the dishonesty charge

which was not contained in the charge sheet as provided for in the appellant's disciplinary policy[11]. Ms Mondo submits that the charge of dishonesty was an afterthought however in the same vein admits that the respondent was charged with dishonesty but that the charge only appeared in the notice she received to attend the disciplinary hearing.[12]

[45] From the evidence before court dealt with above it appears that Mr Chika provided the respondent with the Notification of Disciplinary Hearing before the meeting took place with Ms Coetzee. The reason why I say the notification was before the meeting is that the notification clearly states "A meeting will be set and communicated for disciplinary discussion in Ramona's Office." The same is confirmed in the minutes of the meeting signed by the respondent on 7 September 2018. Therefore, the court is of the view the notification dated 19 September 2018 received by the respondent on 19 September 2018, which contained the charge of dishonesty and unauthorized absence was not an afterthought. It came about as a result of the meeting that took place in Ms Coetzee's office wherein the real reason of absence was discovered. In the result, the court is satisfied that there was a proper charge of dishonesty and the same was placed throughout before the disciplinary hearing and the arbitration proceedings. In the circumstances the arbitrator erred in finding that there was no charge of dishonesty against the respondent.

Procedural aspect in conjunction with the disciplinary code

[46] The arbitrator and the respondent are in agreement that the appellant failed to follow its own disciplinary procedures and as a result the dismissal of the respondent was procedurally unfair. I beg to differ with the both of them and I say so for the following reasons. The first provision alleged to not have been complied with is B10.8.1. In this courts view this provision was complied with in that Mr Chika informed the Manager of the respondent's absence and a meeting was scheduled to discuss the respondent's reason for being absent from work on 5

[11] Arbitration award, Appeal Index, volume 1. P 85 at par 27.

[12] Respondents' heads of argument p 8 at par 27.

September 2018. Therefore, steps were taken by the Manager to determine if the employee has a case to answer to.

[47] In accordance with B10.8.1 and B10.8.2, the respondent was notified in writing on 19 September 2018, which is days after the meeting took place, to determine if the employee has a case to answer to. The respondent was provided with a notification titled “Notification of Disciplinary Hearing” which the court is satisfied met the requirements of this provision. I will therefore not repeat the requirements as set out in the provision dealt with above. The charges were clearly set out against the respondent that she had to answer to. The respondent was provided with a template by Mr Chika as a form of guidance. I see no reason or motive why Mr Chika would tell the respondent what to write in her statement. No reasons are placed before this court in that regard.

[48] In addition, B10.8.2, as previously stated above the respondent was notified in writing of the intended disciplinary hearing on 19 September 2018 scheduled for 1 October 2018. The said notification contained the charge, place, time and date of hearing. The respondent was afforded sufficient time to prepare herself for the said hearing, in fact the respondent had 12 days to be exact, before the hearing. I do not see any attempt from the respondent, in the event the days for her preparation was not sufficient, to have approached the appellant to afford her more time. In the result, I am satisfied that the appellant complied with the provisions of B10.8.2 and B10.8.3.

[49] I wish state that even if the appellant had not followed procedure in dismissing the respondent, there was a fair and valid reason to dismiss the respondent.[13]

Substantive fairness

[13] *Kahoro and Another v Namibian Breweries Ltd* 2008 (1) NR 382 (SC) at 390; *HS Limbo v Ministry of Labour*, unreported judgment by Swanepoel J in LCA 01/2008 delivered on 10 February 2010 at para [28].

[50] In *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & Others*[14] it was stated that:

'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 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.'

[51] Having found that the respondent was indeed charged with dishonesty, which is a dismissible offence in terms of B10.2.4 of the disciplinary code, I am of the view that the appellant had a fair and valid reason to dismiss the respondent within the meaning of s 33 (1) of the Labour Act. In addition the dismissal was based on a reasonable grounds in that the first respondent committed a serious breach that goes to the root of a contract, company policies and the principle of good faith.

[52] I am of the view that due to the seriousness of the offence of dishonesty by the respondent in that she did not tell the truth of her whereabouts when initially asked and what appears to be a pattern by the respondent of mixing up her dates (even though she got away with it in the first instance in that she was not charged) results in a breach of trust between the appellant and the respondent.

[53] The respondent was employed in a banking institution in a position where trust is a key factor. Dishonesty is generally seen as a serious offence and in certain instances dishonesty can justify dismissal. In my view the employees of banking institutions should maintain the highest possible ethical standards and honesty. In *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* it was stated that 'this trust which the employer places in the employee are 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 the relationship between employer and employee[15]".

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[14] *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & Others* (An unreported judgement of this Court) Case No. LCA 47/2007 delivered on 8 July 2008.

[15] *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC).

[54] The dishonesty of the respondent rendered the employment relationship intolerable due to broken trust between the parties. This was also not the first time that an incident like this happened. I therefore find that indeed the relationship between the appellant and the respondent has irretrievably broken down and reinstatement could not have been feasible.

[55] On the evidence presented before the arbitrator, I am of the opinion that, the arbitrator's award cannot be upheld. The award is not justified by the evidence that was led before her.

[56] No reasonable arbitrator, properly directed could, in my considered view, have arrived at such a conclusion, given the entire matrix of the case. Her conclusion in this regard, is in my considered view perverse and should not, even with the greatest benevolence, be allowed to stand. It is therefore liable to be set aside.

Order

[57] Having due regard to all the foregoing, it appears that the award cannot be allowed to stand. That being the case, the following order is accordingly found to be condign and is thus granted:

1. The appeal is upheld.
2. The award issued by the Arbitrator, Ms. Hamukwaya, dated 25 January 2021, be and is hereby set aside.
3. The arbitrator's order shall read "The complaint is dismissed."
4. There is no order as to costs.
5. The matter is removed from the roll and is regarded as finalised.

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JS Prinsloo

Judge

APPEARANCES

APPELLANT:	R Maasdorp Instructed by Köpplinger Boltman Legal Practitioners, Windhoek.
RESPONDENTS:	R Mondo Of Nixon Marcus Public Law Office, Windhoek