REPUBLIC OF NAMIBIA

IN THE LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2021/00056

In the matter between:

NAMIBIA STUDENTS FINANCIAL ASSISTANCE FUND **APPELLANT**

and

HILYA TAETUTILA NGHIWETE **1ST RESPONDENT**
MEMORY SINFWA N.O **2ND RESPONDENT**

Neutral citation: *Namibia Students Financial Assistance Fund v Nghiwete* (HC-MD-LAB-APP-AAA-2021/00056) [2022] NALCMD 50 (16 September 2022)

Coram: Oosthuizen J
Heard: **28 January 2022**
Delivered: **16 September 2022**

Flynote: Statutory presumption of unfair dismissal — onus on employer to prove a fair dismissal — high threshold when employer intervene in ongoing disciplinary inquiry chaired by independent chairperson approved by employer which is not finalised — employee applied for postponement of scheduled partly heard hearing on basis of sick leave certificate by health professional — application made to presiding chairman — employer, without prior termination of disciplinary inquiry;

without formulating additional charges; and without giving opportunity to employee to make submissions concerning dismissal, summarily dismissed employee — dismissal unfair — whether reinstatement would be fair in the circumstances.

Summary: Appellant is the Namibia Students Financial Assistance Fund (NSFAF), a juristic person in terms of Act 26 of 2002. First Respondent was the Fund's Head: Secretariat (or Chief Executive Officer) since 2013. First Respondent was summarily dismissed by the Board of NSFAF on 7 February 2020, while there was an ongoing disciplinary hearing conducted by an independent disciplinary chairman appointed by the Fund. The Fund complained about dilatory conduct of first Respondent over the period May 2018 until dismissal. The Fund's unilateral dismissal without a hearing was prompted by a medical certificate and application for postponement to the chairperson of the ongoing disciplinary enquiry. The Board of the Fund deemed it prudent to deliberate and decide on the postponement, the medical certificate and failure to complete a sick leave report and an application for sick leave and consequently dismissed the first Respondent without applying a fair procedure.

Held that: the onus to prove a fair dismissal is on the Appellant. In order to satisfy the onus the Appellant must prove that the dismissal was for a valid and fair reason, and was in accordance with a fair procedure.

Held that: the basic requirement of fairness towards the employee required the Fund, to oppose the first Respondent's application for a postponement on health reasons within the confines of the ongoing scheduled disciplinary hearing. After recording their position in the letter of 8 January 2020 to oppose the requested postponement, there was absolutely nothing impossible for the Fund to advance their position during the disciplinary hearing which was pre-agreed for continuation on 15 to 16 and 24 January 2020, 4 and 7 February 2020 and 20 to 23 April 2020.

Held that: for Appellant to submit that there was no admissible evidence on the medical condition of the first Respondent was premature. The Appellant was not seized with the hearing, the independent chairperson, Mr Daniels, was. There is nothing in the Appellant's disciplinary code giving the Board authority and

competence to adjudicate and pronounce on evidentiary matters, while it (the Board), was not seized with the hearing.

Held that: the minutes of the Special Board meeting of 6 February 2020 and the dismissal letter of 7 February 2020, viewed objectively with the disciplinary code and in the circumstances of this case, evidenced an inopportune arrogation and exercise of powers by the Appellant's Board. First Respondent's dismissal was invalid and unfair. The procedure followed was likewise unfair.

Held that: the Appellant's allegations against the first Respondent, which were presented in the Appellant's letters during January 2020, in the Board minutes of 6 February 2020 and in the dismissal letter of 7 February 2020 as facts, are and remain untested at the correct forum (the disciplinary hearing) until today.

Held that: the Board of the Fund was wrong to dismiss the first Respondent without due process.

Held that: the Board ought to have seen to it that its Department of Human Capital investigate the new complaints and formulated charges which should have been added to the existing charges for an independent adjudication by the independent chairman of the disciplinary hearing whether he allowed the postponement or not.

Held that: there was no vitiating misdirection or irregularity on the side of the arbitrator when she found that the dismissal of the first respondent was substantially invalid and unfair and that the procedure followed was also unfair.

Held that: taking into account the five factors quoted by the arbitrator in her award when reinstatement is to be considered together with the totality of the evidence tendered in the arbitration proceedings (inclusive of the evidence of the first Respondent), I conclude that another arbitrator or court acting reasonably would have come to a different conclusion, i.e. not to order reinstatement due thereto that the employment relationship and trust between the parties had broken down.

Held that: noteworthy is that, there was evidence of a breakdown in trust between the current Board of the Fund and the first Respondent on the evidence lead on behalf of the Appellant. First Respondent's evidence supported the fact that the parties do not trust each other. The employment relationship between the parties is *de facto* non existent since April 2018 to date.

Held that: the evidence tendered by the first Respondent in the arbitration proceedings viewed with the evidence of the Appellant militates against reinstatement.

Held that: factors to be taken into account in declining to order reinstatement are where an employment relationship has broken down or trust irredeemably damaged. 'These factors are not exhaustive. Plainly the remedying award is not only to be fair to employees but also to employers.'

ORDER

IT IS ORDERED THAT:

1. The dismissal of first Respondent was without a valid and fair reason and without following a fair procedure.

2. The appeal in respect of the first order of the arbitrator, is dismissed and rejected.

3. The appeal against the first Respondent's reinstatement succeeds.

4. The Appellant shall pay the first Respondent the monthly remuneration she would have received from 8 February 2020 until 15 July 2021 (subject to statutory deductions).

5. Each party shall bear its own legal costs.

JUDGMENT

OOSTHUIZEN J:

Introduction

[1] The Appellant is the Namibia Students Financial Assistance Fund ("NSFAF"), a juristic person which was established by Act 26 of 2002, brought into force on 15 May 2002 by GN 72/2002 (GG2738). In this judgment the Appellant will also be referred to as the "Fund".

[2] The first Respondent is Hilya Taetutila Nghiwete, an adult female and Head of the Secretariat of the Fund from March 2013 until 7 February 2020.

[3] The second Respondent is Memory Sinfwa N.O.. Second Respondent was the arbitrator in the dispute brought by first Respondent against NSFAF pursuant to the dismissal of the first Respondent from her employment with the Fund.

[4] Second Respondent's award made on 15 July 2021 and in favour of first Respondent was to the effect that first Respondent's dismissal was 'both substantively and procedurally unfair and thus set aside'. Appellant was ordered to reinstate the first Respondent to the position she held prior to her dismissal with all benefits enjoyed while in employment effective 1 September 2021. Further that Appellant must pay the first Respondent the remuneration she would have received had she not been dismissed on 7 February 2020, on or before 31 August 2021.

[5] It is common cause between the parties that a disciplinary hearing into the conduct of the first Respondent was ongoing from 3 October 2018 before an independent Chairperson and that the disciplinary hearing was not concluded on 7 February 2020 when the Appellant unilaterally dismissed the first Respondent.

The dismissal letter of 7 February 2020

[6] The dismissal letter reads as follows:

'Mrs. Hilya Nghiwete
Windhoek

Dear Mrs. Nghiwete,

RE: DISCIPLINARY HEARING: NSFAF // HILYA NGHIWETE

1. We refer to the above matter and to the related correspondence exchanged between the parties in January 2020.

2. On 16 April 2018, you were suspended from your duties pending an investigation into serious charges against you. The charges range from maladministration and conflict of interest to gross insubordination and financial mismanagement, suggesting corrupt practices on your part as Head: Secretariat. The Fund subsequently enlisted the services of forensic specialists to investigate the charges against you. Despite being invited to participate in that investigation in an attempt to expedite the process, you refused to cooperate. The investigation was concluded in August 2018. Since then, the Fund has engaged in a lengthy disciplinary process at unprecedented costs to the Fund.

3. We place on record the following:

3.1 Your sick leave certificate dated 12 December 2019 (forwarded to the Chairperson of the disciplinary inquiry only on 4 January 2020) is wholly inadequate for the purpose for which it was intended. The certificate provides no explanation whatsoever of your medical condition; of your ability to participate in the hearing; or the degree to which the diagnosis currently exists or may persist after 12 March 2020.

3.2 In the light hereof, through our lawyer's letter dated 8 January 2020, we indicated to you that we do not accept your client's sick leave certificate and requested a report to be filed by Dr Mudzanapabwe to specifically address the following:

3.2.1 the nature of the diagnosis of "psychopathological";

3.2.2 the degree to which the diagnosis has affected/is affecting your health;

3.2.3 whether and how the diagnosis impairs your ability to testify;

3.2.4 whether the diagnosis is permanent or temporary;

3.2.5 why you require three months' sick leave;

3.2.6 whether you will be able to participate in the hearing after 12 March 2020.

We requested the report by 10 January 2020 and insisted that it be accompanied by a formal application for sick leave in terms of the NSFAF Leave Policy dated July 2018. We also attached a template application for leave form to be completed by you.

3.3 Your lawyers responded in a letter dated 12 January 2020 claiming all that was required of you was a medical certificate. You refused to provide us with a medical report claiming that no such report was required in terms of NSFAF "practices or policies". Your lawyers furthermore indicated that you were not under any obligation to complete the leave form, apparently on the basis that you were on suspension;

3.4 On 16 January 2020, your lawyers indicated by way of an email to our legal team that Dr Mudzanapabwe was not prepared to provide us with a medical report, and would only do so "unless compelled by Court" and "under camera".

3.5 On 21 January 2020, our lawyers addressed a letter to your legal team again insisting that a full medical report is required. The motivation was that NSFAF is a large organisation which requires a Head: Secretariat or Chief Executive Officer ("CEO") to provide leadership to the organisation at a critical time, something which has been denied due to the protracted nature of the disciplinary process, and on the further basis as set out in our lawyer's previous correspondence. It was stressed that it is utterly unreasonable (and indeed unfair) to expect NSFAF to keep this position open for another two months with no assurance whatsoever that you would be medically fit to continue with the hearing after 12 March 2020. Having considered that the position has for almost two years been without a substantive incumbent resulting in prejudice to the leadership structure within the Fund, it was also stressed that an uncertain future for the Fund is undermining of good governance at the institution, and contrary to the public interest. We further highlighted that in the absence of any such information (as more fully set out in paragraph 3.3 above) neither the chairperson of the disciplinary hearing nor the Fund could make an informed decision concerning the postponement of the hearing or the future conduct thereof, or for that matter

your ability to continue future employment with the Fund. We further stressed that no explanation has been given as to why you, despite being in possession of the sick certificate since 12 December 2019, only brought the illness to our attention on 4 January 2020, and furthermore as to why you failed to apply for sick leave as required by the Fund's Leave Policy, referred to earlier. Our lawyers also recorded your continued refusal to apply for sick leave, despite the reminder contained in our lawyer's letter to your legal team dated 8 January 2020. In the light of the above considerations, we demanded that you agree in writing to a medical examination by a psychiatrist of the Board's choice, such agreement to be communicated by no later than 23 January 2020.

3.6 On 24 January 2020, your lawyers responded to our demand for you to undergo an examination by a psychiatrist of our choice, by questioning the basis upon which you should be examined by a psychiatrist. In that letter you gave no commitment - as demanded by us through our lawyer's previous correspondence - to subject yourself to a medical examination by psychiatrist of our choice, or for that matter by any medical practitioner whatsoever. We interpreted this to be a continued refusal by you to co-operate with the Fund in order for the Fund to be in a position to ascertain the nature, degree and severity of your medical condition, how long it may last and the impact it may have on the continuation of the disciplinary process and, critically, for the operational requirements of the Fund.

3.7 On 30 January 2020, our lawyers received a further letter from your legal team in which your lawyers referred to a medical condition and its effects by way of what they claim to be your doctor. In the context, we assume this to be Dr Mudzanapabwe - although the doctor was not identified in the letter. We point out that your lawyer's letter is not a report from your treating doctor, and in no way conforms with our demand that you agree in writing to a medical examination by a psychiatrist of our choice. We stress that the Fund is entitled to identify the medical practitioner who would conduct any such medical examination.

4. The attitude of the Fund towards mental illness is based on empathy and concern for any affected employee, but of course must also take into account that the manner in dealing with the situation must be based upon the principle of fairness to both the employer and employee concerned. This accords with the Fund's obligations in terms of the Labour Act, No. 11 of 2007, as well as to the International Labour Organisation's applicable Conventions.

5. We are advised and we stress that the onus was on you to prove your inability to attend the disciplinary hearing, as well as your entitlement to sick leave for the period of three months commencing on 12 December 2019. This onus has not been discharged by virtue of the presentation of the sick leave certificate dated 12 December 2019. The Fund's

legal team has set out in detail in previous correspondence the basis upon which the Fund takes this view. We further emphasise that the mere production of a medical certificate, and particularly in the circumstances of this matter, is not sufficient to justify your absence from the hearing. It is also a great cause for concern that you who, according to your legal team, had been undergoing treatment for your psychopathological condition for a period of 5 months prior to 12 December 2019, were fit to travel internationally during that period to conduct your private business, but suddenly claimed to be unfit to participate in the disciplinary hearing. You have not tendered any explanation for this, notwithstanding being called upon to do so, nor have you denied these allegations.

6. We further point out in terms of clause 2.4 of the Fund's Leave Policy any leave - whether it be annual leave or sick leave - must be applied for by the employee concerned and "shall be discussed and approved in consultation with the immediate supervisor". You have not only failed to make application for sick leave (as you should have done on 12 December 2019), despite our demand that you do so (communicated through our lawyer's letter dated 8 January 2020), but delayed in informing the Fund that you had been booked off by Dr Mudzanapabwe until Saturday, 4 January 2020, two days before the disciplinary hearing was to recommence.

7. We further point out that in terms of clause 12.4 of the Fund's Leave Policy the Fund is entitled to request from you "proof of illness at any time and for any duration of such sick absence". We are advised that there is ample legal authority to the effect, in these circumstances, that an employer is entitled to demand an independent medical diagnosis of the illness and that the mere production of a medical certificate is insufficient to justify your absence from the disciplinary hearing. We are further advised that the courts have also established the principle that it is not reasonable to expect an employer to merely accept that an employee is entitled to sick leave (in this case for three months) and a possible indefinite further period (in the absence of a medical report) in circumstances where an employee refuses to be subjected to a further medical assessment by a practitioner of the employer's choice.

8. This refusal is undermining of the Board's authority, a violation of the conditions of your suspension, and reflects on your general attitude towards the disciplinary process. This is evidenced by your conduct at the outset in refusing to cooperate by declining several requests to be interviewed by KPMG as part of the forensic investigation. This attitude is further evidenced by your conduct during the process of the disciplinary inquiry in requesting postponement on six occasions which requests were mostly made on very short notice to the chairperson. On the last occasion in January 2020, your request was communicated on

the weekend prior to the recommencement of the hearing, despite the fact that you knew about your being booked off for your alleged medical condition almost 3 weeks prior thereto.

9. In the light of the above, the position taken by you is grossly unreasonable, and in the context of the employment relationship, unfair to the Fund. It is a situation which the Fund cannot allow to continue any further, given the central role the Head: Secretariat must play in the affairs of the Fund, and given also that the Fund must act in the public interest in ensuring that the Fund is meeting its duties both on the level of governance and in the public interest.

10. In the light hereof, the NSFAF Board - after careful consideration of the matter resolved in a special Board meeting held on 6 February 2020 that it has no alternative but to terminate your employment with the Fund with immediate effect.

Yours Sincerely,
(signed)
Klemens / Awarab
Chairperson of the NSFAF Board'

Dispute for Arbitration

[7] First Respondent referred a dispute to the Labour Commissioner for arbitration on 17 February 2020. The Appellant in this appeal proceedings was the Respondent in the referred dispute and the first Respondent in this appeal proceedings was the Applicant in the referred dispute for Arbitration.

[8] Paragraphs 6, 7 and 8 of the first Respondent's (Applicant's) particulars of complaint reads as follows:

'6. The Respondent whilst the parties were engaged in a disciplinary hearing, abandoned the disciplinary hearing by unlawfully terminating the Applicant's contract of employment without a hearing and in a manner wholly inconsistent with section 33(1)(a) and (b) of the Labour Act and in direct conflict with the judgment of *Kiggundu and Others c Roads Authority and Others 2007 (1) NR 175 (LC)* as per **Annexure HN 3** attached hereto, on 7 February 2020 as per **Annexure HN 4**.

7. The Applicant's employment termination is both procedurally and substantially unfair in that: -

7.1 there was no hearing prior to the dismissal in accordance with the Respondent's own disciplinary procedures;

7.2 the decision was made in a manner that is arbitrary, unreasonable, unfair and without a valid and fair reason;

7.3 the Respondent was not entitled to abandon the disciplinary hearing particularly in the circumstances where the Respondent's decision is to institute disciplinary proceedings against the Applicant and the disciplinary process itself were a subject of a pending High Court challenge set to be hear on 7 May 2020 as per the attached notice of set down marked as **Annexure HN 5**.

7.4 The decision was not taken by a properly constituted Respondent's Board and at a properly convened meeting of directors.

8. Accordingly, the Applicant pleads that her dismissal from her employment is unfair, invalid and of no effect in law and it is liable to be set aside and substituted with an award directing that the Respondent reinstates the Applicant into her position and pay her all remuneration from the date of dismissal to the date of reinstatement.'

The arbitration award

[9] At the start of the proceedings before the arbitrator two bundles of documents were handed up. The bundles were marked "A" and "B". "A" was the bundle the Applicant (first Respondent herein) wished to rely on and "B" was the bundle the Respondent (Appellant herein) wished to rely on. The bundles were so accepted under condition that the documents therein were what they purport to convey but that their contents are not necessarily true and correct. Bundle "A" focused on the period from January 2020 to and including February 2020. Bundle "B" of the Fund focused on the period from April 2018 to February 2020, i.e the whole period of the disciplinary inquiry from inception until overtaken by the Fund's dismissal letter.

[10] Selected paragraphs of the arbitration award are repeated, as follows:

'**Issues for determination**

[5] It is required of me to decide whether/not applicant was unfairly dismissed both substantively and procedurally and the appropriate relief thereof

Background of the dispute

[6] The applicant was employed by the respondent as the Chief Executive Officer from the 01st of April 2013 until 07th February 2020. Subsequently, on the 17th of February 2020 the applicant referred a dispute of unfair dismissal and unfair labour Practice to the Labour Commissioner in accordance with section 86 (2) (a) of the Labour Act 11 of 2007.'

[11] The arbitrator then summarised the evidence presented and proceeded as follows under the heading "Analysis of the Evidence":

'[27] At this point in time, I will attempt to lay the legal basis for dismissal in our law, with a view to determining whether, in light of the facts presented, there were good ground to dismiss the applicant, which burden lies on the respondent to prove.

[28] Section 33 of the labour Act 11 of 2007 deals with unfair dismissal and reads as follows:

"33 (1) An employer must not, whether notice is given or not, dismiss an employee-
(a) without valid and fair reason and
(b) without following -
(i) …………………….
(ii) ………………a fair procedure, in any other case."

[29] From the above quoted provision, it is apparent that a two-legged inquiry is to be raised up in determining whether applicant's dismissal was procedurally and substantively fair. Substantively fairness focuses on whether there existed a valid and fair reason to dismiss; whether or not the employee contravened the rule? Whether or not dismissal is the appropriate sanction for the offence. Procedural fairness sets the standard against the employer's action before dismissing an employee.

Substantive fairness

[30] The reasons for dismissal as reflected in the dismissal letter is that the applicant refused to be subjected to a second opinion and/or to submit a medical report after having been booked off for three (3) months by a Psychologist; and to fill in leave for the period she was booked off with a conviction that she had frustrated the ongoing disciplinary hearing.

[31] It is common cause that parties agreed that they would not deal with the merits of the disciplinary hearing, but evidence was led to indicate the process from inception up until the termination of the applicant's employment. Therefore the reasons for dismissal that needs to be analysed as to whether there were valid and fair are those contained in the dismissal letter. It is evident from the last two correspondences (dated 21 January 2020 and 30 January 2020 respectively) before the dismissal letter, that there was no conclusion reached as to what was the final position on the matter at hand.

[32] Through the respondent's request to subject the applicant to a second opinion by a Psychiatrist or submit a medical report and to complete leave would have been reasonable under the circumstances, no charges were proffered against the applicant to prove that she indeed misconducted therefore these were merely one-sided allegation. Clause 3 of the Employee Relations Policy specific to 3.8 read with 3.3 states that "An employee shall be informed and made aware of the reasons why disciplinary steps are being instituted against her."

[33] If it was the respondent's conviction that the applicant frustrated the process, they were at liberty to proceed with the disciplinary hearing and allow the chairperson to pronounce himself. The right do so is contained in the respondent's own Employee Relations Policy under clause 11.3.2 where reasons on which they can proceed with a disciplinary hearing in the absence of the employee are outlined.

[34] In *Schmitz Services CC v Titus & Another* it was held that "it must be remembered that substantively unfair dismissal is proven where the employer has no valid and fair reason to dismiss the employee; that is, where the employee is not found guilty of the misconduct he or she is charged with and where the misconduct does not justify the ultimate punishment". The applicant in the case was not charged, the allegation levelled against her were not put to test in order to determine her guilty, and that in itself amounts to a "premature" dismissal.

[35] Similarly in *Management Science for Health v Kandungure* it was held that 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.

[36] For all the aforegoing, I hold that the respondent failed to prove that there was a valid and fair reason to dismiss the applicant rendering the dismissal of the applicant substantively unfair.

Procedural fairness

[37] It is common cause that initially the applicant was suspended, charged and subjected to disciplinary hearing but it was not concluded. Thereafter the respondent opted to dismiss the applicant by merely serving her with a dismissal letter. It is important to note that the applicant was not afforded the opportunity to be heard neither in the initial disciplinary hearing as it was abandoned nor when the termination came into effect.

[38] I tend to disagree with the respondent's contention that they did not see the need to charge the applicant nor to afford her the opportunity to be had as she had already frustrated the initial process "it would have made no difference". Section 33(1) (b) is very clear that an employer <u>must not</u>, whether notice is given or not, dismiss an employee without following a fair procedure.

[39] The respondent in this case wore the hat of both a judge, complainant and prosecutor, which in all fairness does not stand the test of the *audi alteram partem* rule of natural justice. The respondent's Employee Relations Policy under clause 10 specifically 10.1 read with clause 6.6.1 states that "no employee may be dismissed without being granted a formal hearing or enquiry, unless circumstances such as the employee either absconded or being unwilling to return to work render this impossible" - which is not the case in the present matter.

[40] Similarly Clause 20 of the said policy clearly shows that dismissal will be preceded by a disciplinary enquiry. The respondent in this matter failed to follow its own laid down policies and procedures and unilateral dismissed the applicant. For all the aforegoing, I hold that the respondent failed to follow a fair procedure in dismissing the applicant, thus rendering the applicant's dismissal procedurally unfair.

Reinstatement

[41] The applicant's relief claim is reinstatement with full benefit. The respondent's contention is that reinstatement will not be a viable option as the trust relationship between the applicant and the respondent have been irretrievably broken. Parker outlines important factors to be considered when making a decision whether to reinstate or not reinstate, and they are as follows:

1. The nature of the duty of the employee that was breached;
2. The nature of the misconduct or other offences;
3. How far the breach or misconduct has caused bad blood between the employer and the employee;
4. The likelihood of the employee committing a similar breach or misconduct again, if he/she was reinstated; or
5. Whether because of the length of time that has elapsed between the date of dismissal and judgement 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.'

[42] The applicant in the present matter was not charged of any misconduct meaning the allegation made by the respondent were not put to test to determine whether or not the applicant misconducted and the gravity of such misconduct. Therefore the factors mentioned from number 1 to 4 falls away. In terms of the 5th factor, the applicant's position is still vacant. The respondent's reliance on allegations that were not proven to bring about the issue of the relationship being irretrievably broken does not hold water under the circumstances.

[43] In the matter *ABB Maintenance Services (Pty) LTD v Moongela* it was held that, since the appellant has not established a valid reason for the dismissal of the respondent, the question of irretrievable break down of the working relationship does not arise. *The court thus found* it just and fair to order the appellant to reinstate the respondent with back pay.

[44] Therefore as empowered by section 86(15)(d) & (e) I will grant the relief as claimed, which is reinstatement with full benefits and the remuneration the applicant would have received had she not been dismissed.'

<u>Grounds of Appeal</u>

[12] On 12 August 2021 the Fund (Appellant) noted an appeal in this Labour Court pursuant to Section 117(1)(*a*)(ii), read with s 89(1)(*a*) of the Labour Act 11 of 2007 against the entire award (and orders) issued by the second Respondent on 15 July 2021.

[13] The grounds of appeal and questions of law are the following:

'1. The arbitrator found that the First Respondent's dismissal was substantively and procedurally unfair. Consequently, the question of law which falls for determination is whether or not, on the evidence placed before her, the arbitrator misdirected herself when she concluded that the dismissal was unfair and ordered reinstatement and backpay.

2. The arbitrator erred in law when, in the context and circumstances of the present matter, she found that the dismissal was unfair because the First Respondent was not charged with misconduct nor afforded a hearing prior to the dismissal. The arbitrator failed to take into consideration the well-established line of authorities which confirms that a right to a hearing is not absolute and that in certain circumstances, which were prevalent in the present matter, an employer cannot reasonably be expected to provide an employee with an opportunity to defend him/herself against allegations made.

3. In finding that the dismissal was unfair, the arbitrator erred in law/misdirected herself when she failed to take into consideration the First Respondent's entire conduct towards the disciplinary inquiry from the period of 2018 to the date of the First Respondent's dismissal.

4. The arbitrator erred in law/misdirected herself when she failed to consider all the reasons, as recorded in the dismissal letter of 7 February 2020, which led to the First Respondent's dismissal. The arbitrator totally missed the context within which the Appellant dismissed the First Respondent, and also the nature and extent of the First Respondent's deliberately dilatory conduct towards the disciplinary hearing which made continuation of the employment relationship impossible. The arbitrator also completely ignored the fact that the First Respondent's conduct towards the disciplinary process was to the prejudice only of the

Appellant and came at a hefty cost to the taxpayer who funds the Appellant and its operations.

5. The arbitrator erred in law/misdirected herself when she disregarded the uncontested evidence that the First Respondent travelled internationally for private business in September 2019 whilst suffering from a psychopathological condition, which condition the First Respondent subsequently claimed made her unfit to participate in the disciplinary hearing for a period of 3 months from January to March 2020. The arbitrator further failed to assess this particular conduct by the First Respondent against the First Respondent's entire conduct towards the disciplinary hearing, including the First Respondent's unreasonable refusal to complete a sick leave form and her further refusal to undergo a medical examination to obtain a second opinion on her medical condition, with the effect that the arbitrator failed to find that the First Respondent had no real intention to testify at the disciplinary hearing.

6. The arbitrator erred in law/misdirected herself when she failed to take into consideration the principle that fairness comprehends that regard must be had not only to the position and interests of the employee (the First Respondent), but also those of the employer (the Appellant) in order to make a balanced and equitable assessment. In fact, the arbitrator completely ignored the position and interests of the Appellant vis-à-vis those of the First Respondent.

7. The arbitrator erred in law/misdirected herself when she failed to find that the Appellant could not reasonably have been expected to provide the First Respondent another opportunity to defend herself against (her own) misconduct which was clearly directed to stall the disciplinary inquiry once again.

8. The arbitrator erred in law/misdirected herself when she found that the Appellant had no valid reason to dismiss the First Respondent. The Appellant had various reasons on which it based its decision to dismiss the First Respondent, which reasons were recorded in both the Board resolution of 6 February 2020 and in the letter of dismissal dated 7 February 2020 - both letters were presented in evidence.

9. The arbitrator erred in law when she failed to find that the trust relationship between the Appellant's board and the First Respondent, as well as the trust relationship between the Appellant's senior management members and the First Respondent, had broken down irretrievably. The arbitrator further erred in law when she failed to take into consideration the First Respondent's own testimony (and supporting documents) of distrust towards the

Appellant's past and current board which clearly evinced a break down in the trust relationship with the Appellant.

10. The arbitrator erred in law when she ordered reinstatement and backpay in favour of the First Respondent, in circumstances where the trust relationship between the parties had broken down irretrievably.'

First Respondent's submissions in support of the arbitration award

[14] First Respondent, Ms Nghiwete, supports the arbitration award and submits that the arbitrator's award cannot be faulted in law.

[15] Furthermore, the first Respondent submits that there are further grounds raised in the arbitration proceedings which the arbitrator did not pronounce upon but is still available to first Respondent to sustain the award outcome, these are:[1]

[a] That the dismissal is null and void as a Board member, Ms Munyika, who was prohibited from voting under section 6(2)(*a*) of the NSFAF Act, 26 of 2000, approved and voted for the dismissal of first Respondent.

[b] Ms Munyika was not appointed for a "particular purpose" as required by section 6(2)(*a*) of the Act.

[c] The Appellant's Board has no competence, authority and right to interfere and stop an ongoing disciplinary hearing by an independent chairperson in the absence of evidence and a guilty verdict by dismissing first Respondent.

[d] The Board members unlawfully decided on the dismissal without a reasonable and proper notice (to the members) for the members to prepare on dismissal of first Respondent.

Evaluation of the respective grounds, applicable law and evidence

[16] The Labour Act 11 of 2007 is referred to as the Labour Act.

[1] First Respondent's Heads of Argument page 5 and 6.

[17] The Namibia Students Financial Assistance Fund Act 26 of 2000 is referred to as the NSFAF Act.

[18] An employer is not allowed to dismiss an employee, with or without a notice, without a valid and fair reason, and without a fair procedure.[2]

[19] In terms of section 33(4)(*b*) of the Labour Act it is presumed that the Appellant has unfairly dismissed the first Respondent, unless the Appellant prove otherwise. It is common cause that the Appellant dismissed the first Respondent on 7 February 2020.

[20] The onus to prove a fair dismissal is on the Appellant. In order to satisfy the onus the Appellant must prove that the dismissal was for a valid and fair reason, and was in accordance with a fair procedure.

[21] A fair procedure was pronounced to include the following:[3]

[a] An advance notice of a hearing with concise charges must be given to the employee to enable the employee to prepare adequately to challenge and answer the charges.

[b] The employee must be advised of his/her right of representation.

[c] Chairperson of the hearing must be impartial.

[d] At the hearing the employee must be given the opportunity to present his/her case in answer to the charges and to challenge the assertions of his/her accusers and their witnesses.

[e] There should be a right of appeal and the employee must be informed about it.

---

[2] Section 33(1) of the Labour Act 11 of 2007, applicable to the circumstances of the case at hand.

[3] *Management Science for Health v Kandungure* 2013 (3) NR LC, at 634, para [67]; *Food & Allied Workers Union and Others v Amalgamated Beverages Industries Ltd* (1994) 15 ILJ 630(IC).

[22] The procedure followed by Appellant to terminate the services of first Respondent while a disciplinary hearing on a range of alleged serious charges were conducted by an independent chairperson was indeed alien to the usual procedure which would have allowed the disciplinary hearing to conclude.

[23] The circumstances leading to appellant's decision to dismiss the first respondent needs to be considered.

[a] A disciplinary hearing into the conduct of the first Respondent was in progress.

[b] While the disciplinary hearing was conducted the first Respondent through her lawyers sought a further postponement from the independent chairperson until 12 March 2020 based upon a sick leave certificate obtained from a clinical psychologist on 12 December 2019 which stated that first Respondent is psychopathological. The request was also send to the lawyers of the Appellant.[4]

[c] On 8 January 2020, the Appellant's lawyers wrote and send a letter to first Respondent's lawyers. The letter was also forwarded to the chairperson of the disciplinary inquiry.[5] In the letter it was recorded that since October 2018 the disciplinary hearing has been postponed five times at the behest of the first Respondent on very short notice and the Appellant had to bear the associated costs of the presiding chairperson, counsel, venue hire and pre-booked recording services each time.

[d] The letter continued as follows:

'2.2 The latest request for a postponement dated 4 January 2020 - the 6th one to date- was similarly presented practically at the last minute notwithstanding that the alleged basis for the postponement was known to your firm/ your client since 12 December 2019. What's more, all parties involved in the matter, including NSFAF witnesses, had (at some inconvenience) planned an early return from their December/January break solely to prepare

[4] Bundle A, Exhibit "A", pp 14 to 17.
[5] Bundle B, Exhibit "B", pp 174 to 177.

for the resumption of the hearing from 6 to 10 January 2020, which were dates the partirs specifically agreed to during September 2019 already. The frequency and manner in which request for postponement (including threatened postponements) have to date been made suggests to our client that your client has no real intention to testify in her disciplinary hearing.

2.5 The sick certificate apparently authored and signed by one Dr Mudzanapabwe is wholly inadequate for the purpose for which it has been tendered. The certificate provides no explanation whatsoever of your client's condition; of her ability or inability to participate in the hearing (at the very least for purposes of NSFAF's remaining two witnesses); or of the degree to which the diagnosis currently exists or may persist after 12 March 2020. Our client is totally in the dark about the nature, degree and severity of your client's condition and how long it may last, and the future of the disciplinary hearing currently hangs in the balance - a situation which clearly favours your client who receives full benefits and remuneration during this time, to the prejudice of NSFAF's operational requirements as well as the public interest.

2.6 Our client does not accept the sick certificate and, in order to consider the request for postponement, insists that a report be compiled by Dr Mudzanapabwe in which he specifically addresses the following:

2.6.1 the nature of the diagnosis of the "psychopathological";

2.6.2 the degree to which the diagnosis has affected/ is affecting your client's health;

2.6.3 whether and how the diagnosis impairs your client's ability to listen to testimony and give instructions to you in preparation for cross-examination;

2.6.4 whether and how the diagnosis impairs your client's ability to testify;

2.6.5 whether the diagnosis is permanent or temporary;

2.6.6 why your client requires 3 months leave;

2.6.7 whether your client will at all be able to participate in the hearing after 12 March 2020.

The report should be made available to NSFAF by 10 January 2020 and must be accompanied by a formal application for sick leave in terms of the NSFAF Leave Policy of July 2018. We attach a template application for leave form to be completed by your client.

3. We propose that the disciplinary hearing stand down to 15 January 2020 in order for our client to consider the leave application as well as Dr Mudzanapabwe's report as requested above.

4. We reserve our client's further rights in this matter.'

[e] On 12 January 2020 first Respondent, through her lawyers, responded to the issue of the sick leave as follows:[6]

'All that is required is a medical certificate. Nothing more, nothing less. Our client is being attended to by a doctor based on her medical condition. Details of an individual's ailments are confidential, as you will know. No report is required either in terms of your client's practices or policies. We therefore place it on record that the certificate furnished by our client is sufficient.

Our client is not under obligation to complete the leave form sent to us. In any event, we fail to understand the ratio behind sending our client an application for leave when she is suspended. In fact, your client's continuous unreasonable conduct towards our client is aggravating our client's medical condition. The fact remains therefore that our client has been medically booked off for the period concerned.

Without derogating from the above, and without prejudice to our client's rights, efforts are being made to see whether the doctor concerned will be prepared, with the consent of our client (if given), to provide additional details of our client's condition without necessarily breaching confidentially. In this respect, we will revert to you on or before 15 January 2020.

All our client's rights remain strictly reserved, and we record that our client is medically booked off for the period stated in the certificate concerned.'

[f] On 16 January 2020, first Respondent through her lawyers send an email to Appellant's lawyers with the subject "SICK LEAVE DISCLOSURE" which reads as follows:[7]

'Our client consulted with her Dr to see if he can disclose the nature of our client's condition. The Dr indicated that he is hesitant to do that unless compelled by court and he will be doing it under camera.

---

[6] Bundle B, Exhibit "B", pp 178 and 179.

[7] Bundle B, Exhibit "B", p 180.

The Dr indicated that NSFAF can contact Dr Mudzanapabwe Joab at 0812402036.
The Dr maintained the same position that even if he disclose our client's condition that does not change the sick leave.

Furthermore our client has instructed us to enquire as to:

1.1. When her leave cycle ends and starts?

1.2. What is my leave balance

1.3. They should indicate the official closure dates (In 2018 and in 2019) as our client is aware that every year we get 5 days extra for annual leave in December.'

[g] On 21 January 2020 Appellant's lawyers wrote to first Respondent's lawyers concerning the required medical report that a full medical report is required and:[8]

'2.4 Due to the absence of any such information (as more fully set out in paragraph 2.6 of our latter dated 8 January 2020), neither the chairperson of the disciplinary hearing nor our client can make an informed decision concerning the postponement of the hearing or the future conduct thereof, or for that matter your client's ability to continue future employment with the Fund.

2.5 In addition, your client has been in possession of the sick leave certificate since 12 December 2019. No explanation has been given to date as to why, firstly, your client withheld such relevant information for a period of more than three weeks prior to its presentation to ourselves on 4 January 2020 (i.e. on the Saturday before the enquiry was due to recommence); and secondly, as to why your client failed to apply for sick leave as required by the Fund's Leave Policy. Despite our client's reminder that your client do so, your client has communicated (via your letter dated 12 January 2020) that she refuses to do so, your client has communicated (via your letter dated 12 January 2020) that she refuses to do so. In this regard, our client reserves the right to bring further disciplinary charge(s) against your client.

2.6 On your own admission, your client had been undergoing treatment for her *"psychopathological"* condition for a period of 5 months prior to 12 December 2019. We are instructed that during this period your client was, however, quite capable of travelling internationally for her private business when she joined the official delegation of the Vice-President of Finland during September 2019 - in breach of her suspension conditions (an

[8] Bundle A, Exhibit "A", pp 23 to 25.

issue on which we also reserve our client's rights at this stage). This conduct requires an explanation from your client, more specifically as why she is fit to conduct her private business but claims to be unfit in respect of participation in the disciplinary hearing.

2.7 We note that in an email from your offices dated 16 January 2020 your client has refused to provide our client with a medical report as requested in paragraph 2.6 of our letter dated 8 January 2020. In that email it is indicated that the treating doctor will only disclose the nature of your client's medical condition if compelled to do so by a Court and *"under camera"*

2.8 We note further that it is open to your client to instruct her medical practitioner to provide our client with the requested medical report, but your client declines to do so. In the circumstances, our client thus has reason to believe that your client prefers to not fully disclose her medical condition, and rather seeks to use the inadequate medical certificate to attempt to prevent the scheduled disciplinary hearings taking place.

3. In light of the above considerations, and your client's refusal to furnish our client with the requested medical report, our client demands that your client agree in writing to a medical examination by a psychiatrist of our client's choice, such agreement to be communicated to our client by <u>no later than 12h00 on Thursday, 23 January 2020.</u>

4. Should your client fail to agree to the medical examination, we reserve our client's rights in full in regard to the future conduct of the disciplinary enquiry.'

[h] On 24 January 2020 the lawyers for the first Respondent by way of a letter addressed to the lawyers of the Appellant[9] enquired: '…on what basis does your client demand that our client be examined by a psychiatrist taking into account that our client was examined and booked off on leave by a psychologist.' And further 'Take note that our client was booked for psychological reasons and not psychiatric.'

[i] On 27 January 2020 the psychologist of first Respondent supplied the first Respondent with his opinion on the required medical report. First respondent shared it with her lawyers.[10]

[9] Bundle A, Exhibit "A", p 26, paragraphs 3 and 4.
[10] Bundle A, Exhibit "A", p 28.

[j] On 30 January 2020, the lawyers for first Respondent wrote to the lawyers of Appellant that:[11]

'3. Our client's doctor has informed our client that he provided our client with the sick leave because of the significant amount of stress that our client is undergoing and that our client went through in the past. The stress is causing marked anxiety and depressive symptoms. This in turn affects our client's cognitive functioning such as concentration, attention, information processing etc. Bearing in mind the loss of our client's father last year which is a significant stressful life event.

4. This makes our client vulnerable to the development of secondary stress (e.g. the current work-related stress) and the associated psychopathology. It is our client's doctors considered opinion that our client must be able to optimally attend to her work after the expiry of the sick leave that he provided. Of importance is for them to continue with the psychotherapeutic treatment sessions.

5. We trust the above is in order and should be sufficient to address any concerns that you may have with respect to our client's leave.'

[24] All the letters between the lawyers in Exhibit "A" and "B" were copied to the chairperson of the disciplinary hearing, Mr Clement Daniels.

[25] The Chairperson of the Board of Directors of the appellant (NSFAF) testified during the arbitration proceedings on 13 April 2021.[12]

[26] Mr /Awarab confirmed the contents and his knowledge of the letters written by the Board's lawyers from the 8th of January 2020 to the 21st of January 2020. Under cross-examination he confirmed that Appellant's legal practitioner acted and wrote letters and e-mails to first Respondent's legal practitioners after consultation with Appellant.[13]

[27] Mr /Awarab confirmed that he authored and signed the dismissal letter; the documents and their contents appearing in Bundle B, Exhibit "B" on pages 278 to 280, i.e. the Special Board Meeting minutes of 6 February 2020 and relevant

[11] Bundle A, Exhibit "A" pp 30 and 31.
[12] Transcript pp 331 to 423.
[13] Transcript pp 379 and 380.

discussion notes concerning first Respondent, as well as the resolution to terminate the employment of first Respondent effective the signature date by himself, and his signature at the end of the minutes.[14]

[28] Mr /Awarab testified that the trust relationship between the Board and the first Respondent is broken and the acting CEO, Mr Kandume, would probably be the best for the actual working environment.[15]

[29] The following exchange took place during the cross-examination of Mr / Awarab:[16]

'REPRESENTATIVE FOR THE APPLICANT: Okay. So we are talking about what happened in February 2020.

REPRESENTATIVE FOR THE APPLICANT: Okay, I am reminding you. Okay, you are the person that signed the letter of dismissal?

MR KLEMENS /AWARAB: Yes.

REPRESENTATIVE FOR THE APPLICANT: So in other words you are the person that implemented the Board decision?

MR KLEMENS /AWARAB: Yes.

REPRESENTATIVE FOR THE APPLICANT: In our law in Namibia a person must be charged with disciplinary offence, is that correct?

MR KLEMENS /AWARAB: That is correct.

REPRESENTATIVE FOR THE APPLICANT: In terms of your NSFAF policy if an employee commit an offence a disciplinary one did not complete leave form, stole did whatever the policy says that he or she must be charged is that correct?

MR KLEMENS /AWARAB: Yes.

REPRESENTATIVE FOR THE APPLICANT: Okay. With regard to what caused my client to be dismissed did she commit a disciplinary offence?

MR KLEMENS/AWARAB The fact that she refused to abide by the policy provisions.

REPRESENTATIVE FOR THE APPLICANT: Okay. That is one, which one is that?

MR KLEMENS /AWARAB: That she also refused to get an alternative medical opinion.

REPRESENTATIVE FOR THE APPLICANT: Two (2), okay two (2) charges two (2) disciplinary misconduct?

MR KLEMENS /AWARAB: Yes.

[14] Transcript pp 350 to 358.
[15] Transcript p 362.
[16] Transcript pp 366 to 369.

REPRESENTATIVE FOR THE APPLICANT: So they are only two (2) then? Yes you should know, they are only two (2) then?

MR KLEMENS /AWARAB: Yes as far as my recollection yes.

REPRESENTATIVE FOR THE APPLICANT: Yes there is nobody else (inaudible) (55.47) the only chance you have. Okay, did you have her charged because those are the allegations they are not charges, did you have her charged for these two (2) (intervention)…

MR KLEMENS /AWARAB: No I have not, they have not NSFAF has not charged her for that.

REPRESENTATIVE FOR THE APPLICANT: Okay. So there was a deliberate decision not to charge likely?

MR KLEMENS /AWARAB: It was I would not say it was a deliberate decision but the reason why we have decided not to charge was informed by the fact that the current disciplinary process that we are taking her through is not being honoured. So as a consequence charging her now would be not in the interest of the company because it would also have the same consequential delays.

REPRESENTATIVE FOR THE APPLICANT: Remember I am asking this deliberately because it will have consequences on the remedy whether to reinstate or not, so it was then deliberate you took a conscious decision that ah, ah we must not charge her. That is what you just confirmed that is deliberate and conscious. So you were conscious that you were denying her an opportunity to be charged that she is entitled to that in terms of the code disciplinary code. You were deliberate.

MR KLEMENS /AWARAB: We considered that decision based on that fact that we had the previous disciplinary hearing that we were dealing with was been compromised.

REPRESENTATIVE FOR THE APPLICANT: Okay.

MR KLEMENS /AWARAB: Should we charge her again we would face the same conditions.

REPRESENTATIVE FOR THE APPLICANT: I am not asking justification.

MR KLEMENS /AWARAB: Yes.

REPRESENTATIVE FOR THE APPLICANT: I am saying I just want to confirm so that we are on the same page but after looking at that justification you then took a deliberate decision to deny her an opportunity to be charged.

MR KLEMENS /AWARAB: We did not charge her.

REPRESENTATIVE FOR THE APPLICANT: Yes deliberately. Yes you are nodding.

MR KLEMENS /AWARAB: We did not charge her.'

[30] The Board also did not avail the opportunity to first respondent to be heard on the dismissal.[17]

[31] All the Board members present at the meeting of 6 February 2020 approved the dismissal of first Respondent, including the alternate member, Ms Munyika.[18]

[32] The representative for first Respondent then engaged in legal argument with Mr /Awarab and the representative of the Appellant concerning the legality of the voting (to dismiss) based on section 9 of the NSFAF Act.[19]

[33] With reference to clause 10.1 of the NSFAF's disciplinary code, Mr /Awarab confirmed that first respondent did not abscond.[20]

[34] Under re-examination Mr /Awarab testified that in his opinion clause 10.1 contains a list of closed circumstances.[21]

[35] Clause 10.1 of the NSFAF's disciplinary code reads:

> '10.1 No employees may be dismissed without being granted a formal hearing or enquiry, unless circumstances such as the employee either absconded or being unwilling to return to work render this impossible.'

[36] Appellant's letters to first Respondent's lawyers, copying in the chairman of the ongoing disciplinary hearing, aimed to record circumstances which would render the continuation of the disciplinary hearing or enquiry <u>impossible</u> in order to validate a dismissal on new grounds originating from a request for postponement for health reasons made to the chairperson of the disciplinary hearing.

[37] The basic requirement of fairness towards the employee required the Fund to oppose the first Respondent's application for a postponement on health reasons within the confines of the ongoing scheduled disciplinary hearing. After recording

---

[17] Transcript p 373.
[18] Transcript pp 401 and 402.
[19] Transcript pp 402 and 407.
[20] Transcript p 415. Exhibit "B" p 235.
[21] Transcript p 416. Exhibit "B" p 235.

their position in the letter of 8 January 2020 to oppose the requested postponement, there was absolutely nothing impossible for the Fund to advance their position during the disciplinary hearing which was pre-agreed for continuation on 15 to 16 and 24 January 2020, 4 and 7 February 2020 and 20 to 23 April 2020.[22]

[38] The first Respondent correctly requested the postponement from the chairman of the ongoing disciplinary hearing.

[39] The Appellant was reasonably required to use the pre-arranged set down dates. Seemingly, the Appellant instructed its lawyers not to avail the opportunity to the chairman to pronounce on the request for postponement.

[40] Noting its position in letters, specially the letter to first Respondent's lawyer on 21 January 2020, was superfluous and tantamount to window dressing. The fair and reasonable requirement was to advance the Appellant's position within the available pre-arranged set down dates before the independent chairman of the ongoing disciplinary hearing of which 24 January 2020, 4 and 7 February 2020 was available when writing the letter of 21 January 2020. It was for the disciplinary chairman to pronounce himself on the request for postponement after hearing the request for postponement. No impossibility had arisen. It was a self created unwillingness to follow a fair procedure.

[41] Should the disciplinary chairman have granted the postponement, the pre-arranged hearing dates of 20 to 23 April 2020 was still available. In any event the first Respondent testified that she would have attended the disciplinary hearing if the chairperson has ruled against her request for postponement.[23]

[42] The fact that the diaries of at least three legal practitioners had to be consulted each time further remandments were to be agreed, was inherent and required as part of the fair process. This fact obviously contributed a fair share to the delay in finalising the disciplinary hearing.

[22] Bundle A, Exhibit "A" p 13.
[23] Transcript, pages 669 and 670.

[43] The witnesses in the arbitration proceedings were clear that they were guided by legal advice.

[44] For Appellant to submit that there was no admissible evidence on the medical condition of the first Respondent, was premature. The Appellant was not seized with the hearing, the independent chairperson, Mr Daniels, was. There is nothing in the Appellant's disciplinary code giving the Board authority and competence to adjudicate and pronounce on evidentiary matters, while it (the Board), was not seized with the hearing.

[45] The minutes of the Special Board meeting of 6 February 2020 and the dismissal letter of 7 February 2020, viewed objectively with the disciplinary code and in the circumstances of this case, evidenced an inopportune arrogation and exercise of powers by the Appellant's Board. First Respondent's dismissal was invalid and unfair. The procedure followed was likewise unfair.

[46] The Appellant's allegations against the first Respondent, which were presented in the Appellant's letters during January 2020, in the Board minutes of 6 February 2020 and in the dismissal letter of 7 February 2020 as facts, are and remain untested in the correct forum (the disciplinary hearing) until today.

[47] The Board of the Fund was wrong to dismiss the first Respondent without due process.

[48] The Board ought to have seen to it that its Department of Human Capital investigate the new complaints and formulated charges which should have been added to the existing charges for an independent adjudication by the independent chairman of the disciplinary hearing whether he allowed the postponement or not.

[49] There was no vitiating misdirection or irregularity on the side of the arbitrator when she found that the dismissal of the first respondent was substantially invalid and unfair and that the procedure followed was also unfair.[24]

[24] See paragraphs [27] to [40] of the award as contained in paragraph [11] hereinbefore.

[50] Except for reinstatement, Appellant's grounds of appeal[25] are rejected. I am satisfied that no court acting reasonably, would have come to a different conclusion.

Reinstatement

[51] I am also unable to find an irregularity in the arbitrator's award concerning the first Respondent's reinstatement and order of backpay.

[52] However, taking into account the five factors quoted by the arbitrator in her award when reinstatement is to be considered[26] together with the totality of the evidence tendered in the arbitration proceedings (inclusive of the evidence of the first Respondent), I conclude that another arbitrator or court acting reasonably would have come to a different conclusion, i.e. not to order reinstatement due thereto that the employment relationship and trust between the parties had broken down.

[53] I concur with the first Respondent that the evidence of the Company Secretary concerning the breakdown of trust should be treated with circumspection due thereto that he was found guilty on misconduct and recommend to be dismissed during 2017 when the first Respondent was the complainant.[27] Mr Fillemon (the Company Secretary of NSFAF) testified that reinstatement of the first Respondent shall lead to chaos within the ranks of the NSFAF and that he does not trust her. He however was rescued from dismissal through the intervention of higher authority.

[54] The Board Chairperson testified that there is no existing trust relationship and that Mr Kandume, the acting Chief Executive Officer would probably do better in the actual workplace.[28]

[55] Mr Kandume (the acting Chief Executive Officer) testified about his personal experience with the leadership style of the first Respondent. He testified that when someone in the management structure had a disagreement with first Respondent she would find a way, with Board approval, to create a structure on top of you.[29] He

[25] As recorded in paragraph [13] hereinbefore save for the phrase 'and ordered reinstatement and backpay' in the first ground of appeal, the first to eighth grounds of appeal are rejected.
[26] Paragraph [41] of the award, quoted hereinabove under paragraph [11].
[27] Transcript, pp 615 to 617.
[28] Transcript, p 362.
[29] Transcript, p 451.

testified that based on first Respondent's past conduct, it was not in the best interest of the Appellant to reinstate first Respondent.[30]

[56] First Respondent's submission was that the acting Chief Executive Officer's evidence too, must be seen in the context that he is benefiting from her absence.

[57] Mr Tjahere (senior manager marketing and communications) confirmed problems with first Respondent's management style and testified that based upon his experience with first Respondent, he did not trust first Respondent to lead the Fund[31] and did not want to go back to the environment he endured under first Respondent.[32]

[58] Noteworthy is that, there was evidence of a breakdown in trust between the current Board of the Fund and the first Respondent on the evidence lead on behalf of the Appellant. First Respondent's evidence supported the fact that the parties do not trust each other. The employment relationship between the parties is *de facto* non existent since April 2018 to date.

[59] The evidence tendered by first Respondent in the arbitration proceedings[33] viewed with the evidence of Appellant, militates against reinstatement.

[60] First Respondent in effect testified that NSFAF was unfair towards her in causing the Company Secretary to coordinate her disciplinary hearing which started in 2018.[34]

[61] First Respondent doubted the *bona fides* of the Board insisting on a medical report (whether she is correct or incorrect).[35] I, however, remember the context - the Board should have advanced its concerns to the chairperson of the disciplinary hearing. It is, however, evidence of mistrust by the first Respondent in the Board's *bona fides*, which in turn speak to the employment relationship's break down.

---

[30] Transcript, p 453.
[31] Transcript, p 535
[32] Transcript, p 536.
[33] Transcript, pp 576 to 726.
[34] Transcript, page 618.
[35] Transcript, pp 664-668.

[62] First Respondent testified that she did not complete the leave form because she was still determined to go to the hearing if the disciplinary chairperson would have ruled that the hearing will continue.[36]

[63] First Respondent believed that her employer was unreasonable in insisting on an explanation of what 'psychopathological' meant.[37]

[64] First Respondent confirmed she was harassed and victimized by Patty,[38] but previously in evidence in chief she testified about the previous Board Chairperson, Patty Karuaihe, and her 'good terms' relationship.[39]

[65] First Respondent made it clear that she did not trust the Board.[40]

[66] First Respondent believed that the NSFAF Board is manipulated by the Company Secretary, i.e that the Board members are not independently minded. She repeated this manipulation issue in her evidence in chief as well as under cross-examination.[41]

[67] Factors to be taken into account in declining to order reinstatement are where an employment relationship has broken down or trust irredeemably damaged. 'These factors are not exhaustive. Plainly the remedying award is not only to be fair to employees but also to employers.'[42]

[68] First Respondent was dismissed on 7 February 2020. Since then an acting Chief Executive Officer was appointed Mr /Awarab testified that the process of reintegration of the NSFAF with the Ministry of Education shall be completed during 2023.[43] In the meantime he regarded the acting Chief Executive Officer as capable to lead the Fund. The employee employer relationship between the first Respondent and the NSFAF has broken down. In the circumstances reinstatement of the first

[36] Transcript, pp 669 (middle) and 670.
[37] Transcript, pp 672 line 25 over on 673.
[38] Transcript, page 673.
[39] Transcript, pp 624 and 625.
[40] Transcript, pp 692 and 693.
[41] Transcript, pp 621, 698, 717 and 718.
[42] *Swartbooi v Mbengela NO* 2016(1) NR 158 SC at 168 para [46].
[43] Transcript, pp 360 and 361.

Respondent is not a viable option. The arbitrator's award for reinstatement was not reasonable. It will be unrealistic to treat the employment relationship between Appellant and first Respondent as still being enforceable.

[69] An award for compensation is complicated by this Court's confirmation that first Respondent's dismissal was not valid, not fair and following an unfair procedure. The complexity is exacerbated by the evidence of first Respondent limiting her losses to her monthly income,[44] unemployment, and failure to apply for employment.[45]

[70] The award for reinstatement and compensation was given on 15 July 2021. The time lapse between 7 February 2020 and 15 July 2021 cannot be blamed on the first Respondent.

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

1. The dismissal of first Respondent was without a valid and fair reason and without following a fair procedure.

2. The appeal in respect of the first order of the arbitrator, is dismissed and rejected.

3. The appeal against the first Respondent's reinstatement succeeds.

4. The Appellant shall pay the first Respondent the monthly remuneration she would have received from 8 February 2020 until 15 July 2021 (subject to statutory deductions).

5. Each party shall bear its own legal costs.

G H Oosthuizen

Judge

[44] Transcript, pp 629 and 630.

[45] Transcript, p 723.

APPEARANCES:

APPELLANT:	Karin Klazen Of Ellis Shilengundwa Inc.
1 ST RESPONDENT:	Sisa Namandje Of Sisa Namandje & Inc.
2ND RESPONDENT:	Memory Sinfwa (In person)