REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-LAB-APP-AAA-2021/00044

In the matter between:

BEARS (LEWIS STORES NAMIBIA (PTY) LTD
t/a BEARS OUTJO) **APPELLANT**

and

JOHANNES !HOAEB **FIRST RESPONDENT**
KLEOPHAS GAINGOB N.O. **SECOND RESPONDENT**
THE LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *Bears v !Hoaeb* (HC-MD-LAB-APP-AAA-2021/00044) [2022] NALCMD 55 (29 September 2022)

CORAM: SIBEYA J
HEARD: **10 May 2022**
DELIVERED: **29 September 2022**

Flynote: Labour law – Unfair dismissal – Misconduct emanating from an employee allegedly being at work whilst under the influence of intoxicating alcohol during working hours – An employee is under the influence of intoxicating alcohol if his faculties are impaired to the extent that he is unable to render the services

required of a sober person even to the minimum standard – Evidence of the extent of impairment must be led – taking alcohol does not automatically result in being under the influence of alcohol – Being under the influence of alcohol found not to have been proven and thus rendering the dismissal substantively unfair – Appeal dismissed.

Summary: The respondent was employed by the appellant in Windhoek in 2018 and from December 2019 he worked as a Stock Controller at Bears Outjo. On 24 August 2020, the respondent, while at work and during working hours, was suspected to be under the influence of alcohol. He was subjected to an alcohol examination.

The appellant suspended the respondent. On 28 August 2020, a disciplinary hearing was conducted where the respondent was charged for being under the influence of alcohol during working hours in breach of the company Code of Ethics. On the same date, the respondent was convicted as charged and dismissed with immediate effect.

The appellant's internal procedures do not make provision for internal appeals.

The respondent referred a dispute of unfair dismissal to the Office of the Labour Commissioner alleging that his dismissal was both procedurally and substantively unfair.

The arbitrator conducted an arbitration hearing and subsequently delivered an award on 18 June 2021, where he ruled that the termination of the respondent's employment contract was substantively and procedurally unfair.

Discontented by the award, the appellant appeals against the entire award.

Held that, if employees are charged with being 'under the influence of', evidence must be led to prove that their faculties were impaired to the extent that they were incapable of rendering the expected services.

Held that, the appellant failed to prove the charge of being under the influence of intoxicating alcohol against the respondent on a balance of probabilities.
Held that, the appellant failed to establish that the respondent did not render services required from him even at a minimum level due to alcohol intoxication.

Held further that, the appellant failed to prove the level of intoxication of the respondent and as a matter of consequence, it cannot, therefore, be said that the appellant established a valid and fair reason to dismiss the respondent.

Held further that, a matter not raised in the notice of appeal is not available for the appellant to pursue during the appeal.

ORDER

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1. The award issued by the Arbitrator dated 18 June 2021 in favour of Mr ! Hoaeb, is hereby confirmed in so far as it was held that the dismissal of Mr ! Hoaeb was substantially unfair.
2. The appeal against the award of 18 June 2021 is dismissed.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

SIBEYA J:

Introduction

[1] Serving before court is a labour appeal noted by the appellant against the arbitration award delivered by the arbitrator on 18 June 2021.

[2] Mr !Hoaeb referred a dispute of unfair dismissal to the Office of the Labour Commissioner for determination, subsequent to a disciplinary hearing on the charge of misconduct which resulted in his dismissal from employment by the appellant. At the arbitration proceedings, the arbitrator found that the dismissal of Mr !Hoaeb was both procedurally and substantively unfair. The arbitrator, thereafter, ordered that Mr !Hoaeb be reinstated and further that he must be compensated.

[3] The appellant appeals against the award. The appeal is opposed by Mr ! Hoaeb.

Parties and representation

[4] The appellant is Bears (Lewis Stores Namibia (Pty) Ltd t/a Bears Outjo), a private company duly incorporated and registered in the Republic of Namibia, with its principal place of business situated at the cnr of Gautenberg Street and Farraday Street, Windhoek. The appellant shall be referred to as such.

[5] The first respondent is Mr Johannes !Hoaeb, an adult male and former Stock Controller of the appellant stationed at Outjo. The first respondent is the only person who opposes the appeal and, therefore, he shall be referred to as ‘the respondent’. Where reference is made to the appellant and the respondent jointly, they shall be referred to as ‘the parties’.

[6] The second respondent is Mr Kleophas Gaingob, an adult male cited in these proceedings in his official capacity as the arbitrator duly appointed by the Labour Commissioner in terms of s 120 of the Labour Act 11 of 2007 (‘the Act’), to preside over the dispute referred to the Labour Commissioner as stated hereinabove. His address of service is 249-582 Richardene Kloppers Street, Khomasdal, Windhoek. The second respondent shall be referred to as ‘the arbitrator’.

[7] The third respondent is the Labour Commissioner, duly appointed in terms of s 120 of the Act and the appointing authority of the arbitrator with his address situated at 249-582 Richardene Kloppers Street, Khomasdal, Windhoek. The third respondent shall be referred to as ‘the Labour Commissioner’. No relief is sought

against the Labour Commissioner who is cited herein merely for the interest that he may have in the matter.

[8] The appellant is represented by Mr Rukoro, while the respondent is represented by Mr Nanhapo.

Background

[9] The respondent was employed by the appellant in Windhoek in 2018 and from December 2019 he worked as a Stock Controller at Bears Outjo. On 24 August 2020, the respondent, while at work and during working hours, was suspected to be under the influence of alcohol. He was subjected to an alcohol examination.

[10] The appellant suspended the respondent. On 28 August 2020, a disciplinary hearing was conducted where the respondent was charged for being under the influence of alcohol during working hours in breach of the company Code of Ethics. On the same date, the respondent was convicted as charged and dismissed with immediate effect.

[11] The appellant's internal procedures do not make provision for internal appeals.

[12] The respondent referred a dispute of unfair dismissal to the Office of the Labour Commissioner alleging that his dismissal was both procedurally and substantively unfair.

[13] The arbitrator conducted an arbitration hearing and subsequently delivered an award on 18 June 2021 where he ruled that:

'Having arrived to the determination that the termination of the applicant employment contract *(sic)* was substantively and procedurally unfair, I now give the following order to finally put this matter to rest.

6.1 The applicant to this matter must be re-instated effective 1st July 2021, by the respondent to this matter.

6.2 The respondent to this matter is hereby ordered to effect the payment in lieu for *(sic)* the loss of income calculated as follows:

- August 2020 to June 2021 = 10 months

- Basic salary = N$ 6500

- N$ 6500 x 10 = N$ 65 000-00.

6.3 Therefore the respondent to this matter is hereby ordered to effect the total payment of N$ 65 000-00, to the applicant no later than 31st July 2021.

6.4 The award is final and binding and become *(sic)* a court order in terms of sec 87 (1) (a) (b) respectively.

6.5 The above amount … earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of the judgment or debt, in terms of Prescribe Rates of Interest Act , 1975 (Act No. 55 of 1975).'

[14] Discontented by the award, the appellant appeals against the entire award.

Grounds of appeal

[15] The grounds of appeal, in summary, are the following:

(a) That the arbitrator erred when he found that the dismissal of the respondent was procedurally and substantively unfair when the hearing was conducted in the absence of the respondent while the respondent agreed to such procedure;

(b) That the arbitrator erred when he held that the dismissal was procedurally and substantively unfair when he found that the appellant failed to justify the alleged drunkenness or under the influence of alcohol and the arbitrator failed to appreciate that the penalty to be imposed is the prerogative of the employer;

(c) The arbitrator failed to take into account the conduct of the respondent when considering compensation and further erred by failing to provide reasons for determining compensation.

[16] It must be pointed out at the outset that Mr Nanhapo submitted at the commencement of the hearing that the respondent does not take issue with the challenge to the finding that the dismissal was procedurally unfair, but the respondent opposes the appeal against the finding that the dismissal was substantially unfair. The appeal, therefore, challenges the finding that the appellant had no valid and fair reason to dismiss the respondent. I will, thus, in the course of the judgment confine myself to the determination of the real dispute between the parties. It is whether the appellant dismissed the respondent after establishing that it had a valid and fair reason to do so or not.

Appellant's case and arguments

[17] It is the appellant's case that the respondent, a Stock Controller, was under the influence of alcohol while at work during working hours and, therefore, breached the appellant's Code of Ethics. The appellant was subjected to a disciplinary hearing which after evidence was led, recommended the dismissal of the respondent. The respondent was dismissed on 28 August 2020. The award on the dispute of unfair dismissal was delivered on 18 June 2021.

[18] It is the appellant's case that on Monday, 24 August 2020, the initiator of the disciplinary hearing, Mr Rodriek Diergaardt, testified at the arbitration proceedings that he noticed that the respondent was under the influence of alcohol as his speech was impaired/slurred. Two alcohol testers were purchased but the respondent refused to blow into them. The respondent inquired as to what will follow if the tester revealed negative results, to which Mr Diergaardt responded that then he will tender an apology. It is the appellant's case that the respondent then agreed to take the test. He was tested and the result was that he had alcohol in his system, so the appellant stated.

[19] It is appellant's case further that it has no rule on the limit of alcohol that may be in a person's body, it is either you have alcohol in your system or not. This, Mr

Rukoro submitted is in keeping with the appellant's policy of zero-tolerance against employees who are under the influence of alcohol at work. The respondent was charged with being under the influence of alcohol. Mr Rukoro argued that the respondent admitted to have drank alcohol the previous night and that he had a hangover. This, according to Mr Rukoro, was an admission by the respondent that he had alcohol in his system.

[20] It was the appellant's case that the respondent's eyes appeared red, was argumentative and he smelled of alcohol.

[21] Being under the influence of alcohol while on duty warrants dismissal, per the appellant's Code of Ethics. Mr Rukoro argued that what the arbitrator should have considered is whether the respondent was under the influence of intoxicating liquor not whether he was drunk or not.

[22] Mr Rukoro further argued that the arbitrator failed to provide reasons for setting aside the disciplinary sanction and ordered reinstatement (where no evidence was led regarding the claim for reinstatement). Mr Rukoro went further and stated that, given the lapse of a considerable period of time from the date of the dismissal of the respondent, reinstatement could no longer be viable. He relied on the judgment of the Supreme Court of *Swartbooi and Another v Mbengela and Others*.[1]

[23] It was argued further by Mr Rukoro that the arbitrator also failed to explain why his award was delivered out of the prescribed period of 30 days. He proceeded to argue that even if it is found that the appellant ought to compensate the respondent, the delay to deliver the award and the effect of COVID-19 which contributed to the delay to finalise the arbitration should be taken into account not to punish the appellant for what were factors beyond its control. Mr Rukoro argued that the appeal be upheld.

Respondent's case and arguments

[24] It is the respondent's case that he drank alcohol on Sunday night, 23 August 2020, but denied being under the influence of alcohol on Monday, 24 August 2020.

[1] *Swartbooi and Another v Mbengela and Others* (SA 73/2013) [2015] NASC 31 (21 November 2015).

The respondent further stated that he did not consent to being tested for alcohol but was forced to do so. He refused to be tested by Mr Diergaardt, who had no expertise in operating the testing apparatus.

[25] It is the respondent's version that the result of the test did not determined the level of alcohol in his system.

[26] Mr Nanhapo submitted that the appellant failed to prove the charge that the respondent was under the influence of alcohol during working hours. Mr Nanhapo expounded on his submission that, the appellant relied on the evidence of Mr Diergaardt who tested the respondent for alcohol, yet Mr Diergaardt lacked expertise in alcohol testing. Mr Diergaardt further lacks expertise to provide evidence on impaired speech, on the alleged red eyes of the respondent and the smell of alcohol, so Mr Nanhapo argued. He further disputed the allegation that the respondent admitted to having alcohol in his system.

[27] Mr Nanhapo then turned to mount an attack on the alcohol tester utilised. He submitted that no evidence was led that the tester was calibrated to indicate the level of alcohol detected. According to him, Mr Diergaardt could also not clearly state, at arbitration proceedings, whether the test result was green or orange following his evidence that orange meant no alcohol in the system while green showed the presence of alcohol.

[28] In respect of the late delivery of the arbitration award, Mr Nanhapo submitted that evidence was last heard in March 2021 but the written heads of argument were due to be filed on 15 April 2021 and, therefore, it cannot be said that the proceedings were finalised in March 2021. Mr Nanhapo further submitted that no law prohibits the award of compensation beyond the month after the conclusion of the arbitration proceedings. He called for the dismissal of the appeal, as the compensation was reasonable, fair and equitable in this matter.

Analysis

Substantive fairness

[29] The charge that the respondent was convicted of at the disciplinary hearing and subsequently dismissed, reads as follows:

'It is specifically alleged that on Monday, 24 August 2020 you were under the influence of alcohol (intoxication) during working hours. This conduct is a breach of the Company's Code of Ethics and if proved, constitutes a gross breach of the position of trust and confidence required of you by virtue of your position.'

[30] At arbitration it was found that the dismissal was procedurally and substantively unfair. As alluded to above, the contention which is live for consideration is whether or not the arbitrator was correct when he found that the dismissal of the respondent was substantively unfair.

[31] I find it prudent to first consider the scheme of the employment relationship between the appellant and the respondent in respect of the misconduct charge of being under the influence alcohol (intoxication) during working hours. The respondent's employment contract incorporates the appellant's Code of Ethics. Clause 5.4.4 of the Code of Ethics provides, *inter alia*, that:

'To ensure a safe, health and secure work environment, all Lewis stakeholders must: …not be intoxicated or under the influence of illegal substances during the performance of duties.'

[32] Category D of the list of offences provides that an offence of possession, supply or consumption of drugs, which covers that of being under the influence of an intoxicating substance, including alcohol, while on duty, attracts a penalty of dismissal.

[33] The respondent's employment contract and the Code of Ethics does not define what it means to be under the influence of alcohol or intoxicating substance.

[34] Mr Diergaardt testified that he made the following observations on the respondent on 24 August 2020:

(a) That his speech was impaired;
(b) That his eyes were red;

(c) That he behaved unusually;

(d) That he smelled of alcohol.

[35] It was Mr Diergaardt's testimony further that the respondent agreed to be tested for alcohol and when tested, the result registered green, indicative of the presence of alcohol in the respondent's system. The appellant laid great store on the admission made by the appellant that he consumed alcohol the previous night in order to substantiate its stance that the respondent was under the influence of alcohol on 24 August 2020, during working hours.

[36] Mr Rukoro, argued that it is the employer's right to determine penalties for transgressions. The appellant decided that dismissal should be the appropriate penalty. He argued that the appellant adopted a zero-tolerance approach towards employees who are found to be under the influence of alcohol during working hours and dismissal was, therefore, both reasonable and fair. I agree with Mr Rukoro that it is well within the employer's discretion to adopt a zero-tolerance approach towards certain forms of misconduct. I further agree that the recommended sanction for the transgression should be reasonable and fair.

[37] The question that remains to be answered is whether the arbitrator misdirected himself when he found that it was not proven that the respondent was under the influence of alcohol during working hours?

[38] To answer the above question, it must first be understood as to what constitutes being under the influence of alcohol (intoxication). In the absence of the company policies shedding light on the meaning of the words 'being under the influence of intoxicating alcohol', I resort to common law to understand the meaning thereof. In *Mondi Paper Co v Dlamini,*[2] the court discussed the dismissal of an employee on an alcohol-related charge and said the following:

'Mr Chadwick, who appeared for the Appellant, was inclined to concede that what was contemplated by drunkenness was an impairment of the faculties to the extent that the ability of the person to perform his job was impaired or there was a danger to safety. I understood Mr Tanner for the Respondent, to rely on the test referred to in Albertyn and

[2] *Mondi Paper Co v Dlamini* (1996) 9 BLLR 1109 (LAC) at page 1114.

McCairn Alcohol, Employment and Fair Labour Practice at page 97, which he summarised as follows (I quote from his heads of argument):

> "Intoxication involves an impairment of the employee's faculties, a discernible effect upon his behaviour beyond the limits of sobriety, not merely the smell of alcohol on his breath."

Although, as I have said, the evidence indicated that the Respondent had consumed alcohol, which was not denied, there was no accurate record of precisely how much alcohol he had consumed, and there was some uncertainty, largely due to the Respondent's own evidence and attitude during the whole proceedings, as to how much he had consumed and when he consumed it.

In my view the evidence did not justify a finding that the Respondent was guilty of drunkenness, giving to that word the meaning which one would normally give to it in relation to a person who had consumed alcohol to excess as opposed to one who has merely consumed some alcohol. The offence is not, as I have said, consumption of alcohol or having consumed alcohol before coming on duty, it is one of drunkenness, and in my view that offence was not proved.'

[39] In *Tanker Services (Pty) Ltd v Magudulela*,[3] the court considered a matter where an employee was dismissed for being under the influence of alcohol while driving a 32-ton articulated vehicle belonging to the employer, and said the following:

> 'The difficulty with proving the charge brought against the respondent is that the intoxication is a matter of degree. The respondent would only be "under the influence of alcohol" if he was no longer able to perform the tasks entrusted to him, and particularly the driving of a heavy vehicle, with the skill expected of a sober person.
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> Whether an employee is by reason of the consumption of intoxicating liquor, unable to perform a task entrusted to him by an employer must depend on the nature of the task. A farm labourer may still be able to work in the fields although he is too drunk to operate a tractor. Consumption of alcohol would make an airline pilot unfit for his job long before it made him unfit to ride a bicycle. The question which I should ask myself is, therefore, whether the respondent's faculties were shown in all probability to have been impaired to the extent that he could no longer properly perform the skilled, technically complex and highly responsible task of driving an extraordinarily heavy vehicle carrying hazardous substance. '

[3] *Tanker Services (Pty) Ltd v Magudulela* (1997) 12 BLLR 1552 (LAC) at page 1553.

[40] It is apparent from the above authorities that in order to prove the charge of being under the influence of alcohol, the employer ought to lead evidence to show that the employee's ability to carry out his or her work was impaired by the alcohol to an extent that he or she could not render the skills expected from a sober person. In my view, the employer must lead evidence to clearly demonstrate the extent to which a person's ability is impaired and that he or she could not render services even to the minimum standard required by the employer.

[41] Collins Parker, in his work, *Labour Law in Namibia*,[4] discussed drunkenness at the workplace and remarked as follows:

> 'It does not matter whether the substance was consumed during or outside working hours or at his workplace or outside it: the test is whether the employee, because of drunkenness, is incapable of performing his service to his employer in terms of the contract of employment.'

[42] In *Tanker*'s matter *(supra)*, it was settled that before one is accused of being under the influence of alcohol, the degree of intoxication should be considered. In my view, there are two issues that come into play. Firstly, it must be established that because of alcohol consumption, an employee is incapable to exercise the skill required or render services to his or her employer even at the minimum standard required. Secondly, the level of intoxication must be determined. It is difficult to imagine, depending on person to person, that a bare minimum quantity of alcohol may impair the faculties of an employee to such an extent that he or she is unable to exercise the required skill or perform services required by the employer because of such limited amount of alcohol.

[43] I, therefore, find that having taken alcohol does not automatically manifest itself into being under the influence of alcohol. One may take alcohol but still, maintain his or her faculties and carry out his services with the required skill and care.

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[4] 2012, University of Namibia Press, p 56.

[44] In *casu*, it is beyond dispute that no evidence was led regarding the level of intoxication or alcohol in the respondent's system. Furthermore, no evidence was led regarding the nature of the services that the respondent could not render due to alcohol consumption.

[45] I find Mr Rukoro's argument that in line with the appellant's zero-tolerance of being under the influence of alcohol, the approach adopted by the appellant is, either you have alcohol in your system or not, the level of alcohol matters not, disconcerting. Point blankly I find such an approach to be unreasonable. There may be exceptional instances or job categories of such a nature that justifies a zero-tolerance to alcohol and in such instances the company policies should be clear for all the employees to see and appreciate the nature of the prohibition and related penalty.

[46] In the present matter, the companies Code of Ethics prohibits being under the influence of alcohol during working hours and that is precisely what the appellant ought to have proven. To put this matter to rest, it is plain that the appellant was expected to lead evidence to prove that the respondent was under the influence or control of alcohol, not that the respondent had taken alcohol even to the slightest degree. The appellant, in my view, remained in the starting blocks in its quest to prove that the respondent was under the influence of intoxicating alcohol as charged.

[47] I agree with the submission by Mr Nanhapo that the evidence of Mr Diergaardt that the respondent was impaired; that he smelled of alcohol; that his eyes were red; that he behaved unusually and that he was argumentative falls short of proving that the respondent was under the influence of intoxicating alcohol. I must just mention, contrary to the argument by Mr Nanhapo, that it requires no expertise to observe that one's eyes are red or that a person smells of alcohol or that such person is behaving unusual.

[48] Mr Diergaardt testified that, when the respondent blew into the tester it showed green indicating the presence of alcohol at over the limit of 0.5. He stated further that when there is no alcohol the tester shows orange. At the arbitration proceedings Mr Diergaardt said that, the tester that the respondent blew into had later turned orange. He admitted to not being an expert in operating the tester. Mr

Diergaardt could not inform the arbitrator as to how long the tester takes for the green colour to fade. There was also no evidence of calibration of the tester used. The reliability of the tester was, therefore, put into question. Besides, no admissible evidence came out of the tester regarding the level of alcohol in the respondent's system (even if one was to accept that the respondent had alcohol in his system). The failure to provide the level of alcohol in the respondent's system renders the tester utilised to be of no value to this matter.

[49] The appellant further grumbles about the finding of the arbitrator that it failed to justify the allegations of drunkenness while the charge preferred against the respondent was that of being under the influence of intoxicating alcohol and not drunkenness. The English Oxford Dictionary[5] defines drunkenness as:

> 'Affected by alcohol to an extent of losing control of one's faculties.'

[50] Drunkenness has at times been interchangeably used with intoxication. Some have defined drunkenness with reference to the behaviour of a person who consumed alcohol, while alcohol intoxication is the state in which alcohol is present in a person's body. I do not intend to engage in this debate, even at the invitation of Mr Rukoro, as I find it academic in that it adds or subtracts nothing of substance to the finding that I made above. The essence of the finding of the arbitrator is, and remains that the appellant failed to prove the charge preferred against the respondent. The reference to drunkenness is of no moment. The arbitrator also appears to have interchangeably used the word drunkenness and intoxicating liquor.

Delay in delivery of the award

[51] The appellant complains, in its heads of argument, that the award of 18 June 2021 was delivered out of time by the arbitrator and thus contrary to s 86(18) of the Act. The appellant does not argue that by virtue of the award not being delivered within a period of 30 days as provided for in s 86(18), the award, therefore, constitutes a nullity or should be disregarded. The appellant appears to say that the delay in the delivery of the award impacted on the compensation awarded to the

[5] 11th edition.

respondent. The appellant conflated the issue of the delay in the delivery of the award together with the award of compensation and reinstatement.

[52] I point out that the complaint of the delay in the delivery of the award features nowhere in the appellant's notice of appeal. An appeal is based on the grounds set out in the notice of appeal. Absent the complaint regarding the late delivery of the award in the notice of appeal means then that the delay in the delivery of the award is not a subject of the appeal.

[53] For what it is worth, it is apparent from the record that after hearing evidence in March 2021, the arbitrator required that written arguments be filed by 15 April 2021. This calculates the 30 days period to mid-May 2021. The award was, therefore, delivered about a month out of time. The effect of late delivery has been a subject of litigation in this court.

[54] The High Court in *International University of Management v William S Torbitt & 3 Others,*[6] found that s 86(18) is worded in peremptory terms, and the reference to the word 'must' means that delivering an award outside the prescribed period of 30 days renders the award a nullity. That decision was appealed against. The Supreme Court set aside the decision of the High Court and found that the word 'must', as used in the Act, should be interpreted as permissive, requiring only substantial compliance in order to be legally effective.[7] This is in consideration of the semantic and jurisprudential guidelines developed by the courts. The Supreme Court cleared the air that failure to comply with the prescribed 30 days period does not render the award invalid where the award is subsequently issued.

[55] Angula DJP in *Wagner v Keeja,*[8] at para 9 and 10 remarked as follows regarding late delivery of the award:

'The Supreme Court further pointed out at paragraph 61 that in order to determine whether or not there was substantial compliance, a court may consider the following factors:

"The reason for the delay; the period of delay; the prejudice to the respective litigants if the award were to be allowed to stand or were to be dismissed; and the availability

[6] *International University of Management v William S Torbitt & 3 Others* LC 114/2013 [2014] NALCMD 6 (20 February 2014)
[7] *Torbitt and Others v International University of management and Others* 2017 (2) NR 323 (SC).
[8] *Torbitt (supra).*

> of evidence if the matter had to be re-heard. The list is not exhaustive. Each case must be considered on its own circumstances and merits."

Finally the Supreme Court held at paragraph 63, that 'that the legislature had no intention to visit strict non-compliance with section 86(8) within a nullity *ab initio* and I am of the view for the reasons provided that substantial compliance therewith will not stultify the broader operation of the Act'.

[56] I hold the view that the Supreme Court in the *Torbitt* matter laid to rest arguments that seek to have arbitration awards nullified on account of not being delivered within the prescribed period of 30 days. In *casu*, the award was delivered, *albeit* delayed by one month. In my view, guided by the *Torbitt* decision of the Supreme Court, the award remains extant. This, I conclude, also on the premise that the validity of the award is not attacked in the notice of appeal, strictly speaking.

Reinstatement and compensation

[57] On the referral of the dispute for conciliation and arbitration, the respondent claimed to have been unfairly dismissed and sought the relief of reinstatement and compensation for loss of income.

[58] The notice of appeal does not contain any ground that questions the order of reinstatement in the award. I, therefore, take it that the order of reinstatement is not in issue. The appellant cries foul, in the heads of argument, about the order of reinstatement that it is not fair, that the trust relationship between the appellant and the respondent has irretrievably broken down and a considerable period of time has lapsed from the date that the respondent was dismissed and therefore reinstatement is no longer an option. The appellant has itself to blame because reinstatement does not constitute any of the grounds of appeal in this matter. An appeal is based on the grounds set out in the notice of appeal. Failure to set out the qualm about the order of reinstatement in the notice of appeal renders reinstatement not to be a ground of appeal and not ripe for discussion in these proceedings.

[59] For the reasons stated above, I decline to entertain a discussion on the validity of the order of reinstatement.

[60] The appellant submitted that the arbitrator erred when he awarded compensation for payment of 10 months' basic salary. It was Mr Rukoro's argument that the arbitrator did not account for the fact that the respondent contributed to his dismissal and, therefore, this should count against the compensation award. I find this argument to lack merit in view of my earlier finding that the respondent was unfairly dismissed. No wrong in respect of the charge preferred against the respondent is attributed to the respondent. The position is simply this, the appellant brought a charge against the respondent on the basis of which he was dismissed while the appellant failed to prove such charge.

[61] Mr Rukoro further submitted that no reasons were provided by the arbitrator to explain how he arrived at the amount ordered for compensation. Although the award does not serve as a model of clarity which emulation thereof can be encouraged, it is nevertheless an award. The compensation is calculated at the monthly basic salary of N$6500 multiplied by ten months. The period of ten months covers August 2020 when the respondent was dismissed to June 2021 when the award was delivered.

[62] The respondent's monthly salary was not in dispute. The complaint of the appellant is not that the monthly salary includes other benefits which were not proven but that no reasons were provided for the award of compensation made. The appellant further seem to complain that no evidence of loss suffered was led.

[63] Section 86(15) of the Act, requires the arbitrator to act judicially, not administratively, in the exercise of his discretion to determine the award of compensation.

[64] Compensation that is relevant to this matter consists of an amount that is equal to the remuneration that the employee ought to have been paid by the employer had he not been unfairly dismissed. In this regard I find the remarks by Gibson J in *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others,*[9] to be compelling when she said that:

'In my view had the case been similar to the case of *Navachab Gold Mine v Ralph Izaaks* delivered by this Court (Hannah J) on 1 September 1995 the position would have been different. The *Navachab* case as well as the *Ferado (Pty) Ltd v De Ruiler* 1993 14 ILJ

[9] *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC) at 223.

974 (LAC) are clearly distinguishable on the facts, in that in both cases the respondents sought compensation including loss of certain benefits, such as medical and or loss of a house. In such a case it was up to the respondents to establish subjectively what the losses entailed were.

Section 46(1)(a)(iii) is formulated in a way that distinguishes two types of awards. The Learned Chairperson chose to award the latter award, ie the amount equal to what could have been paid to the respondents as opposed to compensating for the patrimonial loss suffered. Given that election it became unnecessary for the Chairperson to call for evidence of the actual losses sustained by the respondents to be led.'

[65] I agree with the above remarks that where compensation is equivalent to remuneration that excludes other benefits, it is not necessary to lead evidence in order to establish the financial loss suffered.

Conclusion

[66] I find that it is unreasonable to sanction the dismissal of an employee on the allegation of having alcohol in his or her system, irrespective of the level of alcohol in the system and further irrespective of whether an employee could still perform his or her work as required, notwithstanding having alcohol in his or her system.

[67] In view of the foregoing conclusions and findings, I hold the view that the appellant failed to prove the charge of being under the influence of intoxicating alcohol against the respondent on a balance of probabilities. The appellant failed to establish that the respondent did not render services required from him even at a minimum level due to alcohol intoxication. The appellant also further failed to prove the level of intoxication of the respondent. As a matter of consequence, it cannot, therefore, be said that the appellant established a valid and fair reason to dismiss the respondent. The arbitrator can, thus, not be faulted in his finding that the dismissal of the respondent was substantively unfair. In the premises, I find that the appeal must fail on the merits and falls to be dismissed.

Costs

[68] Section 118 of the Act regulates costs and stipulates that no order for costs should be issued by the Labour Court in labour matters, save in situations where the institution, defence or further pursuit of proceedings is either frivolous or vexatious. In the exercise of my discretion, I find that neither the institution of the appeal nor the opposition thereof can be said to be frivolous or vexatious. This matter, therefore, in my view, falls squarely within the ambit of s 118 of the Act. In the exercise of my discretion, I will not make an order as to costs.

Order

[69] In view of the foregoing findings and conclusions, I make the following order:

1. The award issued by the Arbitrator dated 18 June 2021 in favour of Mr ! Hoaeb, is hereby confirmed in so far as it was held that the dismissal of Mr !Hoaeb was substantially unfair.
2. The appeal against the award of 18 June 2021 is dismissed.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

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O S Sibeya

Judge

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