

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2023/00002

In the matter between:

GIFT KAVARI

APPELLANT

and

**INTERNATIONAL UNIVERSITY OF MANAGEMENT
LABOUR COMMISSIONER
NICOLHAS S MOUERS**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Neutral citation: *Kavari v International University of Management* (HC-MD-LAB-APP-AAA-2023/00002) [2023] NALCMD 52 (30 October 2023)

Coram: SCHIMMING-CHASE J

Heard: 21 July 2023

Delivered: 30 October 2023

Flynote: Labour Appeal — Labour Act 11 of 2007 — Section 33 — Appeal against an arbitration award — Dismissal — Whether dismissal was substantively and procedurally unfair — Appellant bears the onus to prove reasonable prospects of success on appeal — Appellant failed to discharge onus.

Summary: The International University of Management (IUM) charged one of its lecturers, Mr Gift Kavari, with four charges of misconduct, namely, disrespectfulness,

assault, insubordination and disobedience and failure to follow policy procedures. During the internal disciplinary proceedings, Mr Kavari was found guilty of the charges and was dismissed. Dissatisfied with the outcome of the disciplinary proceedings, Mr Kavari referred a dispute for unfair dismissal to the office of the Labour Commissioner.

During the arbitration proceedings, Mr Kavari testified in his own defence and called an additional witness, while IUM produced the evidence of six witnesses.

It is the case of IUM that Mr Kavari stormed into the office of his supervisor, approaching him in a threatening manner – inducing a sense of fear and harm, which incident persisted, despite attempted intervention by a third party and colleagues of Mr Kavari. IUM further contends that Mr Kavari was selected as one the staff members to invigilate examination sessions, and that Mr Kavari was not present during two of the scheduled sessions and failed to inform his supervisor to enable IUM to make alternative arrangements.

The arbitrator found in favour of IUM and confirmed the dismissal, finding the evidence of IUM's witnesses to be credible and to be preferred over the evidence of Mr Kavari.

Held that, it is not for an appellate court to replace its decision for that of the arbitrator, but rather to determine whether the finding of the arbitrator is so perverse that no other reasonable arbitrator could have reached such decision.

Held that, the appellant was informed of the charges and the hearing date. He also had the opportunity to present his case, call witnesses and cross-examine the witnesses of IUM. He informed the panel that he had sufficient time to prepare for his hearing. The grounds recorded in the notice of appeal do not speak to the record, and even more so, do not speak to any controvertible and assailable finding by the arbitrator to warrant setting aside the arbitration award.

The appeal is accordingly dismissed.

ORDER

1. The appeal against the arbitrator's award under case number CRWK-725/2020 is dismissed.
2. There is no order as to costs.
3. The matter is finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction and background

[1] This is an appeal against the decision of the arbitrator in a labour appeal. The appellant is Gift Kavari ('Mr Kavari'), an adult male previously employed as a lecturer by the first respondent, International University of Management during the period August 2015 until February 2020.

[2] The first respondent is a private university incorporated in terms of the relevant laws of Namibia, and will be referred to as 'IUM' in this judgment.

[3] The second respondent is the Labour Commissioner, appointed as such in terms of s 120(1) of the Labour Act 11 of 2007 ('the Labour Act').

[4] The third respondent is the duly appointed arbitrator in the office of the Labour Commissioner. No opposition was entered by the second and third respondents.

[5] It should be mentioned from the onset that the prosecution of the appeal and the opposition thereto has been hampered by many procedural missteps occasioned by both parties. During the hearing of the matter, the parties agreed that the court should consider the merits of the matter in the spirit of adjudicating the real and true dispute between the parties. To the extent necessary, the court condoned the parties' non-compliances with its rules and proceeded to hear the appeal on the merits.

[6] This appeal emanates from an arbitration award following an internal disciplinary hearing held by IUM against Mr Kavari.

[7] Mr Kavari was brought up on four charges of misconduct, namely: a) disrespectfulness, b) assault, c) insubordination and d) disobedience / failure to follow agency procedures.

[8] Charges one and two relate to Mr Kavari's supervisor harbouring a genuine fear that Mr Kavari would become violent towards him, after Mr Kavari allegedly stormed into his office and approached him in a very ill-mannered and threatening way. Charges three and four pertain to Mr Kavari's alleged failure, without the necessary approval, to invigilate examination sessions.

[9] Following the internal disciplinary hearing, Mr Kavari was found guilty and dismissed, which dismissal he referred to the office of the Labour Commissioner.

Evidence led at the arbitration hearing

[10] During the arbitration, IUM called six witnesses:

- a) Mr Julius Likela (Assistant Registrar);
- b) Mr Sebedius Naruseb (HR Director);
- c) Ms Petronella Neiss (Director of Examination Management);
- d) Dr Abner Shopadi (Dean for the Faculty of Business Administration);
- e) Ms Rosalia Mwalundilange (Head of Department and Lecturer within the Business Administration Faculty);

f) Mr Lucky Pieters (Dean for Strategic Management and Leadership Faculty).

[11] Mr Kavari represented himself and called one witness.

[12] All six witnesses of IUM testified about the events leading to the charges.

[13] Mr Naruseb testified that Mr Kavari was found guilty of the charges and dismissed. He further testified that there were previous complaints received about Mr Kavari missing lectures as well as how he treated students.

[14] Ms Neiss testified that as Director of Examination Management, Mr Kavari was selected as one of the staff members to invigilate examination sessions. She never noticed him during the exams and when she took it up with his supervisor, Dr Shopadi, he indicated he would take the issue up with Mr Kavari. She testified that invigilators are informed of sessions two weeks ahead of time. They must sign an attendance register and she does physical roll call an hour before the exam. She testified that if staff members were unable to attend an examination session, they ought to inform her so she could make alternative arrangements, which Mr Kavari did not do.

[15] Dr Shopadi testified that on 18 November 2019, Mr Kavari stormed into his office and accused him of bad-mouthing him, and while pointing his finger at him, told him that he would deal with him, since he is a man. Dr Shopadi called in Mr Peters to ease the tensions, but Mr Kavari directed Mr Peters to leave the office. Dr Shopadi later called a meeting with an independent third party to raise the issues with Mr Kavari, but Mr Kavari refused to inform him who told him that Dr Shopadi was bad mouthing him, or if he heard it himself. He further testified that if Mr Kavari had a serious issue, he could have brought it to the attention of the Head of Department. He testified that he had a genuine fear of Mr Kavari and he felt threatened by Mr Kavari.

[16] Ms Mwalundilange testified that as Head of Department, she found Mr Kavari with Dr Shopadi, and Mr Kavari informed her not to come into the office as it does not concern her.

[17] Mr Peters confirmed the testimony of Dr Shopadi. He further confirmed the heated exchange between the two gentlemen and that Mr Kavari told him to leave, as it did not concern him. He testified that he avoided Mr Kavari as he found him to be aggressive. He denied that he informed Mr Kavari that one Dr Abner Shopadi wants to bring him down.

[18] Mr Kavari testified that he was employed by IUM on a five-year contract as lecturer, commencing August 2015. He held the view that the disciplinary hearing held by IUM was a mere formality, as they had already previously decided to dismiss him. He also stated that the disciplinary panel was tribally motivated, as all were of the same tribe. As regards charges three and four, Mr Kavari testified that invigilators were never expected to sign any attendance register and further that the register had no columns that provided for signatures in any event. He testified that he made arrangements with a Mr Uzera, who stood in for him during two sessions due to personal reasons, and he in return invigilated two sessions of Mr Uzera. He testified that the inspections at the examination venues were not mandated in terms of the IUM policy and that the charges against him were never investigated, nor did he receive a report relating to those charges.

[19] Mr Kavari testified that after the hearing, human resources harassed and disrespected him by coming to his house and insisting that he sign certain forms, including making calls to his wife for him to sign the forms. He testified that he suffered from depression as a result, which amounted to unfair labour practices.

[20] Mr Uzera, who was called by Mr Kavari, confirmed the exchange of invigilating sessions and that same was not recorded on the attendance register. He also testified that it was never required of them to sign an attendance register, but they could, if they wanted to.

Summary of findings at arbitration hearing

[21] It is common cause between the parties that Mr Kavari had six months remaining on his five-year contract with IUM. As such, Mr Kavari sought payment in the amount of N\$300 000, being six months' salary at N\$50 000 per month for the remainder of his contract. Mr Kavari further sought compensation for financial losses in the amount of N\$400 000.

[22] As it relates to charges three and four, the arbitrator considered the register and found there was no column for the invigilators to sign that they were present. The arbitrator found that although the column was absent from the register, all invigilators had signed the register, except for Mr Kavari and that Mr Kavari's version was denied by Ms Neiss. On a balance of probabilities, the arbitrator found that the recording of time only was not sufficient to prove that Mr Uzera was at the venue and that the testimony of Mr Uzera was also not credible, as he also did not sign, or indicate in the comment column that he was standing in for Mr Kavari.

[23] The arbitrator found that Mr Kavari pleaded guilty to charge one (disrespectfulness) and therefore he did not deal with that charge. As to charge two (assault), the arbitrator found the version of Ms Mwalundilange more probable than that of Mr Kavari, as her testimony was supported by Mr Peters.

[24] In the result, the arbitrator found the dismissal to be procedurally and substantively fair in terms of s 33 of the Labour Act.

Points on appeal

[25] In his notice of appeal, Mr Kavari raises the following:

- a) IUM never presented an investigatory report of the charges against him;
- b) the arbitrator failed to mention the unfair practices of IUM, making him teach 17 modules in one year;

- c) the arbitrator was biased and unfair for refusing to accept the 'time in' and 'time out' columns evincing his presence at the exam sessions in his handwriting, despite not signing;
- d) the arbitrator failed to mention that IUM issued him with a certificate of service three weeks before the outcome of his appeal against the disciplinary hearing;
- e) the arbitrator refused to accept his testimony or the testimony of his witness;
- f) the arbitrator refused to accept the arrangement made with his witness to attend to his mother who has stage-four cancer;
- g) he never had any previous disciplinary issues, and was never given an oral or written warning;
- h) the arbitrator failed to reason why the dismissal was fair and reasonable;
- i) the arbitrator failed to acknowledge that no evidence of assault and disrespect was led;
- j) the arbitrator failed to disclose any documents to him used by IUM during the hearing;
- k) the hearing panel was tribally motivated which was not recognised by the arbitrator.

[26] IUM in its opposition contends that Mr Kavari fails to aver which procedural step was not followed and how that adversely affected him. It argues that the right to *audi* was exercised as Mr Kavari received the charge sheet. His rights were explained to him, he called witnesses, presented documents in his defence, cross-examined witnesses and informed the disciplinary panel that he had sufficient time to prepare for the hearing.

[27] IUM submits that the finding was substantially fair, as the events in the office were corroborated by several witnesses, in that Mr Kavari shouted and threatened his supervisor. As to the invigilation, Ms Neiss testified that Mr Kavari was not at the venue when she did her inspections.

Discussion

[28] Section 33 of the Labour Act sets out the law on unfair dismissal. It reads:

‘33 Unfair dismissal

(1) An employer must not, whether notice is given or not, dismiss an employee –

(a) without a valid and fair reason; and

(b) without following –

(i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34 (1); or

(ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.’

[29] This court in *Dominikus v Namgem Diamonds Manufacturing*,¹ dealt with the principle of substantive fairness:

‘[21] Substantive fairness means that a fair and valid reason for the dismissal must exist. In other words the reasons why the employer dismisses an employee must be good and well grounded; they must not be based on some spurious or indefensible ground. This requirement entails that the employer must, on a balance of probabilities, prove that the employee was actually guilty of misconduct or that he or she contravened a rule. The rule, that the employee is dismissed for breaking, must be valid and reasonable. Generally speaking, a workplace rule is regarded as valid if it falls within the employer’s contractual powers and if the rule does not infringe the law or a collective agreement.’

[30] The requirements of procedural fairness include the right to be:²

a) told the nature of the misconduct committed and to be afforded adequate notice prior to the disciplinary enquiry;

b) afforded opportunity to be heard and to call witnesses in support of any defence and to cross-examine witnesses called against you,

¹ *Dominikus v Namgem Diamonds Manufacturing* (LCA 4 of 2016) [2018] NALCMD 5 (28 March 2018).

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

- c) informed of the finding (if found guilty) and the reasons for the finding,
- d) heard before penalty is imposed,
- e) informed of the right to appeal etc.

[31] The legal principles relating to appeals to the Labour Court are well established. In *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd*³ the Supreme Court held *inter alia* the following:

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

[32] In *Germanus v Dundee Precious Metals Tsumeb*,⁴ the following was held:

‘(b) The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal being an inferior tribunal. The Labour Court as an appeal court will not interfere with the arbitrator’s findings of credibility and factual findings where no irregularity or misdirection is proved or apparent on the record. (See *S v Slinger* 1994 NR 9 (HC).)

(c) It is trite, that where there is no misdirection on fact by the arbitrator, the presumption is that his or her conclusion is correct and that the Labour Court will only reverse a conclusion on fact if convinced that it is wrong. If the appellate court is merely in doubt as to the correctness of the conclusion, it must uphold the trier of fact. (See *Nathingwe v Hamukonda* (A 85/2013) [2014] NAHCMD 348 (24 November 2014).)

(d) Principles justifying interference by an appellate court with the exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised by the arbitrator on judicial grounds and for sound reasons, that is, without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to interfere and substitute its own decision (See *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 724H-

³ *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* (2) (33 of 2013) [2016] NASC 3 (11 April 2016).

⁴ *Germanus v Dundee Precious Metals Tsumeb* 2019 (2) NR 453 (LC) at par [4].

1.) It follows that in an appeal the onus is on the appellant to satisfy the Labour Court that the decision of the arbitration tribunal is wrong and that that decision ought to have gone the other way (*Powell v Stretham Manor Nursing Home* [1935] AC 234 (HL) at 555). See *Edgars Stores (Namibia) Ltd v Laurika Olivier and Others* (LCA 67/2009) [2010] NAHCMD 39 (18 June 2010) where the Labour Court applied *Paweni and Another* and *Powell*.

(e) Respondent bears no onus of proving that the decision of the arbitrator is right. To succeed, the appellant must satisfy the court that the decision of the arbitrator is wrong. See *Powell v Stretham Manor Nursing Home*. If the appellant fails to discharge this critical burden, he or she must fail.'

[33] I am satisfied that the procedural rights of Mr Kavari were observed during the disciplinary hearing. From the notice of appeal, there is no clear distinction drawn between what Mr Kavari contends are substantive and procedural grounds. I cannot see how such procedural rights were violated during the disciplinary hearing. When counsel for Mr Kavari was questioned by the court on this issue, he confirmed that Mr Kavari was informed of the charges and the hearing; he also had the opportunity to present his case, call witnesses, cross-examine the witnesses of IUM and informed the disciplinary panel that he had sufficient time to prepare for his hearing. The grounds recorded in the notice of appeal, do not speak to the record, and even more so, do not speak to any controvertible and assailable finding by the arbitrator to warrant setting aside the arbitration award.

[34] As to the substantive fairness of the dismissal, I note, from the record of the arbitration that the IUM policy clearly states the following:

'28.34 Assault

- a) Assault is the unlawful and intentional application of force/violence to a colleague, co-employee or client/customer of IUM. If the threat of force and violence causes the victim to believe that force/violence may imminently be applied, the misconduct is committed. The misconduct assault is not limit to IUM premises.
- b) Threats of and intimidation are also covered by this conduct.
- c) Provocation or any other reason, which resulted in the assault, must be taken into account when the sanction is considered.

d) Depending on the circumstances of each case, dismissal of a first offender is warranted.⁵ (Emphasis supplied.)

[35] The conduct of which Mr Kavari stood accused of falls squarely within the ambit of the IUM assault policy. It is also evident from the record that the arbitrator considered the testimony of the witnesses who both experienced and observed the alleged altercation, and on a balance of probabilities found their versions more probable. The grounds of appeal and argument advanced by Mr Kavari do not do much to controvert and draw into question the decision of the arbitrator.

[36] I do not find any argument advanced on behalf of Mr Kavari or evident from the record as to why the court must interfere with the decision of the arbitrator. The reasoning was sound and even if this court did not hold the same view (which is not the case), the finding can on no construction be found to be perverse.

[37] In the result the appeal must fail. I make the following order:

1. The appeal against the arbitrator's award under case number CRWK-725/2020 is dismissed.
2. There is no order as to costs.
3. The matter is finalised and removed from the roll.

E SCHIMMING-CHASE
Judge

APPEARANCES

⁵ This policy served before the arbitrator.

APPELLANT:

S Nyatando
Of Susan Nyatando Incorporated,
Windhoek

FIRST RESPONDENT:

E Nangolo
Of Sisa Namandje & Co. Inc.,
Windhoek