

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: D890/08

In the matter between

UTHUKELA WATER (PTY) LTD

Applicant

and

**SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING
COUNCIL**

1st Respondent

NONHLHANHLA DUBAZANE

2nd Respondent

WILBERFORCE M. GWALA

3rd Respondent

JUDGMENT

LAGRANGE, J

1. This is a review application. The employee, the third respondent, was charged with four counts of misconduct. Only three of the charges are relevant for present purposes .
2. The relevant charges read as follows:

“1.It is alleged that you have been absent from work from the 18th of June 2007 till the 22nd of June 2007 being five days without good reason and without complying with company

policy to apply for leave a weekend in advance , should this be the case. You also fail to explain your absence to the manager on your return to work or attempt to fill out in the form. A week later, you also displayed an attitude of arrogance towards the foreman [ns]. When you realize that you were marked absence on the timesheet . This is a violation of rules, 1.2.6 and 1.2.5 in respect of you not filling out a leave form of the code of conduct as agreed at the bargaining Council.

2. It is further alleged that should dissipate rule for instruction by refusing to remove your car which was parked in the manager's parking which contributed to the manager of being belittled in front of all the staff present at the time. The manager had to find an alternate parking bay. After 20 minutes or so you mutual vehicle after the manager threatened to call the SAPS to remove your vehicle. Your actions constitutes a violation of clause 1.2 .4 of the code of conduct.

3. It is alleged that on the 12th of July, at approximately 4:03 p.m.. You find the manager, Mr. Chetty on his cell phone from the office and verbally threatened him, saying twice that he is in "big shit." After you inquired from him as to were the charges came from. In doing so you'll actions is seen as a violation of rules 1.2.9 of the code of conduct.

All of these misconducts constitute gross misconduct and gross insubordination.”

3. It was common cause that the employee was in possession of a final written warning for poor work performance on 19th and 20th of June 2006. That warning related to him using the applicant's vehicle for private purposes, thereby inconveniencing the web team, which he was transporting. It is also common cause that he refused to sign the notice to attend the disciplinary inquiry, which was served on him on 12 June 2007. There was no disagreement that he was absent from work during the period 18 June 2007 to 26 in June 2007 and had not applied for leave in advance. He also did not complete a leave form at any stage, even after his return to work.

Arbitrator's analysis.

Charge one.

4. The arbitrator was satisfied that the employee had not complied with the policy as far as applying for leave in advance is concerned. The employee allegedly needed to take leave to attend to his brother who was mentally ill and claimed that his immediate supervisor knew about his condition. He claimed to have advised his foreman, Mr Mncwango on the 17th June 2007 that he would not be at work the following day, because he had to attend to his brother, on account of the seriousness of his condition at that time. According to the arbitrator's finding the immediate supervisor could not remember if the applicant had told him about his brother, but agrees that the employee told him he would not come to work and would complete a leave form. The arbitrator's view is that the employer had failed to discharge the onus of proof on this element of the first charge, because it had failed to establish that the employee had no good reason for being absent. Consequently, employee had not contravened clause 1.2 .7 of the Code. The arbitrator was clearly off the view that it was for the employer to prove that the employee's brother was not as skilled as he claimed and that it was not for the employee to justify his absence.
5. The arbitrator also dismissed the claim that the employee had showed arrogance towards his foreman Sibiya when he realized that he had been marked absence on the timesheet. If he accepted the employee's evidence that the supervisor had not told him he had been marked absence whereas he had already been at work for two weeks after that absence and would have had an opportunity to sort out the issue if he'd been told about. The arbitrator accepted that this evidence was not disputed by the employer and his supervisor could not tell whether or not he was happy about the entry on the timesheet there was no indication that the employee was displaying arrogance, and therefore could not be found guilty in terms of terms of clause 1.2.5 of the code.

Charge two.

6. On the second charge, the arbitrator found that there were two conflicting versions, which made the probabilities of the matter even and accordingly was compelled to find in favor of the employee on that charge as well. When analyzing the evidence the arbitrator appears to have focused principally on two issues: firstly, the arbitrator accepted that the parking bay in question was not specifically designated for the manager until after the incident, and

secondly, there were other bays available for both of them to park in. She also took account of the employee's denial that he knew that the bay was for the exclusive use of Chetty. Consequently, the arbitrator found that see employer had failed to prove that the employee had contravened clause 1.2.4 the code.

Charge three.

7. The arbitrator concluded that the most probable inference she could draw in all the circumstances was that the employee had not threatened his manager on the phone on the 13th of July 2007. In arriving at this conclusion, the arbitrator appears to have been influenced by the following factors:

- 7.1. The charge sheet containing this charge was issued on 16 July 2007 which is the day the applicant was suspended and the reason given for the suspension was to allow the municipality to conduct its investigation into the alleged threats director at to Chetty. The arbitrator found at anomalous that the charge should proceed the investigation and further observes that no mention is made in the investigation report to the fourth charge.
- 7.2. The arbitrator also dismissed the value of circumstantial evidence contained in a statement made by Sibiya, Gwala's supervisor, and Van Schalkwyk, another foreman. They testify that the employee had told them that he would show Chetty "who he is", and that they had brought that statement to Chetty's attention as they thought the statement was a threat. When Sibiya subsequently testified, he said he did not know what the employee meant when he said those words. The arbitrator observes that this contradicts Sibiya's own previous written statement. It must be noted however, that the transcript of the proceedings does not record such a retraction by Sibiya, who confirmed that he and Van Schalkwyk perceived Gwala's statement to be a threat.
- 7.3. The arbitrator also discounted Chetty's evidence that the employee had phoned him after receiving the charges and asked him where the charges were coming from, thereafter threatening him. It appears the arbitrator was skeptical of this evidence, mainly because

he understood the charges had been explained to the employee and therefore there would be no reason for the employee to phone Chetty.

- 7.4. The arbitrator also found that Chetty's evidence that he received the threat on 12 July 2000 was inconsistent with the finding of the chairperson of the disciplinary inquiry, who found that the threat was made on the 13 July 2008.

Finding on procedural fairness.

8. The arbitrator appears to have found that the employee's dismissal was procedurally unfair, because of "irregularities" in the way the disciplinary process was conducted, which led her to conclude that the procedure was flawed. She explains the reason for his conclusion as follows: "*...to name few irregularities, course 6.1 of the collective agreement: disciplinary procedures would not instituted by the municipal manager or its authorized representative, it was Chetty, who constructed the charge sheet. It was the HR manager, who had authority to do that according to Cele; courts 13.2 was also contravened in that the applicant was not given notice of intention to suspend him and does not ordered an opportunity to make representation as to why he should not be suspended; it is clear why charge number 4 was never explained to the applicant as Chetty was not present when the applicant was given the second notice of misconduct and there is no evidence suggesting that anyone else explained the charge to him.*"
- (sic)

Sanction

9. The arbitrator took the following factors into account in deciding whether or not dismissal was an appropriate sanction:
- 9.1. The applicant's service of not less than three years.

- 9.2. The fact that the applicant failed to request permission in advance for his leave of absence.
- 9.3. The status of a final written warning ostensibly issued to the applicant on the 26th of January 2007. The warning was supposedly issued to Gwala for his alleged absence from work for three days without permission or authority from his superior. According to the warning he failed to report his whereabouts and did not submit a medical certificate to support his absence. The arbitrator did not accept that the warning was valid. This was because of the warning appeared to have been issued at 15h00 whereas the incident was described as taking place at 16h00 on the same day. The arbitrator was concerned that the timing of the two events indicated it that something was wrong and further that they should have been sufficient time given to the applicant to prepare for the case, and his rights should have been explained to him. The arbitrator found there was no evidence suggesting this was done. Accordingly, the most probable inference was that the warning was not validly issued.
- 9.4. The arbitrator considered whether or not the trust relationship had broken down. He found that the misconduct was not of a serious nature taking into account the fact that employees could and did to sign the forms on their return to work in the case of emergencies. When they took leave without requesting permission in advance. The arbitrator also took account of his finding that the applicant had advised his immediate supervisor and his manager about his absence and that there was a good reason to justify his absence without permission. She also found that it was essentially the employer's fault that the employee did not obtain a leave form on his return to work and that in this instance. The employer was not unaware of his whereabouts.
- 9.5. It is not entirely clear that the arbitrator also appears to have been influenced in finding the dismissal was too harsh a sanction because the applicant had deductions made from his salary for the days he was absent.

10. Consequently, the arbitrator found the applicants dismissal was procedurally and substantively unfair and ordered his reinstatement with back pay limited to 12 months.

Grounds of review

11. The broad grounds of review on which the applicant relies are that the award of the second respondent was not one a reasonable arbitrator would have made, and that the arbitrator committed gross misconduct or a gross irregularity by failing to consider relevant evidence before her. The applicant then provided details to support its claims some of which raised other distinct grounds of review. These will be examined under the headings of the various findings of the arbitrator which are attacked.

The arbitrator's finding that the employer had failed to establish that the employee had been absent without good reason.

12. In reaching this finding, which the arbitrator considered in determining an appropriate sanction, the applicant claims the arbitrator neglected evidence by his supervisor that he did not tell him on the 17 June 2007 that his brother was sick. The supervisor testified that the employee had only told him he would not be coming back to work on the following day, but could come in and fill in a leave application form. The applicant complains also that the arbitrator ignored Chetty's evidence that when he phoned the employee on the first day of his absence to advise him that he hadn't followed the proper procedures for taking leave, he was told by Gwala that he would be coming to work the following day, which he did not. This is one of several instances where critical testimony of the employer's witnesses was not tested at all under cross-examination, still less was Gwala's version of the phone call from Chetty on 18 July 2007 put to Chetty. This important flaw in the evidentiary foundation of Gwala's case appeared to have escaped the arbitrator's notice entirely.

13. Further, the applicant says that the arbitrator had acted grossly unreasonably in expecting it to validate whether or not the employee's brother was genuinely ill and aware. The employee had been, other than requiring the employee to validate the reason for his absence. The applicant points out that there was undisputed evidence that the employee had been aware of his brother's illness long before he actually to leave. Also, he had failed to produce a medical certificate confirming his current allegedly serious condition. In finding that the employee's supervisors should have given him a leave application form after he returned to work, the applicant claims that this completely ignores the evidence of the supervisor that he asked the employee if he brought a medical certificate to justify his absence. Moreover, the arbitrator ignored the fact that the supervisor was never asked if the employee had gone to him to ask for a leave application form.
14. There was no evidence that Sibiya had asked Gwala for a medical certificate, but he did testify that: *"I reported to the manager that I booked Gwala absent because there was no proof of absence. I did not tell him that he was booked absent because it was upon him to come to me and explain his absence."* (sic). It was never put to Sibiya that it was his responsibility to seek out Gwala and ask him to produce a certificate, whereas he made it clear he expected the latter to bring him something like a medical certificate to explain his absence when he returned to work. Sibiya also confirmed being present when Chetty had phoned Gwala on the first day of his absence, just after he had reported Gwala's absence to Chetty because foreman had been without transport because of Gwala's absence.
15. I agree that the arbitrator appears to have simply accepted Gwala's evidence that he had advised both Mncwango and Chetty of his brother's condition. She further appears to accept that it is not for the employee to explain his unauthorized absence or apply for leave on his return but the responsibility of the employer to investigate and determine if he had good reason to stay away from work or not. In this respect the arbitrator appears to believe that once it is established that leave was not authorized, it does not even mean that the employee bears even an evidentiary burden of leading evidence to justify that absence and why the failure to follow the procedure was excusable.

16. Moreover, apart from just preferring Gwala's evidence, she fails to consider the evidence of Mncwango and Chetty, particularly in the light of the important fact that their evidence on the issue was not challenged and when Gwala did not allow his version to be tested with the employer's witnesses. Apart from chiefly ignoring the employer's evidence, she failed to consider how the failure to put Gwala's version to the employers' witnesses, seriously diminished the value of his testimony.
17. Such a basic failure to consider the effect of not putting a version to the applicant's witnesses means the arbitrator failed to fulfill one of the basic functions of her role as an arbitrator which had the effect of denying the employer a fair hearing, apart from rendering her finding on this important issue fatally flawed. Unfortunately this defect in the evaluation of evidence is repeated in most of the instances below.
18. Had she considered the evidence of Mncwango and Chetty on their communications with Gwala on 17 and 18 July 2007, in the light of Gwala's failure to test his version against theirs she would not have been able to find that he did advise them that the reason for his absence and failure to apply for leave in advance was owing to his brother's illness. She would also have found that Gwala's sole attempt to deal with his absence had been when he notified Mncwango on 17 July 2007 he would not be coming in the next, but after that he made no attempt to explain his extended absence or his failure to return on 19 July 2007, as he had advised Chetty, to any figure in authority. Further, she would have been hard pressed to accept his story that he attempted in vain to obtain leave forms from Sibiya on his return, but did not pursue the matter when Sibiya failed to provide them after a number of requests.
19. In turn the most reasonable conclusion to draw is that Gwala did not advance a reason for his absence before or after his return to work and accordingly had not demonstrated that his absence was justified or that there was a good reason for him failing to obtain permission before he was absent or to have his absence condoned after his return. A finding that he was guilty of being absent without leave for a week would have been fair in the circumstances.

The arbitrator's finding to the versions of the parties regarding the instruction to remove the employee's vehicle was evenly balanced.

20. The applicant complains that in arriving at this conclusion the arbitrator accepted the employee's evidence that he was unaware the parking bay had been reserved for Chetty, but ignored the fact that at the time he was instructed to remove the vehicle he never mentioned that to Chetty but simply refused to remove his vehicle. Moreover, the evidence that he simply refused to remove his vehicle was not disputed. Likewise, the fact that the incident took place in the full view of other employees waiting for roll call who laughed at Chetty, when Gwala denied that the car was his, was not disputed. Also uncontested was Chetty's testimony that he approached one Khubeka, whom he described as the "Chairman of the union" to speak to the Gwala and that it was only when he conveyed to Khubeka that he would ask the police to come and remove the vehicle because nobody knew whose it was that was when the vehicle was removed. The applicant questions how the arbitrator could say the evidence was evenly balanced in the light of these facts.
21. In regard to Chetty's evidence, it should be noted that he conceded he did not actually see Gwala removing the vehicle on that occasion, but he had seen Gwala previously on several occasions driving the vehicle in question to work. He also testified that there were other empty bays available at the time of the incident.
22. What is remarkable, it that not one question was directed by Gwala's representative to Chetty to contradict any of his testimony on this incident. Given that only Chetty and Gwala testified, the arbitrator seemed to believe that in the absence of independent corroborative testimony, she simply had two witnesses' versions of the incident, which were of equal evidentiary value. Again, she failed to appreciate that Gwala's version was never tested with Chetty and he was not challenged in any respect by Gwala's representative, even on his own version of the events leading to the second charge.
23. An interesting feature of Gwala's own testimony is that even though he claims he did not know the parking bay was reserved for Chetty, he did not dispute that his car was parked in the disputed bay, and when he claims Chetty was allegedly shouting "Whose car is this?" he

did not respond that it was his. He also claimed, apparently for the first time, to have apologized to Chetty because Chetty was saying he had embarrassed him. Gwala also claimed that Khubeka was present when he did so.

24. On the evidence presented the only reasonable conclusion on the probabilities, given Chetty's uncontested evidence, which was reinforced to some extent by Gwala's implicit admission that embarrassing him in front of other workers' in the way Chetty claimed he had would have been wrong, the arbitrator ought to have found that he was guilty of this misconduct too.

The arbitrator's findings relating to the alleged threat made to Chetty.

25. Firstly, the applicant, points out that the evidence of Van Schalkwyk and Mr. S. was not directly relevant to the charge, which concerned a phone call made by the employee to Chetty after the notice of the first inquiry had been served on the employee Chetty had testified that the employee had said he was in "big shit", which Chetty took to be a threat.
26. The applicant also contends that it was unreasonable for the arbitrator to say that he couldn't make sense of the employee's alleged behavior of phoning the manager to ask whether charges were coming from and then threatened him. When the manager had given the notice to him and explained the charges to him already. The applicant contains that it was perfectly understandable if the employee was angry about the charges that he would have made. The court to Chetty and said what he was alleged to have said. Essentially this complaint amounts to a complaint that the arbitrator appears not to have weighed up alternative explanations for the alleged behavior.
27. The applicant also argues that one of the considerations which the arbitrator took into account in deciding that the surrounding circumstances did not support the alleged threat made to Chetty was that the arbitrator considered the the employee's suspension to have been unfair. The applicant contends that this is simply an irrelevant consideration.

28. The arbitrator's finding that it was observed that Chetty, who was the complainant would also be the person charging the employee with making the alleged threat is also attacked by the applicants on the basis that it completely ignores the evidence of the human resources officer that the authority to charge employees had been delegated to him and that he had assisted Chetty with drafting the charges.
29. The applicant also takes issue with the fact that the arbitrator appear to have attached so much weight to the discrepancy between the date on which Chetty testified he had been threatened compared with the date which appeared in the findings of the chairperson of the disciplinary inquiry.
30. What is remarkable about the evaluation of this charge is that apart from considering a number of irrelevant pieces of evidence, the arbitrator yet again attaches no significance to the fact that Chetty's account of the menacing phone call from Gwala was not disputed in any respect by Gwala when Chetty was cross-examined. As in other cases where this glaring failure to test the employer's evidence ought to have played an important role in evaluating the respective versions, it plays no roll at all in her evaluation.
31. Quite apart from raising a number of red herrings in her evaluation of this charge, on a balance of probabilities, taking into account Gwala's contemptuous attitude towards Chetty illustrated in by the parking bay incident, it is quite plausible that Gwala would have phoned Chetty and threatened him as alleged.

The arbitrator's finding about the invalidity of the final written warning of 26 January 2007.

32. The applicant points out that Chetty confirmed that he had issued the warning to the employee had refused to sign for it and that it was never put to Chetty that he had made the warning up. Moreover, none of the issues relied on by the arbitrator to make an adverse finding against the employer on the question of the warning were put to Chetty when he testified. The applicant argues that failing to give Chetty an opportunity to address the arbitrator on such issues amount to gross misdirection on her part.

33. I agree with the applicant that the arbitrator's conclusion was unjustified on the reasons given because she failed to test her theory about the problems with the warning with Chetty, so he had no opportunity to address them and they were not issues raised by Gwala. On this basis she acted irregularly in postulating an explanation for the invalidity of the warning without putting it to Chetty or without raising her theory with the applicant before she decided the issue on this basis.
34. Nonetheless, even though the arbitrator's finding on the validity of the warning must be set aside, on considering the issue afresh the outcome is not materially different but concerns whether or not the warning was issued. It must be said the applicant did not lay a very good evidentiary basis for concluding the warning had in fact been issued. No signatures appeared on the document and it was not entirely clear from Chetty's testimony whether he was claiming he issued it in person to Gwala, or whether someone else did. The weakness of Chetty's direct knowledge of the issuing of the warning ought to have been apparent to the applicant and in the circumstances, it should have realised more direct evidence might be needed to support its case in this regard.
35. Accordingly, notwithstanding the fact that the arbitrator's finding that the warning was invalid stands to be set aside on review, I am satisfied that the applicant failed on a balance of probabilities to establish that it was in fact issued to Gwala.

The arbitrator's finding that there was no breakdown in the employment relationship.

36. According to the applicant the arbitrator failed to take account of the disruption caused by the employee's absence without getting permission in advance. As a result, steps were not taken to obtain a replacement. So that work could be continued without interruption. This adversely affected maintenance work, and the employee's team was left without transport.
37. Moreover, the arbitrator's finding that the trust relationship had not broken down because the employer was not unaware of the employee's whereabouts, was not the basis on which the employee had been dismissed. The employer's case was that he had not applied for leave in

advance, had not filled out a leave application form and had not explained or substantiated a reason for his absence even after his return. Implicitly, the applicant is saying that the arbitrator misconstrued the nature of the misconduct which justified the employee's dismissal.

38. In fact there is no basis to be found in the oral testimony recorded in the transcript that either Sibiya or Mncwango were advised of the reason for Gwala's absence. Mncwango was simply asked "...were you not aware about a sicknesses at his [Gwala's] home, he never discussed anything (inaudible)?", to which he simply replied "No, I can't remember that." This line of questioning was not pursued, nor was it put to him that Gwala would testify that he had apprised him of this brother's illness. Moreover, when Mncwango was asked about whether Gwala had given him any reason for his intended absence on 18 June 2007, he confirmed that he had said nothing about the reason, but merely that he would not be coming on that day and would fill in a leave form. According to Mnx, Gx did not even ask him to report his absence. Importantly, it was never put directly to either his immediate supervisor or his foreman that Gwala had previously told them about his brother's illness or that he gave that as the reason for his absence. Lastly, it was never suggested to Chetty in cross-examination that when he spoke to Gwala on 18 July 2007, Gwala mentioned that the reason for his absence concerned his brother. The consequence of not doing so is that Gwala's later evidence was essentially never tested with the very witnesses who could have contradicted it, which means the arbitrator should have been wary of attaching much weight to it at all.
39. Moreover, in trying to explain why it would be intolerable to continue to employ Gwala, Chetty specifically testified that Gwala's conduct would lead to other staff believing they could do as they liked and get away with it, if he continued to work for the applicant.
40. In any event, whatever the merits of this finding are on review, is premised that Gwala was found guilty only of the offense of unauthorized absenteeism. Once the arbitrator's acquittal of Gwala on the other two charges cannot stand, this conclusion obviously has to be revisited.

41. As I have indicated above, on a balanced consideration of the evidence, taking account of the obviously relevant evidence the arbitrator ignored and the failure of Gwala to challenge obviously incriminating evidence of the employer, he was guilty of threatening Chetty over the phone after the initial charges were issued and he was guilty of gross insubordination in his conduct relating to the parking bay incident, by flagrantly flouting Chetty's authority in front of other subordinates. Gwala's lack of a sense of accountability towards management is also illustrated by the way he dealt with his week long absence from work without obtaining prior authorization. Gwala attitude towards his employer's operational needs and procedures was one of indifference and it is difficult to believe given the serious challenges he had shown to the authority of a senior manager that his presence at the workplace could be tolerated in future.
42. The phrases 'irretrievable breakdown' or 'complete loss of trust' are often invoked as if merely saying such mantras establishes that such a situation exists as a matter of fact. However, in this case the invocation of those terms would be justified on the objective evidence and the conclusion that the relationship could not be restored is a reasonable conclusion.

The arbitrator's finding of procedural unfairness.

43. In essence, the applicant contends that the arbitrator applied the incorrect test in determining whether or not the dismissal was procedurally unfair and in finding that the suspension of the employee was unfair, the arbitrator had acted outside her power
44. The applicant also rejects as absurd the arbitrator's finding that the last charge was not explained to the employee, because Chetty was not present when the second notice of misconduct was issued to him. It does so because it believes the finding is grossly unreasonable, given that the employee did not attend the inquiry to state whether he understood the charge or not, and even in the appeal hearing where he was represented, at no stage did he claim that he could not understand the charge, nor did he do so at the arbitration

hearing. It does appear the arbitrator was desperately looking for something other than the alleged non-compliance with the rules relating to who may initiate disciplinary proceedings.

45. In any event the arbitrator seemed to believe that such departures from the procedure involving lack of authority for certain steps or flaws in the suspension process rendered the dismissal procedurally unfair. In this regard the arbitrator misdirected her enquiry by applying the wrong test for procedural fairness. Non-compliance with a procedure does not *per se* amount to procedural unfairness. The question to be asked is whether the employee had a fair opportunity to defend himself against the charges, and the arbitrator's failure to do this amounted to a gross irregularity.¹
46. The only material issue raised by Gwala, which once again was not directly put to the applicant's witnesses, was that he believed that the arbitration was scheduled for 26 July 2007 and that he kept making enquiries to confirm this was the case as there was a possibility it might change. Oddly the day he expected it to take place he says he simply waited for transport to collect him. He claimed that he phoned in on 27 July and was told the enquiry had taken place the previous day, whereas it was only scheduled to start that very day. In other words, he believes he was maliciously misled about the date of the enquiry. Yet, he does not explain convincingly why he did not challenge Van Schalkwyk's evidence how when he went to fetch Gwala for the enquiry on 27 July 2007, Gwala was not at home.
47. I am satisfied that no material issues of procedural unfairness were raised by the third respondent in this matter and accordingly his dismissal was also procedurally fair.

Conclusion

48. The arbitrator's adopted fundamentally flawed approach to the evaluation of evidence, which resulted in her completely ignoring the third respondent's failure to challenge the applicant's

¹ See, *Khula Enterprise Finance Ltd v Madimane & Others* (2004) 25 ILJ 535 (LC) at 540-541 paras [12] – [13]

witnesses on material aspects of the case, she failed to evaluate the evidence in a balanced way. Quite from this she failed to explain why she simply preferred the employee's evidence on a number of matters and seemed to simply ignore that of the employer without justification. This amounted to misconduct on her part in relation to her duties as a commissioner in terms of section 145(2)(a)(i) of the LRA and her award stands to be set aside on this basis. Such an approach is also one no reasonable arbitrator would adopt.

49. In addition she materially misdirected herself in the way she assessed the procedural fairness of the third respondent's dismissal which also constituted misconduct in relation to her duties as an arbitrator.
50. In the analysis above I have re-evaluated the respective charges and found that, on a balance of probabilities, the employer had a fair reason for dismissing the applicant who was correctly found guilty on the substance of all three charges and no material evidence of procedural unfairness was led to justify a conclusion of procedural unfairness. In summary his dismissal was both procedurally and substantively unfair.
51. This was a review which ought not to have been opposed and in the circumstances it is appropriate that costs follow the result.

Order

52. In view of the above,

- 52.1. The second respondent's arbitration award is reviewed and set aside;
- 52.2. The findings of the arbitrator are substituted with a finding that the third respondent's dismissal was procedurally and substantively fair;
- 52.3. The third respondent is ordered to pay the applicant's costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 28 October 2010

Date of judgment: 26 November 2010

Appearances:

For the applicant: Mr P Shangase of Shangase Attorneys

For the third respondent: Shanta Reddy Attorneys