REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J185/06

In the matter between:

CX[i] Applicant

and

MITSUI & CO. SOUTHERN AFRICA (PTY) LTD Respondent

Date of hearing: 10 November 2011

Date of judgment: 8 June 2012

Summary: (automatically unfair dismissal – HIV status – not the reason for dismissal – Dismissal for misconduct – procedurally unfair – no notice of right to representation – failure to clarify issue of calling witnesses)

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant, Mr CXCX, was employed by the respondent company as a driver and messenger in 1992. He was dismissed on 1 February 2005.

The reason given by the employer for the dismissal was fourfold. Firstly despite numerous previous warnings about not leaving the office without giving notice to his manager he did so again the previous day. Secondly he was insubordinate and that he did not return immediately to the office after returning from Rapid Motors. Thirdly, despite a warning the previous year regarding his use of alcohol he admitted he had been drinking and had not returned to the office in order to avoid being tested in the previous day. Lastly, he yet again parked in the basement despite being told on many previous occasions not to.

[2] CX contends, to the contrary, that he was dismissed on account of his HIV positive status which he revealed in March 2003 to the assistant manager, Ms H Verster, because he trusted her. He had been advised when he was told of the diagnosis to confide in someone he trusted. He claims that after this the relationship changed and he was overloaded with lots of office work which caused him stress. He believed that after he had advised Verster of his status the company was looking for a reason to dismiss him. The respondent maintains that the dismissal was for misconduct and was unrelated to his HIV status. It was common cause that the applicant had advised Verster of his status in March 2003 and again advised the respondent when he was dismissed in February 2005.

[3] The parties agreed that the court was required to determine whether the dismissal was automatically unfair, or alternatively, if it was not whether it was nevertheless a substantively and procedurally unfair dismissal for misconduct. In the end, this alternative claim was concerned mainly with the question of whether he had been given a fair hearing prior to his dismissal. In the supplementary pre-trial minute, the applicant confirmed that he was seeking compensation and not reinstatement.

The material facts

[4] Much of the evidence by both parties concerned the history of disciplinary action taken against the applicant prior to his dismissal on 1 February 2005. It is common cause that during the period 14 January 2003 to 25 November 2004, CX was issued with no less than one previous notice of dismissal and three detailed written warnings, through which some

common threads ran. Although these were the only written warnings before the court, it must be mentioned that on 14 January 2003, the applicant narrowly avoided dismissal for repeated misconduct of a similar nature preceding that date. CX never appealed against any of the disciplinary measures taken against him during the above period.

[5] He claimed that he had felt compelled to accept them because he had been told if he did not he would face dismissal. Somewhat puzzlingly, he also said he could only sign for things he knew about. I understand him to mean he would have signed willingly to acknowledge things he did not dispute, but in any event he had been pressurised under threat of dismissal to sign the warning letters. Despite all the warning letters referring to an earlier discussion between him and Verster, CX denied that any discussions were held. On every occasion he claimed he was simply presented with the letter and was told: "*You did this, you must sign*".

Withdrawn dismissal of 14 January 2003 and first rehabilitation session

[6] The first recorded disciplinary incident placed before the court was a notice of dismissal dated 14 January 2003. The notice details incidents on 23 December 2002 and 6 and 13 January 2003 relating to various unexplained absences of the applicant from the office. The letter concludes with the following:

> *"After your numerous warnings, and the fact that you have already had your last warning letter the company has decided to dismiss you with immediate effect."*

[7] Verster testified that this letter was issued only after a number of previous written warnings, some of which related to drunkenness. These were not included in the respondent's bundle because they were not considered directly relevant to the case. In fact, the company did not implement the dismissal on this occasion. The applicant agreed that the dismissal notice was withdrawn, provided he underwent rehabilitation for alcohol abuse. During March 2003, he attended a rehabilitation program for alcohol abuse. The applicant claims that the respondent had advised him that he should go for rehabilitation because his performance was not up to standard and threatened to dismiss him if he did not agree to go. He only

agreed because he had a responsibility towards his family not to risk his livelihood.

[8] CXVerster's testimony was that she had drafted the letter and Mr Y Ogata had given it to the applicant and asked him to read and comment on it. Ogata had wanted to dismiss the applicant on that occasion but she felt that there was some doubt whether the charges could be proved and also it appeared that his misconduct was related to a drinking problem.

Written warning of 16 May 2003

[9] On 16 May 2003 he was issued with a warning letter. Verster said that the letter was handed over by Ogata and the applicant was again given an opportunity to give his version of events in the course of a discussion which took place. The warning concerned a previous insurance claim for a motor accident that took place in 2002, which CX had told the insurers had occurred on a Monday. It turned out, according to the claim made by the other party to the accident, that it took place on a Saturday. According to the warning, CX did concede that it might have taken place on the weekend. The company policy was that he was not allowed the private use of the vehicle on the weekend. The second claim was that he had had a further accident on 11 May 2003, which also took place on a Sunday when he was not supposed to be using the vehicle. The reason the first accident was only raised in 2003 was that the company only became aware of the discrepancy between CX's account and the account of the other driver when the insurer contacted it.

[10] The remedial action recorded in the warning was to assign the applicant to office duties only, with no loss of remuneration.

Second rehabilitation session in May 2004

[11] In May 2004, the applicant again attended a rehabilitation session for six days, also paid for by the company. The applicant testified that he attended the session at the company's insistence, where Verster recalled that he had approached the clinic himself and the clinic had notified them that he was undergoing detoxification. In a letter dated 10 May 2004, which confirmedthis arrangement, the respondent also stipulated that the

applicant could be requested to undergo a test for alcohol in his bloodstream at any time, and if any alcohol was found he could face instant dismissal. The applicant signed a copy of this letter accepting this condition. Again, he maintained that he only did so only because he was told that if he did not he would be dismissed.

Written warning of 18 August 2004

[12] On 18 August 2004, CX was issued with another written warning headed "2nd Warning Letter". The first complaint in the letter was that the applicant had created a disturbance at a filling station and that he was driving under the influence of alcohol at the time. CX said that he was filling the company vehicle at a garage and his son was with him at that time. When he was asked for the petrol card by the attendant he noticed that the tank had only been half-filled. An argument ensued with the petrol attendant over this, but he denies that he was intoxicated at the time. He said that he had come straight from a meeting at his son's school and could never have been under the influence at such a meeting. Verster testified that she had been phoned by the owner of the filling station who complained about his conduct and had said that he believed CX was under the influence of liquor.

[13] On this occasion, CX was again reminded of the fact that he had agreed that at any time the company could test him for the presence of alcohol or drugs in his bloodstream. He was also warned for not attending to his other duties, namely printing out time records, checking company vehicles and checking paper supplies. Lastly, it was mentioned that he was frequently away from his desk unnecessarily and on some occasions had gone to sleep in the vehicle. The warning ended by saying that if he did not improve his attitude to his responsibilities in general and control his use of alcohol he would be dismissed.

[14] The letter also referred to a conversation between him and Verster that morning on the issues set out in the letter. However, CX denied that there was any such discussion preceding the letter being issued to him, which was simply presented to him for acknowledgement. He maintained that he had to sign the letter or he would be dismissed, but could not explain why

the letter only stated that if he did not improve his attitude towards his responsibilities and control his alcohol use he would be dismissed. Likewise, he did not provide any other reason why he signed the warning letter which included an acknowledgement that he understood its contents, if he disputed the fact that he and Verster had discussed the issues set out in the letter that morning.

Final written warning of 25 November 2004

[15] The applicant was issued with a final written warning on 25 November 2004. This concerned two instances on the 15th and 23rd of November respectively, when he had been absent from the office without notice to his manager. It appears that by this time the applicant was once again performing the duties of a driver. The warning stated that he had previously been spoken to about the matter and that even though he had undertaking it would not happen again, it did. The warning ended as follows :

> *"Due to the fact that you have had numerous warnings regarding the above, and various other matters, this will be your final warning, and if you do not behave in a responsible manner then the company will have no alternative but to dismiss you."*

[16] On this occasion, as with all the others, the applicant insisted that he was simply asked to sign the letter after which Verster took it to the managing director and general manager for their signatures. However, he did say that he was asked to sign for the warning after a meeting with Verster, which suggests that some discussion took place before the sanction was handed down.

Dismissal on 1 February 2005

[17] In the letter notifying the applicant of his dismissal the respondent provided these reasons for the decision:

> *"Although you have been warned on numerous occasions not to leave the office without giving noticeto your manager, you again did so yesterday, 31 January 2005.*

> *You were totally insubordinate as you have been given strict instruction to report to Mrs Verster immediately you reached office after returning from Rapid motors.*
>
> *In May 2004 you are given a letter regarding your use of alcohol. You have admitted to the fact you are drinking. Our intention was to send you for a test yesterday, but you have admitted that you avoided he office as you are scared of this. This proves the point that you were under the influence of alcohol during office hours.*
>
> *Although you have been instructed on numerous occasions not to park in the basement parking you have again done so today, and last week."*

[18] The applicant said he was summoned to the boardroom after two o'clock on 2 February 2005 and issued with the letter. He was not given prior notice of any enquiry in the form of a charge sheet. The applicant said he was also told to bring his cell phone, keys and access card to the meeting. He said he was simply given the letter of dismissal and it was mentioned to him that on the previous day the respondent had caught him but he did not want to come back and it had been reported that he was under the influence at the time. According to the applicant, he challenged the company's representative to call the person who said he was drunk, but they would not do so. CX further denied he had not come back to the office to avoid being tested.

[19] Under cross-examination CX conceded that on 1 February 2005 there had been two separate meetings and not one as he had originally testified. He and Verster had been present at both meetings. He agreed that at the first meeting he was asked about his whereabouts the previous day. At the trial it was also put to him that the explanation he had given on Tuesday for his absence on Monday was that he had fought with his girlfriend arising out of the fact that he had contracted his illness from her. Verster said that when he raised this she assured him that she had not told anyone of his previous disclosure about his illness, but the applicant did not have a difficulty with raising it himself in Mr M Minato's presence. Minato was the General Manager of Administration at the time. According to Verster's

evidence, he did not try to explain his absence on account of being ill. The applicant disputed this. He said he had simply raised his HIV status with Verster and Minato when he was dismissed, saying that was the reason the company wanted to dismiss him.

[20] In the trial, the applicant gave his version of the alleged misconduct described in the dismissal letter. Regarding his absence on 31 January 2005, he said that he had not been feeling well and was suffering from cramps owing to a previous operation for gall stones. He had dropped off the person he had collected from Rapid Motors at the office and told him he had to go to the doctor. He agreed that Verster phoned him and instructed him to return to the office. In turn he told her that he could not, but would come the following day. Verster's version was that she had called him to find out where he was and he had told her that he was on his way back to the office and never mentioned anything about going to the doctor.

[21] At the first meeting on 1 February 2005, according to Verster, the applicant was advised that there would be a meeting that afternoon, which took place at about 2:30 p.m. According to her Minato was present at both meetings. It was at the earlier meeting that the applicant disclosed his HIV status for the first time to Minato. Minato made it clear that the letter spelling out the applicant's alleged misconduct had nothing to do with the applicant's HIV condition. Verster said that Minato had asked the applicant to go and think about what was in the letter and return, with legal representation if he wished,at the afternoonmeeting. It should be mentioned that this alleged offer of a right to representation was not put to the applicant when he was being cross-examined, and consequently carries little, if any, weight.

[22] It was apparent from the evidence of Verster that the general practice at the firm was to present the employee with a letter setting out the disciplinary complaint. She claimed that in most cases, there would be a meeting with the employee to discuss the misconduct and then there would be a report back to the General Manager who would finalise the matter. She also testified that there was "Work Practice Manual"

containing the disciplinary procedures of the firm, but this was not introduced into evidence during the trial. When she was asked under cross-examination whether it was not the South African practice to present charges first and then hear evidence of witnesses, her response was that it was the Japanese approach to present a letter. When she was asked if any witness had been called to confirm that the applicant was intoxicated on 31 January 2005, Verster did not answer directly, but said that the firm wanted to see what CX's response would be, once he had considered the letter given to him that morning.

[23] Verster said she had drafted the letter given to the applicant on 1 February 2005 based on reports from other staff members. The respondent did not contend that any witnesses were called except to the extent that Verster had given her account of what she knew of the previous day's events. As the allegations concerning her telephone conversation with the applicant and his failure to return to the office were within her personal knowledge, that part of the letter dealing with that would have been based on her own knowledge.

[24] Minato played the role of complainant and chairperson in the meetings on 1 February 2005, according to Verster. He was the one who raised the issues set out in the letter, which she had drafted on his instruction. Mr Takeda, another manager, apparently took minutes of the meeting, but no copy of these minutes was handed in as evidence.

Other issues

[25] Verster was tested under cross-examination about the company's zero tolerance towards alcohol abuse. She explained that in the context of a driver the company simply could not take risks. Nevertheless, the policy on alcohol abuse was to provide an opportunity for rehabilitation, which is what the company did.

[26] Under cross-examination, CX was challenged on his assertion that the dismissal was on account of him mentioning his HIV status to the respondent. In particular, it was put to him that it was improbable that the company would have dismissed him two years after he had revealed his status if that was the real reason for his dismissal. CX was adamant that

the employer had, during this period, sought grounds for his dismissal such as suggesting that he was intoxicated when he was not. He could not suggest the reason why the company, in particular, might have chosen to make false allegations about him being intoxicated as a way of justifying his dismissal.

[27] It must also be mentioned that, in general, the applicant denied the truth of any of the findings of misconduct contained in the warning letters. The only one which he conceded contained a grain of truth was the warning of 18 August 2004. He said that it was true there had been an altercation at the garage but he denied he had been intoxicated and he had done nothing wrong in disputing the payment demanded by the garage attendant.

[28] At first, CX also denied that Verster had bailed him out when he was arrested for drunken driving, but then conceded that she had indeed come to help him. He insisted that on that occasion he had been using cough mixture rather than consuming liquor, and had been arrested for that reason. Although this incident was not directly relevant to any of the complaints contained in the warning letters, it is relevant to the attitude of Verster, and the respondent, towards the applicant. It is also indicative of CX's general response to any evidence tendered by the employer. The pattern of his responses was to initially baldly deny an allegation, seemingly as a matter of principle, and then to make concessions later.

[29]

Another fact mentioned by Verster in her evidence was that even though the company dismissed the applicant, it paid him a gratuity equivalent to what he would have received as a severance package if he had been retrenched, less the amount of an outstanding loan he owed. This was not challenged.Evaluation

Claim of automatically unfair dismissal

[30] It was common cause that the applicant had originally revealed his HIV status to Verster in March 2003 and had voluntarily disclosed it again to Minato on the day of his dismissal in 2005. The applicant's case that his

HIV status was the real reason for his dismissal rested solely on his claim that the relationship changed after he first made it known to Verster. As evidence of the change in the relationship he said he had been given increased amounts of office work. An increase in his office duties is also consistent with the period during which he was not allowed to drive following the warning in May 2003. He also suspected that once Verster knew of his HIV status, the company was looking for a legitimate reason to dismiss him. Clearly, if CX had been dismissed on account of his HIV status that would have been an automatically unfair dismissal.

[31] However, the largely undisputed portions of the evidence do not support this claim. Firstly, the applicant was very nearly dismissed in January 2003, which was before anyone in the company knew of his HIV status, even on his own account. Secondly, the misconduct for which he was nearly dismissed at that time was his unexplained absence from the office. This complaint was a recurrent theme in subsequent disciplinary action taken against him after the company knew of his HIV status. The consistency in this respect between his previous disciplinary record and his subsequent disciplinary record tends to undermine the applicant's contention that the respondent was looking for an artificial reason to dismiss him once it learnt of his status. On the contrary, it would appear that the applicant's discovery of his condition did not alter an established pattern of misconduct.

[32] Thirdly, there was no evidence to suggest that Verster ever divulged the applicant's status to any of the directors before he did so himself to Minato on 1 February 2005. Thus, based on the evidence, it follows that none of the directors had knowledge of his HIV status until the day of his dismissal. Consequently, the disciplinary steps taken against the applicant between January 2003 and his dismissal in February 2005, all of which were approved by the directors, can hardly be attributed to a complicated conspiracy on their part to try and cloak an automatically unfair dismissal in an acceptable guise. Moreover, Verster also testified that the respondent currently employed other staff living with the HIV virus.

[33] For these reasons, I am not satisfied that the applicant's HIV status was a reason for his dismissal, let alone the main or only one. Consequently, the applicants' claim of an automatically unfair dismissal relating to his HIV status must be dismissed.

Was the applicant's dismissal for misconduct substantively unfair?

[34] The first point that needs to be made in this regard is that the applicant never appealed against any of the written warnings he was issued with. His explanation for accepting all of them when they were issued to him was that he was told he would be dismissed if he did not do so. I am disinclined to accept this explanation for the following reasons. If it was the employer's intention to make the applicant accept warnings under duress, then it is difficult to understand what appears to have been its generally accommodative approach in disciplining the applicant.

[35] For example, despite the applicant facing possible dismissal in January 2003, the company relented and paid for him to attend a rehabilitation programme. Further, after he had been involved in two accidents in a company vehicle, which he was not supposed to be driving at the time, instead of dismissing him, the company gave him office duties. In August 2004, he was once again warned for his abuse of alcohol and given a further chance, despite already having been on a second detoxification course earlier that year. Moreover, one might have expected the firm to have capitalised on the two incidents of unauthorised use of the company vehicle and making a misrepresentation to the insurer, by way of a more sever sanction. Quite apart from its very gradual approach to taking disciplinary action, such a coercive approach is at odds with Verster bailing the applicant out when he was arrested for drunken driving.

[36] It is trite law that disciplinary steps which are not challenged timeously cannot be challenged belatedly when the final step of dismissal is taken. If the applicant had been intimidated into accepting the warnings, and if he believed that any appeal would be futile, there is no explanation why he

did not approach the CCMA over such a long period of time to challenge any of them as he could have done.

[37] In the circumstances, there is no good reason to disregard the accumulated disciplinary history of the applicant. In the main, this history indicated a constant problem with his unexplained extended absences from the office after running errands or collecting passengers. The situation never seemed to improve. Secondly, even though it was common cause that the applicant was not an alcoholic as such, there was a clear trend of complaints indicating alcohol abuse on his part. On the second occasion he attended a detoxification program, the extrinsic evidence of the letter from the rehabilitation centre tends to confirm that he did so voluntarily, which suggests he also realised he had a problem.

[38] Turning to the evidence concerning his absence from work on 31 January 2005, there is a conflict between his evidence and that of Verster. According to CX he had advised his passenger, another staff member, whom he had dropped at the firm's office, that he was going to the doctor. Further, he said that he had told Verster when she phoned him that he was ill and that he would come the following day. Her evidence was that when she phoned him on Monday he had said he was on his way back from Rapid Motors, but that he never appeared, and he never indicated he was at the doctor.

[39] Verster also testified that on the following day CX had raised the question of his HIV status in the context of him explaining to her and Minato that the reason for his absence on Monday was that he and his girlfriend had an altercation for the reasons mentioned previously. The applicant does not dispute that he disclosed his HIV status to Minato on 1 February 2005, but denies he spoke of any altercation. It seems more probable to me that he would have done so in the context of explaining his absence the previous day, which accords better with Verster's version.

[40] In general, I also believe the applicant was a less reliable witness than Verster. A factor which makes me more inclined to accept Verster's version is that the applicant directly contradicted the supplementary pre-trial minutes which had been agreed to on the day the trial commenced. In

the minutes the applicant confirmed that he had received the various disciplinary letters referred to above, yet in his evidence he initially sought to deny receiving them. Later, he grudgingly conceded his knowledge of the warnings. I have already mentioned that on other occasions in his evidence the applicant initially denied the respondent's version and later, without feeling any need to explain his change of course, recanted on his earlier bald denials. I am therefore inclined to be more sceptical of his evidence where it was not independently corroborated by other evidence or inherently probable.

[41] Accordingly, I find that it is more likely that, on Monday 31 January 2005, CX did tell Verster that he was returning to work, but on the next day explained that his absence was owing to the altercation he had with his girlfriend. He never seriously disputed the claim that he had been given a strict instruction to report to Verster after returning from Rapid Motors. He also did not dispute the allegation that he had been parking in the basement, contrary to numerous instructions not to.

[42] On the company's claim that he had admitted he had been drinking, or alternatively, that he had conceded that he had avoided the office because he was scared of being tested, once again it is a matter of Verster's word against his. However, given the fact that Verster's evidence was hearsay and surmise, and no independent witnesses were called to support this claim, I do not think there was sufficient evidence to support this finding.

[43] Taken as a whole, I am satisfied that the last incidence of the applicant's unexplained absence from work and his failure to comply with an instruction to return to work was yet another in a fairly long line of instances of non-compliance with previous warnings about his work habits, and the respondent was justified in concluding that matters had reached a point that he was unlikely to change. In the circumstances, I am satisfied that dismissal was an appropriate sanction for this misconduct even if the finding that he was intoxicated could not be sustained.

Was the applicant's dismissal procedurally unfair?

[44] For the reason already mentioned nothing really hangs on Verster's testimony that the applicant was advised on the morning of 1 February

2005, to consider the letter setting out the complaint against him and that he could obtain legal representation. There was also no evidence to suggest that he was advised that he could question management witnesses and call his own witnesses if he wished to. In this regard it is important to mention that Verster did not seek to contradict the applicant's evidence that he had challenged the company to produce a witness to support its claim that he was intoxicated on 31 January 2005.

[45] Apart from what Verster might have said, the only other evidence tendered by the company at the meetings that day was what was set out in the letter. Neither the applicant nor Verster mentions anyone else testifying as a witness, though it seems reasonable to assume that Verster did relate her telephonic conversation with the applicant of the previous day and that he related his version of the altercation to explain his failure to come to work.

It is less clear whether there was an original letter presented to the applicant at the first meeting which was then amended to reflect that a discussion had taken place. Certainly, it is true that there is scant reflection of the applicant's defence and why it was rejected. There was also no explanation provided why the minutes supposedly taken by Mr Takeda were never tendered in evidence.

[46] Item 4 of Schedule 8 of the Labour Relations Act, 66 of 1995 ('the LRA') does not stipulate an entitlement to call witnesses, or the need to lead evidence as such. In the much cited case of ***Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*** **(2006) 27 *ILJ* 1644 (LC)** Van Niekerk AJ (as he then was) said, at 1651C-1652G:

> *"To some extent, chapter VIII of the Labour Relations Act represents a codification of the jurisprudence that preceded it. The Act itself is silent on the content of any right to procedural fairness, it simply requires that an employer establish that a dismissal was effected in accordance with a fair procedure. The nature and extent of a right to fair procedure preceding a dismissal*

for misconduct is spelt out in specific terms in the Code of Good D *Practice: Dismissal in schedule 8 to the LRA.*

Item 4 of the code provides:

> *'(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and a language* E *that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the* F *decision taken, and preferably furnish the employee with written notification of that decision.' (Emphasis added.)*

It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.

This approach represents a significant and fundamental departure from what might be termed the 'criminal justice' model that was developed by the Industrial Court and applied under the unfair labour practice jurisdiction that evolved under the 1956 Labour Relations Act. That model likened a workplace disciplinary enquiry to a criminal trial, and developed rules and procedures, including rules relating to bias and any apprehension of bias, that were appropriate in that context. I

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognize that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions is found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgment that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a *dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.*

The balance struck by the LRA thus recognizes not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognizes that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.

The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:

"The draft Bill requires a fair, but brief, pre-dismissal procedure ... [It] opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee."

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and *complex "charge-sheets", requests for particulars, the application of the rules of evidence, legal arguments, and the like."*

[47] I agree with the general thrust of the learned judge's reasoning that the legislature intended that internal hearings should not be unduly prolonged by an inappropriate adherence to the rules of formal proceedings. However, I think that there might be aspects of an attenuated informal process which should at least be canvassed with the accused employee at the outset of the process. Thus, in this instance, the applicant was not advised that the employer had no intention of relying on formally presented oral evidence, but would decide the matter solely on the case which was set out on in its letter, subject to what he and Verster might say in the informal discussion. I believe that the applicant should at least have been advised of this so he would be aware of the extent to which the process of airing of the issues would be curtailed and, in particular, that other witnesses would not be called. This was all the more necessary in the context of him being unrepresented.

[48] The overall impression one is left with, is a somewhat stilted and limited interaction between the applicant and his accusers in which he had no independent person to consult with, or to witness the conduct of the proceedings, let alone to speak for him with the relatively greater impunity that a representative, who is not themselves facing the risk of disciplinary action, normally enjoys. The right of representation is an important one, as recognised by Farber AJ in ***Molope v Commissioner Mbha & others* (2005) 26 *ILJ* 283 (LC)**:

> *"Representation is not a matter of discretion. Nor is it tied to the exercise of a prerogative or an indulgence. It is a matter of entitlement and it will generally require very weighty considerations before an employee falls to be deprived of the right foundational thereto."*[1]

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1 At 292B-C. See also the authorities cited by the learned judge at 291H-292B of the same judgment.

[49] Consequently, I am of the view that there were some significant procedural deficiencies in the conduct of the applicant's dismissal process, and an appropriate award of compensation should be made, which I believe should be four months' remuneration.

Costs

[50] The applicant was only partly successful in his alternative claim and failed in his main claim. In the circumstances, I believe each party should bear its own costs.

Order

[51] In the light of the analysis,

51.1 I find that the applicant's dismissal for misconduct was substantively fair but procedurally unfair.

51.2 The respondent must pay the applicant an amount of compensation equivalent to four months' remuneration, being R 18, 504 -00 within 10 days of the date of this judgment.

51.3 Each party must pay its own costs

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: D E Nkabinde of D E Nkabinde Attorneys

FIRST RESPONDENT: G Fourie, instructed by B Matheson

[i] Name of Applicant substituted to preserve his anonymity