



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 15 / 24

In the matter between:

STANDARD BANK INSURANCE BROKERS (PTY) LTD **Applicant**

and

BAJABULILE DLAMINI **First Respondent**

**FUTURE OF SOUTH AFRICAN WORKERS UNION
(FOSAWU)** **Second Respondent**

FAIZEL MOOI N.O. (AS COMMISSIONER) **Third Respondent**

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION** **Fourth Respondent**

Heard: 14 November 2024

Delivered: 7 April 2024

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 7 April 2025

Summary: CCMA arbitration proceedings – review of proceedings, decisions and award of arbitrator – s 145 of LRA 1995 – review test considered – entails

determination of conduct of arbitrator, gross irregularities and reasonable outcome – material error of law considered

Dismissal – gross negligence – principles considered – conduct of employee constituting gross negligence – arbitrator failing to have proper regard to serious nature of misconduct – arbitrator negating and misconstruing essential facts relating to degree of misconduct – finding of substantive unfairness reviewable

Dismissal – dismissal as a fair sanction – principles and evidence considered – arbitrator failing to consider several factors relating to deciding fairness of sanction of dismissal – constitutes material failure by arbitrator – award on sanction unreasonable and reviewable

Dismissal – dismissal as a fair sanction – issued of remorse and trust relationship considered – arbitrator failing to consider pertinent evidence – arbitrator not having proper regard to such principles – finding of arbitrator relating to sanction unreasonable and reviewable

Review of award – conclusion of arbitrator unreasonable and constitutes material error of law – arbitration award reviewed and set aside

JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has brought an application to review and set aside an arbitration award of an arbitrator appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA) to arbitrate an unfair dismissal dispute between the applicant and the first respondent. In terms of this award, the third respondent, as the duly appointed CCMA arbitrator, determined that the dismissal of the first respondent by the applicant was substantively unfair. The application has been brought by the applicant in terms of section 145 of the Labour Relations Act (LRA)¹.

¹ Act 66 of 1995 (as amended).

[2] The arbitration award of the third respondent, dated 21 December 2023, was received by the applicant on the same date. In terms of section 145(1) of the LRA, any review application must be brought within six weeks from date the party seeking to challenge the award on review, having become aware of the award. The applicant's review application was brought on 26 January 2024, which is thus within this time limit. The review application is therefore properly before this Court for determination. The application has been opposed by the first respondent.

[3] I will now proceed to decide the applicant's review application by first setting out the relevant background facts in this matter.

The relevant background

[4] The background facts in this case were straight forward, and to a large extent undisputed.

[5] The applicant conducts the business of a short-term insurance broker, and is a financial services provider regulated by and licenced under the Financial Advisory and Intermediary Services Act (FAIS Act)². It is part of the Standard Bank group of companies (the Bank). The applicant offers and manages short term insurance to and of high profile wealth clients.

[6] The first respondent was employed by the Bank as far back as 2004. In the period between 2004 and 2018, the first respondent was employed in various positions at the Bank. In July 2018, the first respondent was appointed as a Wealth Insurance Manager (Wealth Manager) in the applicant. The first respondent reported directly to the Senior Manager of Insurance Wealth Insure, being Wade Emery (Emery).

[7] As Wealth Manager, the first respondent as required to fulfil a number of duties. This included the onboarding of clients, growing the client book, and then servicing those clients allocated to her in her insurance portfolio. In servicing clients,

² Act 37 of 2002.

the first respondent was required to have regular and direct interaction with all clients her client portfolio. In particular, and as Wealth Manager, the applicant was required to at all times render services honestly, fairly, with due skill, care, and diligence, and in the interest of the clients and the integrity of the financial services industry. She was also required to keep records of all communication with clients.

[8] Because the position of Wealth Manager is classified as a FAIS Representative, the first respondent would have a statutory obligation to comply with the FAIS requirements relating to all aspects of her responsibility. All FAIS Representative employees are also required to attend to ongoing training to maintain their FAIS status. FAIS Representative employees are not permitted by law to delegate their obligations to their colleagues or anyone else.

[9] One of the key duties of a FAIS Representative employee is to manage renewals. Renewals are annual renewals of insurance policies where the premium is likely to be adjusted or increased annually. As Wealth Manager, the first respondent would be required to administer the renewal process by way of a face-to-face discussion with clients. It is this issue of renewals that gave rise to the current proceedings.

[10] In terms section 55 of the Short Term Insurance Act,³ the Registrar: Short Term Insurance published '*Policyholder Protection Rules*' (the Rules)⁴, which *inter alia* deals with renewals. In terms of clause 11.6.5 of the Rules, an insurer must, at least 31 days before the renewal date of a policy (where applicable), provide the following to a policyholder in writing:

- (a) the premium to be paid by the policyholder on renewal of the policy;
- (b) the premium last paid by the policyholder under the policy to enable the policyholder to compare the premium to the premium referred to in paragraph (a);
- (c) any change to the terms or conditions on renewals of the policy, together with an explanation of the implications of that change;

³ Act 53 of 1998.

⁴ As published by way of GN1433 in GG 41329 dated 15 December 2017.

- (d) any change to or addition to the information referred to in rule 11.4 and 11.5 arising from the renewal;
- (e) the policyholder's rights and obligations regarding the renewal, including what cooling-off rights are offered and procedures for the exercise thereof; and
- (f) a statement indicating that the policyholder should consider whether the level of cover to be offered on the renewal is appropriate for the policyholder's needs.'

Clause 11.6.5 of the Rules is then mirrored in clause 11.6.5 of the FAIS Code of Conduct (the Code), with the Code being directly applicable to the first respondent as Wealth Manager.

[11] According to the applicant, it has various systems and procedures in place that enable all its Wealth Managers to comply with the Code, especially where it comes to the issue of renewals. This is known as the Power BI System (the System). The System keeps data for all claims and policies, and automatically prompts the relevant Wealth Manager two months before renewals on policies are due, to commence the renewal process. The System has been ringfenced to prevent clients from receiving notice of renewals automatically, without the involvement of the Wealth Manager, because the Wealth Manager is required to communicate with each client directly in this regard.

[12] In terms of the contact process applicable in the applicant, the Wealth Manager is then required to meet with the client at least 30 days before the renewal becomes effective to discuss the changes that would happen and provide the client with an updated schedule as stipulated by the Code. The insurance underwriter will then issue a renewal code. In fact, and on 10 September 2019, the applicant's insurance underwriter sent an email advising all Wealth Managers that renewals must be actioned within the two months trigger date effected by the System, and further advised that it would no longer be loading credits if the renewal was not actioned within the two months.

[13] The applicant further has a Code of Ethics which emphasises the value of serving customers, being fair to customers, providing excellent product services and solutions and keeping customers informed.

[14] The failure to adhere to the FAIS Requirements has serious implications for the applicant. The FAIS Regulator can impose sanctions ranging from a fine to suspending / cancelling the applicant's operating license. It is thus an essential and regulated compliance issue, and not just an internal rule in the applicant.

[15] In the above context, and in early 2023, Emery discovered that the first respondent had failed to action renewals within the two months after the System triggered an alert for her to commence the renewal process, in several cases. In particular, Emery discovered that the System triggered alerts for eight renewals, however the first respondent had only loaded five renewals on the System. The first respondent was requested by Emery on 7 March 2023 to explain this discrepancy in writing. In her letter of explanation sent to Emery on 13 March 2023, the first respondent did not dispute that she did not action the renewals. She explained that she could not remember the circumstances leading to her failure to action the renewals for each client, and conceded she was '*usually more casual*' where it came to renewals, because, according to her, if the client had not signed the record of advice and notice documents, the system would automatically implement the renewal.

[16] The applicant viewed this as an unacceptable explanation, as it flew directly in the face of the requirements of the Code and to conduct the renewals on a face-to-face basis with the client. Consequently, the first respondent was suspended on 11 May 2023 pending further investigation. The investigation yielded further breaches of the Code by the first respondent, in the form of failing to keep records of advice and providing clients with incorrect advice.

[17] On 5 June 2023, the first respondent was issued with a notice to attend a disciplinary hearing to be held on 28 June 2023. By virtue of this notice, the first respondent would face the following misconduct charge:

'Alleged Negligence misconduct for the period of 25/10/2022 to 30/01/2023 you failed to apply due diligence when you failed to adhere to FAIS Code of Conduct as a SIL Rep for the renewal process with the clients namely - HS000617474-AJDSAreias, SHS000841521-MrKorner, SHS000800368-Mr

Bell, SHS000739710 - Mrs Nolwazi Qata, SHS000741468 Mr SE Jonah and SHS000641549 Mrs P Moodley. Your actions have exposed the bank to the risk of losing its licence and possible reputation risk'

[18] The disciplinary hearing then took place on 28 June 2023. The first respondent pleaded not guilty to the charge against her, and then fully participated in the disciplinary hearing. She was however found guilty of the charge against her. The issue of an appropriate sanction was then considered. Having regard to the provisions of the Code, the serious nature of the first respondent's misconduct and the policies of the applicant, as well as the fact that the first respondent was previously issued with a final written warning for breach of the FAIS Act (which had expired), the chairperson of the disciplinary hearing, in a written finding dated 10 July 2023, recommended that the first respondent be dismissed. As a result, the first respondent was dismissed on 10 July 2023.

[19] Dissatisfied with being dismissed, the first respondent referred an unfair dismissal dispute to the CCMA on 26 July 2023. The parties failed to settle at conciliation held on 14 August 2023, and the dispute proceeded to arbitration, where it ultimately came before the third respondent for arbitration on 17 November and 14 December 2023.

[20] In his arbitration award dated 21 December 2023, the third respondent found that the dismissal of the first respondent by the applicant was substantively unfair. The third respondent then afforded the first respondent consequential relief in the form of retrospective reinstatement, with back pay in a sum of R176 044.05, being an amount equivalent to three months and two weeks salary. The applicant was not satisfied with this outcome, leading to the review application before me, which I will now turn to deciding by first setting out the applicable test for review.

The test for review

[21] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁵ the Court held that '*the reasonableness standard should now*

⁵ (2007) 28 ILJ 2405 (CC).

suffuse s 145 of the LRA’, and that the threshold test for the reasonableness of an award was: ‘... *Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?*...’⁶. This means that the award in question is tested against all the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.⁷ In conducting this test it is necessary for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.⁸ In *Herholdt v Nedbank Ltd and Another*⁹ the Court said:

‘A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable ...’

[22] In sum, applying the correct review test has a logical chronology. First, it is ascertained whether there is a failure or error on the part of the arbitrator. Second, and only where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable, based on all the evidence and issues before the arbitrator, even if it may be for different reasons or on different grounds as those referred to by the arbitrator.¹⁰ It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.¹¹

[23] This matter also concerns a contention by the applicant that the third respondent committed a material error of law. If an error of law is committed by an

⁶ Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 96.

⁷ See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at paras 43.

⁸ Id at para 41.

⁹ (2013) 34 ILJ 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

¹⁰ *Fidelity Cash Management Service* (supra) at para 102.

¹¹ See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

arbitrator, and that error of law is material, it would render the award arrived at to be unreasonable, and thus subject to being reviewed and set aside.¹² In fact, an award based on a material error of law can be legitimately challenged not only on the basis of it being unreasonable, but also on the basis that the award would be incorrect.¹³ The simple point is that a reasonable arbitrator will not commit a material error of law. The Court in *Herbert v Head of Education: Western Cape Education Department and Others*¹⁴ articulated the following apposite summary:

‘In *MacDonald’s Transport* it was found that the LRA did not contemplate that a CCMA or bargaining council arbitrator, both statutory roles, would have the last word on the proper interpretation of an instrument as this would mean that a patently wrong interpretation would be left intact, which ‘would be absurd’. The wrong interpretation of an instrument by an arbitrator could therefore constitute a reviewable irregularity as envisaged by s 145 of the LRA, in the sense that a reasonable arbitrator does not get a legal point wrong. The court concluded that either ‘the reasonableness test is appropriate to both value judgments and legal interpretations. If not, “correctness” as a distinct test is necessary to address such matters’. This view was echoed in *NUMSA*, in which it was stated that an incorrect interpretation of the law by a commissioner constitutes a material error of law which ‘will result in both an incorrect and unreasonable award’, which ‘can either be attacked on the basis of its correctness or for being unreasonable’.¹⁵

[24] As against the above principles and test, I will now turn to deciding the merits of the review application by the applicant.

Analysis

¹² See *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC) at paras 32 – 33; *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) at paras 21 – 22; *Civil and Power Generation Projects (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2055 (LC) at para 33.

¹³ In *National Union of Metalworkers of SA v Assign Services and Others* (2017) 38 ILJ 1978 (LAC) at para 32, it was held: ‘... An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable ...’. This judgment of the LAC was upheld by the Constitutional Court in *Assign Services (Pty) Ltd v National Union of Metalworkers of SA and Others (Casual Workers Advice Office as Amicus Curiae)* (2018) 39 ILJ 1911 (CC).

¹⁴ (2022) 43 ILJ 1618 (LAC) at para 24.

¹⁵ The Court was referring to *MacDonald’s Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593 (LAC) at para 29, and *Assign Services* (*supra*).

[25] At the commencement of the arbitration before the third respondent, both parties resorted to making comprehensive opening addresses. In the course of the opening address by the first respondent's union representative, the third respondent questioned whether the first respondent was disputing that she was guilty of the offence, or was only disputing that the sanction of dismissal was unfair. After some exchange between the first respondent's representative and the third respondent, the following transpired:

'COMMISSIONER: So you are saying that she has conceded that she is guilty of the offence.

MR MOTHA: Yes, yes.

COMMISSIONER: So essentially what you are saying is that there are various factors that make the sanction too harsh (indistinct) inconsistency.

MR MOTHA: That is correct.'

Procedural fairness was also not placed in dispute in the arbitration.

[26] Based on the aforesaid, all the third respondent was called upon to decide, and in the end was competent to decide, was whether the sanction of dismissal of the first respondent constituted a fair sanction.¹⁶ The fact that the first respondent committed the misconduct with which she had been charged was not in issue before the third respondent. It follows that all the relevant facts giving rise to the conclusion that the first respondent was guilty of the misconduct stood as uncontested / undisputed. Because there are no pleadings to speak of in CCMA arbitration proceedings, the opening addresses by the parties basically serve the very same purpose as limiting issues in a pre-trial minute.¹⁷ In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*¹⁸ the Court dealt with the limitation of issues for determination in an arbitration, by way of

¹⁶ In *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614B-D, it was said that: '... If a party elects to limit the ambit of his case, the election is usually binding ...'. See also *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 ILJ 142 (LAC) at paras 16 and 83

¹⁷ In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others* (2013) 34 ILJ 2347 (LC) at para 62, the Court held: '... The effect of the events at the commencement of the arbitration, as specifically set out above, is similar to a pretrial agreement and has the same consequences. As there are no pleadings in CCMA arbitrations, the court has specifically dealt with the significance of opening addresses ...'. See also *Tiger Brands Field Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALCJHB 216 (13 August 2013) at para 71.

¹⁸ (2008) 29 ILJ 964 (LAC).

the opening addresses made by the parties. The Court referred to what each party in the arbitration had said in their opening addresses,¹⁹ and then concluded:²⁰

‘... in an arbitration such as the one that happened in this matter, the parties do not exchange, and, in this case, did not exchange, pleadings that would enable each party to know what the other party's case is. In cases in which opening statements are made, they serve to inform both the arbitrator and the other side what one's case is. ...’

[27] One of the grounds upon which the first respondent contended that her dismissal constituted an unfair sanction was an allegation of inconsistency. This case of inconsistency was firmly rejected by the third respondent who found that: ‘... *No inconsistency has been proven in this regard* ...’. In the absence of any cross review by the first respondent, and with the applicant not having taken issue with this particular finding, it stands, and thus inconsistency is not a relevant consideration. As such, all the evidence relating to the same will not be considered in this judgment.

[28] The third respondent concluded that the dismissal of the first respondent was indeed an unfair sanction, for a number of reasons. Firstly, the third respondent held that because the chairperson of the disciplinary hearing had held that the first respondent was guilty of ‘*negligence*’ and not ‘*gross negligence*’, it meant the offence was not that serious and corrective discipline could still follow. Secondly, the third respondent considered the applicant’s disciplinary code, and in particular the provision that read a dismissal may result: ‘*Where an employee has been given a final written warning and commits related misconduct again within 12 months*’. Based on this provision, and according to the third respondent, because the first respondent did not have a final written warning, dismissal was not appropriate.

[29] As referred to above, the first respondent had however in the past received a final written warning for a violation of the Code, which warning had expired. The warning concerned an instance where the first respondent had manipulated the System, without approval from the underwriters, to reinstate a client policy. It is clearly a related warning. The chairperson in the disciplinary hearing considered this warning as one of the factors in support of a finding that the first respondent be dismissed. The

¹⁹ See paras 20 – 22 of the judgment.

²⁰ Id at para 23.

chairperson also found that the kind of behaviour contemplated by this warning also became evident after her suspension,²¹ that it showed a repetition of unacceptable behaviour, and that '*... the risky behaviour and negligence are evident ...*'. The third respondent disagreed. He reasoned that it was unfair for the chairperson to have regard to the expired final written warning as the first respondent was not charged with the alleged risky behaviour that continued after her suspension, and it was further unfair to have regard to the first respondent's alleged risky behaviour because she did not concede to these allegations. Effectively, the third respondent negated the final written warning as a factor to be considered.

[30] The next factor considered by the third respondent was the seriousness of the misconduct. He held that he not convinced that the first respondent's misconduct was so serious that it warranted dismissal, because she was charged with negligence and not gross negligence. He was further of the view that the facts did not establish gross negligence, but gave no exposition in the award why he believed this was the case.

[31] It was common cause that as a result of the failures perpetrated by the first respondent in this case, one client had to be refunded, which obviously caused direct financial harm to the applicant. The third respondent however negated this event, finding that this was not sufficiently serious to warrant dismissal. As to harm to the applicant in general, the third respondent held that it was mere reputational harm which was potential rather than actual as no formal complaint was launched. The third respondent also found mitigation in the fact that there was no written policy on what the first respondent had to do. And finally, the third respondent considered the first respondent's long service as being a strong mitigating factor warranting a sanction short of dismissal, especially as the final written warning had expired which indicates that she was capable of rehabilitation.

[32] The third respondent arrived at the following conclusion: '*... while the trust relationship was dented, I am not convinced that it was irretrievably broken, as alleged by the respondent as the trust relationship lasted almost twenty years; the applicant was guilty of negligence, not gross negligence; the reputational loss was potential, not actual, and the financial loss seems to have been limited to a refund to*

²¹ This is the further instances of a breach of the Code discovered whilst she was suspended and an investigation was conducted.

Ms Moodley According to the third respondent, as a result of these factors, the sanction of dismissal was unfair.

[33] So, could these findings of the third respondent be regarded as unreasonable, considering the facts before him as well as the relevant principles of law relating to deciding the fairness of the sanction of dismissal? It would be appropriate, in answering this question, to first give an exposition of the relevant legal principles. The point of departure is, as articulated by Ngcobo J in *Sidumo supra*²²:

‘... the commissioner... does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting-point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair’.

[34] In deciding whether the employer acted fairly in deciding to dismiss an employee, a variety of factors must be considered, as a whole.²³ These are, in sum, the following: (1) the importance of the rule that had been breached (seriousness of the misconduct); (2) the reason the employer imposed the sanction of dismissal; (3) The explanation presented by the employee for the misconduct; (4) the harm caused by the employee's conduct; (5) whether additional training and instruction may result in the employee not repeating the misconduct; (6) the service record of the employee; (7) the breakdown of the trust / employment relationship between the employer and employee; (8) the existence or not of dishonesty; (9) the possibility of progressive discipline; (10) the existence or not of remorse; (11) the job function of the employee; and (12) the employer's disciplinary code and procedure.²⁴ Not all the factors are always relevant to a particular case, so only those that are relevant must

²² Id at para 178.

²³ See *Sidumo (supra)* at para 78.

²⁴ See *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82; *Bridgestone SA (Pty) Ltd v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2277 (LAC) at paras 17 – 18; *Woolworths (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* (2016) 37 ILJ 2831 (LAC) at para 14; *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at para 30; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38; *Fidelity Cash Management (supra)* at para 94.

be identified, and considered.²⁵ In general terms, what requires consideration by an arbitrator was articulated in *Vodacom (Pty) Ltd v Byrne NO and Others*²⁶ as follows:

‘... the determination of the fairness of a dismissal required a commissioner to form a value judgment, one constrained by the fact that fairness requires the commissioner to have regard to the interests of both the employer and the worker and to achieve a balanced and equitable assessment of the fairness of the sanction ...’

[35] In the context of the aforesaid principles, it is my view that the third respondent approached the issue of determining the fairness of the sanction of dismissal in this case on entirely the wrong basis. The approach adopted by the third respondent is not only unreasonable, but would be a material error of law. What the third respondent did, which is quite evident from his reasoning considered as a whole, was to decide what he personally believed would be fair where it came to the sanction of dismissal in this case. He never considered whether what the applicant did in this case was fair. It is not for an arbitrator to step into the shoes of the employer and then decide whether dismissal is a fair sanction, as if the arbitrator was the employer. That completely ignores what is fair to a particular employer, in the context of the particular business of such employer. This can be illustrated by a simple example. An arbitrator may personally consider an instance of an employee sleeping whilst on duty is not serious enough to warrant dismissal. However, the employer conducts business in the security industry, where sleeping on duty is a deal braking offence. For an arbitrator to then decide the dismissal is unfair based on the arbitrator’s personal views and preference would be fundamentally in error.²⁷ As said by Navsa AJ in *Sidumo supra*:²⁸

²⁵ See for example *Duncanmec (supra)* at para 46.

²⁶ (2012) 33 ILJ 2705 (LC) at para 9. See also *Wasteman Group v SA Municipal Workers Union and Others* (2012) 33 ILJ 2054 (LAC) at 2057G-I.

²⁷ As Ngcobo J said in *Sidumo (supra)* at para 180: ‘But it could not have been the intention of the lawmaker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that to have been the case the outcome of a dispute could be determined by the background and perspective of the commissioner. The result may well be that a commissioner with an employer background could give a decision that is biased in favour of the employer, while a commissioner with a worker background would give a decision that is biased in favour of a worker. Yet fairness requires that regard must be had to the interests both of the workers and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction ...’.

²⁸ Id at para 79. See also *Cape Gate (Pty) Ltd v Mokgara and Others* (2022) 43 ILJ 1277 (LAC) at para 27.

'To sum up. In terms of the LRA a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

[36] The third respondent had little regard to the business of the applicant, its regulatory constraints, and what is considered to be the essential duties of the first respondent as Wealth Manager. The third respondent seems not to understand the business of the applicant at all. He had little regard to why the applicant, as employer, believed the dismissal of the first respondent was fair. What the third respondent instead did was to decide what he personally considered to be fair. This error in approach materially affected the ultimate conclusions he came to, and set the tone as to why his award simply cannot be sustained on review.

[37] The third respondent accepted the veracity of the content of the finding of the chairperson in the disciplinary hearing, as being relevant and accepted evidence to consider when deciding whether the sanction of dismissal was fair. This hearing finding contains a detailed exposition of the mitigating and aggravating factors / evidence submitted by the parties in the disciplinary hearing. All the factors and evidence necessary to decide what would be a fair sanction was thus before the chairperson. The chairperson considered all those submissions and evidence. He considered the first respondent's lengthy service, her overall good performance, that there was no deliberate intention on her part to cause harm, her personal circumstances and the fact that she was remorseful, as mitigating factors. As aggravating factors, he considered the previous final written warning (albeit expired), that the third respondent was trained in and knew what she was required to do, the misconduct was serious, the applicant had dismissed employees in the past for similar misconduct, the first respondent had breached legislation and the Code, and there is the possibility of reputational damage, financial loss, penalties, fines, imprisonment and loss of licence.

[38] Considering all these factors summarized above, the chairperson decided '*The transgression is of a very serious nature and I found Ms Dlamini guilty of negligence*'.

The chairperson also held that even though the final written warning had expired, it can serve to establish the propensity of the first respondent to commit certain types of misconduct, albeit not qualifying as the next step in a progressive discipline process. The chairperson decided that the further considerations justifying dismissal was the negligent behaviour on the part of the first respondent that manifested itself, and that the trust relationship had been destroyed. In the end, the chairperson concluded that the mitigation did not outweigh the severity of the first respondent's actions.

[39] How is this decision by the applicant as employer, when exercising a proper value judgment considering the interests of both employer and employee, then unfair? Turning first to considering the nature of the misconduct, there can be no doubt that it is very serious. Despite this, the third respondent negates this to something far less serious, based on reasoning that is hard to endorse. The third respondent quotes case law relating to the concept of gross negligence, but then appears not to apply it to the facts at all. It is pointless to quote case law but not apply it to the facts. Instead, what the third respondent does is to find the misconduct is not serious because the chairperson uses the word '*negligence*' and not '*gross negligence*'. This reasoning is unduly simplistic. The third respondent needed to consider what misconduct, on the facts, the first respondent had actually perpetrated. It is not appropriate to defer to what the chairperson labelled the misconduct as. After all, everyone was *ad idem* that there was negligence, and whether it was '*normal*' (for the want of a better description) or '*gross*', is a question of fact and degree,²⁹ which cannot be decided by deferring to a label. This reasoning by the third respondent thus constitutes a failure in executing his task. As held in *Cape Gate (Pty) Ltd v Mokgara and Others*³⁰:

²⁹ In *National Union of Metalworkers of SA and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2023) 44 ILJ 1575 (LC) at para 35, the Court held: '*The test for negligence remains the same — whether negligence, once established, is gross, is a matter of degree, to be determined considering a number of relevant factors. Those factors are inter alia whether the employee is persistently negligent; the seriousness of the act or omission; whether the act or omission is inexcusable; the employee's awareness of the performance standard required or the procedure to be complied with; the seriousness of the consequences of the act or omission; damages caused and the skills and experience of the employee or the position held by the employee ...*'

³⁰ (2022) 43 ILJ 1277 (LAC) at para 22.

‘... It is not about proving all the elements of an offence. All that is required is to prove the essential allegations which form the basis of the misconduct concerned. ...’

[40] On the undisputed facts relating to the misconduct actually perpetrated by the first respondent, there was a material violation of the clear terms of the Code, as a regulatory prescript in the industry. It was one of the first respondent’s core duties to ensure compliance with these prescripts, which she failed to do. This failure took place without proper cause, reason or explanation, and despite the first respondent knowing what she was expected to do. And further, this happened despite the prior two months prior alert given to the first respondent by the System. The consequences of non-compliance can be severe and is highly prejudicial to the applicant. So, is the above misconduct, on the facts and as a matter of degree, gross negligence? In my view, certainly so, in that it shows unexplained remissness and a complete indifference to the proper and responsible discharge of the first respondent’s duties. In *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another*³¹ the Court described gross negligence as follows:

‘... It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care ...’

[41] Appositely, the Court in *National Union of Metalworkers of SA and Another v Commission for Conciliation, Mediation and Arbitration and Others*³² gave the following exposition of what would be expected from an employee in the particular position of the first respondent:

‘Negligence, in short, is the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person and in the employment context, the employee’s conduct is compared with the standard of

³¹ 2003 (2) SA 473 (SCA) at para 7.

³² (2023) 44 ILJ 1575 (LC) at para 32.

skill and care that would have been expected of a reasonable employee in the same circumstances. The reasonable employee with whom the employee is compared must have experience and skill comparable with that of the employee charged. In labour law, negligence is not applied 'in vacuo' or against the general standard of a 'reasonable person', but it is applied in the context of the particular workplace or industry, considering the performance standards and procedures set by the employer. Negligence is usually established with reference to workplace rules or procedures applicable in the workplace ...'

The Court in *National Union of Metalworkers* added:³³

'The test to be applied and with whom the employee is compared, is that of a reasonable employee, having experience and skill comparable with that of the employee charged, in the context of the particular workplace or industry, considering the performance standards and procedures set by the employer. ...'

[42] Applying the aforesaid, I believe that *in casu*, there was a material departure from the norm that would not be expected from a knowledgeable, long serving and experienced employee such as the first respondent. This departure from the norm is extreme, considering what actually happened in this case, and the very nature of the financial services industry. Surely, how hard can it be to process a renewal especially if one is reminded of it beforehand? In simple terms, the first respondent would be warned by the System two months in advance, and all she needs to do is to come into contact with the client to explain the renewal and then, with the client, process the renewal. But she did not do any of this, where it came to the clients referred to in the charge. And then to put matters beyond doubt, she explains her failure on the basis, effectively, that she does not think it is a problem, because the System automatically renews, despite the fact that the one-on-one client renewal is to specifically avoid automatic system renewals which would violate the Code. All considered, there was a complete failure to take care by the first respondent. What is incomprehensible is that the third respondent did not appreciate any of these

³³ Id at para 40.

essential facts, but instead deferred to a label afforded to the misconduct by the chairperson. The following *dictum* in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*³⁴ is apposite *in casu*:

‘Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards.’

[43] In addition, I am of the view that the third respondent in any event misconstrued what the chairperson had actually found. Insofar as the third respondent may believe the chairperson considered that the misconduct was not serious, nothing can be further from the truth, as borne out by the finding of the chairperson himself. I do not understand how a pertinent finding that ‘*the transgression is of a very serious nature*’ can be diminished, just by attaching it to a guilty finding of ‘*negligence*’. What the chairperson was actually saying is that the negligence the first respondent is guilty of is a transgression of a very serious nature. In law, a negligence transgression of a very serious nature is gross negligence. That is what the third respondent unreasonably and irrationally failed to comprehend.

[44] All said, it is my view that the only rational and reasonable conclusion the third respondent could have come to, considering the undisputed facts and the relevant principles of law, is that the negligence perpetrated by the first respondent in this case was very serious, irrespective of whether the label ‘*gross*’ is attached to it or not. It is the kind of misconduct that can competently attract dismissal as a fair sanction,

³⁴ (2019) 40 ILJ 2477 (LAC) at para 16. See also *SA Police Service v Magwaxaza and Others* (2020) 41 ILJ 408 (LAC) at paras 42 – 43.

even for a first offence. For example, in *Nampak Corrugated Wadeville v Khoza*³⁵ the employee party was charged and dismissed for gross negligence in that he had failed to take proper care of equipment for which he was responsible. The Industrial Court found that the employee was negligent but could not find gross negligence to exist which justified dismissal. The erstwhile LAC disagreed and held:

‘...The probable explanation for his conduct, in these circumstances, is simply that he deliberately neglected to perform his duties. Consequently, I do not share the view of the Industrial Court that the evidence against Khoza was so circumstantial that it could not be used to explain his conduct. It was Khoza who had to furnish that explanation. In the absence of any credible explanation, the inference that he deliberately neglected to perform his duty is irresistible. This finding by the employer cannot be faulted.’

[45] But the seriousness of misconduct is, as discussed above, not the only factor to be considered. Unfortunately, the third respondent had no regard to several of the other factors as well. In particular, the third respondent had no regard to any of the following: (1) the applicant had consistently been dismissing employees for similar misconduct in the past; (2) there was not an acceptable explanation by the first respondent for the misconduct; (3) there was a proper and justified reason for the applicant to have opted for dismissal; (4) this was not a case where additional training and instruction could result in the first respondent not repeating the misconduct; and (5) the particular job function of the first respondent and that she failed in one of her core duties. The failure to consider these factors would thus be another failure on the part of the third respondent that would impact on the reasonableness of the conclusion he arrived at.

[46] What did the third respondent then consider, other than the sanction purportedly not being sufficiently serious to warrant dismissal? First, the third respondent appeared to accept that the misconduct did cause the applicant harm. But yet again, the third respondent diminished this to harm that is purportedly not serious. This conclusion is irrational, and fails to have any regard to the nature of the industry. Compliance with the Code in the financial services industry is like

³⁵ (1999) 20 ILJ 578 (LAC) at para 35.

compliance with safety rules on the Mines, where a violation of those rules would create the kind of risk that justifies dismissal.³⁶ Although in the financial services sector a breach of the Code will not cause death and injury, the possible consequences to the applicant as employer is severe, as it is imposed by statutory regulation which could go so far as to effectively close the business and send the proprietors to prison in the case of a violation. This kind of risk is material harm, an issue put to the third respondent under cross examination, and which she never disputed. And added to that, in the financial services sector, much depends on reputation, where it comes to client acquisition and client retention. There are many competitors out there, and the kind of failures that took place in this case could cost the applicant dearly in the reputational context. Harm in this case is undeniable and significant, and the third respondent acted irrationally by not appreciating this. In fact, the manner in which the third respondent went about diminishing the harm was not appropriate, and showed a lack of appreciation of the tenets of the financial services sector, and what would be fair to the applicant as employer as well.

[47] When the evidence presented in the arbitration it considered, it is apparent to me that the manner in which the first respondent herself sought to deal with the misconduct she undoubtedly committed, shows a complete lack of appreciation for the possible consequences and harm her conduct could have caused the applicant. She even, when giving evidence, sought to contest that she had done nothing wrong, and even blamed the System, despite what had been agreed to when the arbitration started. This lack of appreciation would also be a relevant factor justifying her dismissal. But the third respondent unfortunately had no regard to it. In *EOH Abantu supra*³⁷ it was held as follows in deciding that the dismissal was substantively fair, which in my view can equally be applied *in casu*:

‘When it was put to him in the arbitration that he had been negligent, he denied that he was guilty of negligence. That compounds his folly and intimates a lack of appreciation of the reputational harm to the appellant his conduct might have caused ...’

³⁶ Compare *Samancor Chrome (supra)* at para 35; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 25; *Impala Platinum Ltd v Jansen and Others* [2017] 4 BLLR 325 (LAC) at para 17.

³⁷ *Id* at para 21.

[48] Next, the third respondent also had an issue with the chairperson having regard to the expired written warning, which conduct he considered to be unfair. But yet again, the third respondent misconstrues what the chairperson actually found in this respect. The chairperson simply reasoned that an expired written warning may be considered to establish a propensity for certain misconduct, and on such basis, he considered it. There can be nothing wrong with this approach. The third respondent's criticism of it is entirely unfounded, and his negating of this warning would be reviewable conduct. A decided in *Gcwensha v Commission for Conciliation, Mediation and Arbitration and Others*³⁸:

'An employer is always entitled to take into account the cumulative effect of these acts of negligence, inefficiency and/or misconduct. To hold otherwise would be to open an employer to the duty to continue employing a worker who regularly commits a series of transgressions at suitable intervals, failing outside the periods of applicability of final written warnings. An employee's duties include the careful execution of his work. An employee who continuously and repeatedly breaches such a duty is not carrying out his obligations in terms of his employment contract and can be dismissed in appropriate circumstances ...'

[49] The next issue is the issue of the trust relationship, also considered by the third respondent. The evidence by Emery was that the trust relationship was destroyed, with him being the custodian of the trust relationship and in the position to testify about it.³⁹ Without making any finding derogating from the credibility of Emery's evidence in this regard and why such a view would not be justified, the third respondent simply concluded that the trust relationship was '*dented*' but not destroyed. I cannot accept this. Emery explained why the applicant could not trust the first respondent, which explanation makes sense. This explanation, in essence, was that the first respondent could not fulfil one of her core duties, and adopted an approach that was irreconcilable with the Code, and the applicant's own code of Ethics. Under such circumstances, and according to Emery, it was just too risky to continue with the employment relationship and the first respondent could simply not

³⁸ (2006) 27 ILJ 927 (LAC) at para 24. See also *National Union of Mineworkers on Behalf of Selemela v Northam Platinum Ltd* (2013) 34 ILJ 3118 (LAC) at para 38; *Transnet Freight Rail v Transnet Bargaining Council and Others* (2011) 32 ILJ 1766 (LC) at para 43.

³⁹ See *Edcon Ltd v Pillemer NO and Others* (2009) 30 ILJ 2642 (SCA) at para 19.

be trusted to execute her tasks.⁴⁰ This evidence by Emery was not contradicted, and the first respondent led no evidence to the contrary. In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁴¹ the Court said:

‘A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. ...’

[50] If the third respondent properly considered the evidence relating to the trust relationship, he could not have reasonably come to the conclusion that he did, of only a ‘*dented*’ trust relationship. Instead, and on the facts, the trust relationship was not just dented, but scrapped. This trust relationship factor *in casu* accordingly works in favour of dismissal as being a fair sanction. The following *dictum* in *Miyambo v CCMA and Others*⁴² is particularly apposite, where it was held:

‘It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust ...’

[51] The third respondent did not refer in his award to the issue of remorse. This is a material failure. It is true that in the disciplinary hearing, the first respondent comprehensively dealt with the issue of remorse, and expressed what she called remorse in some detail. But it cannot be ignored that this expression of remorse did not come off the back of a guilty plea. Instead, it came following a finding of guilty. But whatever contrition / remorse the first respondent may have exhibited in the internal disciplinary process, this completely evaporated when she gave evidence in the arbitration. In fact, the first respondent sought to present evidence that

⁴⁰ Compare *Afrox Healthcare Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 1381 (LAC) at para 23.

⁴¹ (2000) 21 ILJ 1051 (LAC) at para at para 22. See also *Rustenburg Platinum Mines Ltd (Rustenburg Section) v National Union of Mineworkers and Others* (2001) 22 ILJ 658 (LAC) at paras 21 – 22; *National Union of Metalworkers (supra)* at para 54; *Vilakazi v Commission for Conciliation, Mediation and Arbitration and Others* (2024) 45 ILJ 369 (LC) at para 70.

⁴² (2010) 31 ILJ 2031 (LAC) at para 13.

challenged her guilt, to the extent that the following intervention by the third respondent occurred after a considerable amount of testimony was led by the first respondent:⁴³

‘COMMISSIONER: But now you are going into the applicant’s guilt rather than the sanction itself. I need to understand why the sanction was too harsh.

MR MOTHA: We are heading there, Commissioner

COMMISSIONER: Well, we need to get to that point, because your case is that sanction is too harsh, that is the point I need to understand’

[52] When the first respondent then proceeded to deal with the issue of sanction in her testimony after this intervention by the third respondent, the first respondent still testified that the way she did things was the way she always did it, and there was never a problem. She never came out and acknowledged any wrongdoing, or showed contrition. She never undertook not to repeat the misconduct, if given a chance. She only made one concession, at the end of her testimony in chief, being that she ‘*accepted*’ her guilt. This falls far short of genuine remorse or contrition, of the kind needed to restore the employment relationship. True remorse was explained in *Absa Bank Ltd v Naidu and Others*⁴⁴ as follows:

‘... genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter

⁴³ It must be said that the first respondent once again effectively disavowed her guilt under cross examination.

⁴⁴ (2015) 36 *ILJ* 602 (LAC) at para 46.

alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.’

The first respondent did none of this, something the third respondent had no regard to at all. All said, there was no remorse or contrition shown by the first respondent, which is a material factor working in favour of dismissal as being a fair sanction.

[53] In simple terms, without the requisite remorse, it is not possible to restore the relationship of trust that forms the foundation of the employment relationship. As held in *De Beers supra*⁴⁵ the Court said: ‘... *Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken.*’

[54] The third respondent placed considerable emphasis on the long service of the first respondent (some 19 years). Of course, this is a relevant factor that mitigates against dismissal as being a fair sanction. But it does not have the kind of paramount importance the third respondent seemed to ascribe to it, and certain misconduct would justify dismissal irrespective of long service. This was specifically recognized in *Toyota SA Motors (Pty) Ltd v Radebe and Others*⁴⁶, where the Court said: ‘... *Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal ...*’. The misconduct of the first respondent is an instance where, in my view, her long service cannot save her. I consider the following *dictum* in *Mgaga v Minister of Justice and Correctional Services and Others*⁴⁷ as an apposite description applicable *in casu*:

⁴⁵ Id at para 25. See also *Algoa Bus Co (Pty) Ltd v Tirisano Transport and Services Workers Union on behalf of Mzawi and Others* (2025) 46 ILJ 89 (LAC) at para 13; *Vilakazi (supra)* at para 69.

⁴⁶ Id at para 15. See also *Schwartz v Sasol Polymers and Others* (2017) 38 ILJ 915 (LAC) at para 26; *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others* (2017) 38 ILJ 881 (LAC) at para 28; *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* (2008) 29 ILJ 1180 (LC) at para 42.

⁴⁷ (2024) 45 ILJ 1576 (LAC) at para 28.

‘... Cumulatively the appellant’s conduct belies an employee that is blasé with the rules. In my view, he portrays the actions of a recalcitrant employee. The fact that he has 29 years of service without blemish cannot save him from the sanction of dismissal. ...’

[55] I will, in conclusion, deal with one last finding made by the third respondent. It would seem that the third respondent believed that in terms of the applicant’s disciplinary code, dismissal was not appropriate without a final written warning. In my view, the third respondent misconstrued the disciplinary code. A proper consideration of the disciplinary code shows that it draws a distinction between ordinary misconduct and serious misconduct. In the case of serious misconduct, dismissal may be justified without a prior warning. Serious misconduct is defined as including gross negligence, an act that damages the applicant’s good name and reputation, or any other act that is sufficiently serious to destroy the trust relationship. As discussed above, this is what we have *in casu*. The applicant’s disciplinary code thus justifies the first respondent’s dismissal without a prior warning, and the third respondent’s finding to the contrary is unsustainable on review.

[56] In sum, and where it comes to the third respondent’s determination that dismissal was an unfair sanction in this case, there exists several fundamental failures, being: (1) he failed to have proper regard to the seriousness of the misconduct, which showed a complete failure to take care tantamount to gross negligence; (2) he failed to have proper regard to the critical importance of unconditional compliance with the Code; (3) he misconstrued the evidence and the relevant principles of law where it came to the issues of the lack of remorse on the part of the third respondent, as well as the breakdown of the trust relationship, which strongly worked in favour dismissal being a fair sanction; (4) he failed to consider the material risk of prejudice the applicant was exposed to; (5) He had no regard to the fact that the first respondent effectively had no explanation for the misconduct; (6) he completely negated a previous related final written warning, which was a relevant factor; (7) and finally, he did not consider that the applicant acted consistently in dismissing all the employees that similarly failed in the past. In the balance, the first respondent’s long service and personal circumstances were not sufficient to contradict the fairness of her dismissal. Overall considered, and if the third respondent had proper, reasonable and rational regard to all of these factors, the

only reasonable conclusion he could have arrived at is that the dismissal of the first respondent was justified, and fair. It can hardly be better described than the following *dictum* in *Solari v Nedbank Ltd and Others*⁴⁸ where the Court said the following, specifically referring to conduct of a commissioner where it came to deciding if dismissal was an appropriate sanction:

‘... it is clear on the totality of the evidence before the commissioner that he did not properly consider all the evidence and therefore arrived at a conclusion that a reasonable decision maker could not reach then the award ought to be set aside. The same will apply when the commissioner makes certain inferences from the proven facts that are totally out of sync with those facts. The inference reached without a proper consideration of the proven facts would be an unreasonable decision or a decision which a reasonable decision maker could not reach ...’

[57] For all the reasons as set out above, it is my view that the determination by the third respondent in his award to the effect that that the dismissal of the first respondent was not an appropriate and fair sanction is grossly irregular, and resorts well outside the bands of what may be considered to be a reasonable outcome.⁴⁹ It also constitutes a material error of law. As such, the award of the third respondent falls to be reviewed and set aside.

Conclusion

[58] For all the reasons as set out above, I conclude that the third respondent's finding that the dismissal of the first respondent was substantively unfair constitutes an unreasonable outcome, and a material error of law. It cannot be sustained, and falls to be reviewed and set aside.

[59] Having reviewed and set aside the arbitration award of the third respondent, I see no reason to remit this matter back to the fourth respondent for determination *de novo* before another arbitrator. The matter is straight forward, and the necessary evidence has been fully ventilated and reflected in a transcript that was in all respects

⁴⁸ (2014) 35 ILJ 3349 (LAC) at para 29.

⁴⁹ See *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at para 30.

complete. The relevant documentary evidence also speaks for itself. There is simply no need to go through the whole exercise of arbitration again. Exercising the powers I have under section 145(4) of the LRA,⁵⁰ I consider it appropriate to finally determine this matter. I shall accordingly substitute the arbitration award of the third respondent with an award that the dismissal of the first respondent by the applicant was substantively fair.

Costs

[60] This then only leaves the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, I do not intend to burden the first respondent with a costs order, especially considering the opportunity afforded to me to bring this matter finally to an end. I also do not consider the first respondent's opposition to this matter to be *mala fide* or unreasonable. I am mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*⁵¹ where it comes to costs awards in employment disputes before this Court, and I do not consider there to be sufficient reason to depart from what the Court had to say in this regard. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

[61] In the premises, I make the following order:

Order

1. The applicant's review application is granted.
2. The arbitration award of the third respondent, arbitrator F Mooi, dated 21 December 2023 and issued under case number GAJB 16672 – 23, is reviewed and set aside.

⁵⁰ Section 145(4)(a) reads: '*If the award is set aside, the Labour Court may – (a) determine the dispute in the manner it considers appropriate ...*'

⁵¹ (2018) 39 ILJ 523 (CC) at para 25.

3. The arbitration award is substituted with an award that the dismissal of the first respondent, Bajabulile Dlamini, by the applicant, was substantively fair.

4. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate A Myburgh SC

Instructed by: Tabacks Inc Attorneys

For the First Respondent: Ms M Sonickson of Haffegge Roskam Savage Inc Attorneys