THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case No: PR277/22

In the matter between:

CASHBUILD SA (PTY) LTD	**Applicant**
and	
COMMISSIONER V NGUDLE N.O.	**First Respondent**
THE COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
LUVOLWETHU DYANI	**Third Respondent**

Heard: **23 July 2025**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date for handing down judgment is deemed to be on 6 August 2025.

JUDGMENT

DE KOCK, AJ

Introduction

[1] This matter came before the court as an application to review the arbitration award issued by the first respondent. The applicant raised various grounds of review alleging that the first respondent committed various irregularities and arrived at a decision that a reasonable decision maker could not reach. The outcome of the award is that the third respondent's dismissal was unfair both substantively and procedurally, and that he must be reinstated with eighteen months' back pay.

Background to dismissal

[2] The applicant conducts business as a retailer of building supplies, hardware and related products at several hundred stores across the entire South Africa. The third respondent was employed by the applicant as the store manager of its Mqanduli branch. As such, the third respondent was fully accountable and responsible for the management and operation of the entire store.

[3] The incident giving rise to this matter arose on 13 December 2020 when a customer, one Mzwandile Mdunyelwa (Mdunyelwa), purchased and paid for 10 bags of damaged cement at a discounted price. What this transaction entails is that the bags must have been set aside and taken (removed) by the customer. The evidence was that the applicant does not ordinarily deliver such stock, but in this case and because Mdunyelwa was familiar with the third respondent, the third respondent undertook to deliver it.

[4] The third respondent, however, failed to set aside the bags and failed to schedule the same for delivery to Mdunyelwa. Mdunyelwa never received the bags despite paying for same. Instead, the stock was sold to another customer. The third respondent never delivered any replacement bags to Mdunyelwa throughout December 2020, January and February 2021, despite the bags having been paid for.

[5] Ultimately, on 9 March 2021, Mdunyelwa lodged a formal complaint with the applicant's head office. It is apparent from this complaint that Mdunyelwa was dissatisfied with not having received the stock. The complaint resulted in an investigation by the applicable divisional manager, Rashaad Joel (Joel). The investigation confirmed that the damaged cement bags paid for by Mdunyelwa on 13 December 2020 were never set aside by the third respondent and that it was sold to another customer.

[6] Due to the involvement of Joel, and the third respondent having become aware of the complaint, the third respondent convinced Mdunyelwa to pay the full price for undamaged cement bags, which were then delivered. This only happened after the complaint was lodged on 9 March 2021.

[7] On 19 March 2021, the third respondent was given notice to attend a disciplinary enquiry to be held on 23 March 2021 on two charges of misconduct. The first charge was one of poor customer service/gross negligence in that he failed to perform his duties with proper care by failing to communicate with the customer about the delivery of stock and the cause of the delay, resulting in a complaint by Mdunyelwa. The second charge was bringing the company name into disrepute, based on the same facts.

[8] The disciplinary enquiry took place on 23 March 2021. The third respondent failed to arrive for the disciplinary enquiry. A complete disciplinary enquiry was conducted in absentia, and the dismissal of the third respondent was recommended by the chairperson. The third respondent was dismissed on 25 March 2021. The third respondent appealed against his dismissal on 1 April 2021. An appeal hearing was held on 19 April 2021, during which the third respondent fully participated. The appeal hearing was adjourned to 22 April 2021 to allow the third respondent an opportunity to peruse documentation that he had requested and to prepare. The appeal was unsuccessful.

[9] Dissatisfied with the dismissal, the third respondent referred an unfair dismissal dispute to the second respondent, which dispute was arbitrated by the first

respondent on 11 August and 28 September 2022. On 5 October 2022, the first respondent handed down an arbitration award.

Arbitration award

[10] The second respondent found that the third respondent's dismissal was both substantively and procedurally unfair. The first respondent ordered the applicant to reinstate the third respondent retrospectively to the date of his dismissal. The first respondent also ordered that the third respondent must be paid back pay in the sum of R463 840.38, being equivalent to eighteen months' salary. Dissatisfied with this outcome, the applicant brought the current review application.

Ground of review

[11] The applicant submits that the way the first respondent considered and then determined the evidence left much to be desired, and in effect is tantamount to a complete failure to rationally, reasonably and fairly determine the case. The applicant states that it was critical for the first respondent to have conducted a proper credibility and probability assessment of the evidence presented, which he failed to do. One therefore does not know why the first respondent completely disregarded the testimony of the applicant's witnesses.

[12] The first respondent, being confronted with two mutually contradictory versions, did not discharge his duty and function to determine what evidence to accept. The first respondent needed to resolve the factual controversy by embarking upon a balanced assessment of the credibility, reliability and probabilities associated with the respective versions. The applicant submits that the first respondent, even though not expected to give detailed reasons when making an award, ought to at least provide some basic reasoning pertaining to the essential issues, which he failed to do. It is therefore alleged that consideration of the arbitration award shows that the first respondent simply accepted the testimony of the third respondent, without more, and thereby effectively negated the direct testimony of the applicant's witnesses. For the first respondent to simply negate all this evidence

completely, as he did, without any proper cause or reason is an untenable situation. The aforesaid failures by the first respondent unfortunately leave the court with little opportunity and ability to measure whether the first respondent's findings are unassailable on review. The court is therefore left in the position of having to consider the facts and testimony for itself, and then based on the court's own assessment, to decide if the ultimate outcome arrived at is reasonable or not.

[13] The applicant submits that a proper conspectus and determination of the facts and evidence, as apparent from the record, should leave the court convinced that the following constitutes the core factual basis upon which the matter should be decided. The reason why the third respondent was dismissed is the grossly negligent way he attended to Mdunyelwa as a customer, which amounted to poor customer service which brought the applicant's name into disrepute. First, there was the failure to set aside the stock already paid for by Mdunyelwa, not delivering that stock at the outset as promised, and with that same stock being sold to someone else as a result. Second, there was the failure to have stock timeously delivered to the customer, as promised. Third, there was the misleading of the customer that there was no stock available to deliver, when there obviously was. Fourth, the customer was promised that stock would be delivered for some three months but nothing was done. And, finally, only when the customer complained and Joel intervened, did the third respondent attend to resolve the issue with the customer by delivering the stock.

[14] The applicant submits that the first respondent's findings that the central issue was whether the third respondent *"communicated"* with Mdunyelwa, that the customer led evidence that he was kept informed of the delay, and that for this reason there was no misconduct, are a material failure and misdirection and fail to account for a few facts. In short, it is an unsustainable conclusion for the following reasons. Mdunyelwa, despite the communication from the third respondent, was not happy because, for months, nothing was being delivered, despite promises being made. This was the reason why the complaint was made directly to the applicant's head

office. This, so it was argued, is hardly the evidence of a customer satisfied with *"communication"*.

[15] It was argued that the first respondent completely misconstrued the charges. The first respondent, when looking at and evaluating the charges formulated by the applicant, needed to look past the mere wording of the charges. He was required to establish what the charges actually entailed. The word *"communication"* referred to in the charges ought to have been considered in the context of the allegation of bringing the company name into disrepute, poor customer service and/or gross negligence, which is what the charge was based on. It was argued that it was always the case and understood by the third respondent that the matter concerned the failure to have delivered stock to Mdunyelwa, despite promising to do so, for months, and misleading Mdunyelwa as to the availability of stock. In short, it all centred around the fact that the third respondent caused the goods not to be set aside when first sold to Mdunyelwa, resulting in it being sold to another customer, and then continuously misleading Mdunyelwa over three months to the effect that there was no stock to deliver to him when there was. It is not about the mere existence of communication *per se*. It is about what was communicated. The continuous lying to a customer and doing nothing despite communication can hardly be described as legitimate communication to the customer, which is what the charges contemplate. As a result, the first respondent had no regard whatsoever to the evidence concerning what actually happened in this case.

[16] The first respondent's decision to exclude the document submitted, which shows that there was, in fact, damaged cement stock available in the store to deliver to Mdunyelwa, was irrational and unreasonable. The first respondent excluded the document from consideration of the evidence because it was not produced during the disciplinary hearing and was, according to the first respondent, thus not admissible at arbitration. The first respondent's reliance on the judgment of *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration*

& others[1] *(Fidelity)* is entirely misplaced and clearly in error. There is a material difference between a new reason for dismissal and new evidence to establish the reason why the employee had been dismissed in the first place. In *casu*, the reasons why the third respondent had been dismissed remained the same throughout. The applicant simply produced further evidence to substantiate the very reason why the third respondent had been dismissed in the first place.

[17] The applicant argued that the final written warning ought to have come squarely into play. The final written warning was issued on 6 March 2021 and was not challenged. It was for identical misconduct relating to poor customer service. Considering this final written warning for identical misconduct, the third respondent earned his dismissal. Further factors that would justify the third respondent's dismissal are the responsibility attached to his position as store manager, that he showed absolutely no remorse or contrition for what happened, and that the trust relationship had been destroyed. The misconduct was serious and brought the applicant's name into disrepute. The applicant had consistently dismissed employees in the past for the same misconduct.

[18] The applicant submits that the only reasonable conclusion the first respondent could have arrived at was that the dismissal of the third respondent was substantively fair and justified, and accordingly, the arbitration award falls to be reviewed and set aside.

[19] The applicant also takes issue with the first respondent's finding on procedural unfairness in that the first respondent yet again fails to consider pertinent evidence. The first respondent simply "*plumbs*" for the third respondent's testimony to the effect that he was on approved leave at the time of the disciplinary enquiry and that he had an *"arrangement"* with Joel that he was promised another enquiry. The third respondent, however, crucially, when testifying, led no evidence as to procedural unfairness. What the first respondent referred to as testimony of the third respondent were propositions that came out in the cross-examination of

[1] (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC).

Mdolo. The applicant's testimony was clear that the third respondent was not on leave at the time. The third respondent never objected to the hearing date. The third respondent, despite being informed to attend the enquiry, stated that he would not do so, as he was *"finished"* with the applicant. Therefore, based on the applicant's version, the third respondent effectively elected not to attend the disciplinary enquiry. The first respondent committed a material irregularity in determining the procedural fairness of the dismissal as if the version of the applicant did not exist, and in failing to properly evaluate the evidence, and to arrive at a rational, reasonable and motivated conclusion.

[20] The applicant also argues that the first respondent completely ignored the evidence that any procedural defect that may have been caused by the disciplinary enquiry being held in absentia was fully remedied by the appeal hearing. The appeal hearing was a hearing *de novo* during which the third respondent exercised his right to be heard, to answer the allegations against him, and he was given a reasoned outcome. It is therefore argued that the first respondent's finding of procedural unfairness is entirely at odds with the evidence properly before him and fails to account for applicable legal principles. It constitutes a gross and reviewable irregularity.

[21] The applicant also raised as a ground of review that the relief of reinstatement was inappropriate by virtue of section 193 (2)(b) of the Labour Relations Act[2] (LRA). The first respondent awarded reinstatement with no reasons for doing so. The first respondent failed to exercise the required discretion. The third respondent was employed in a position of substantial trust and responsibility, and the nature of the misconduct mitigated strongly against reinstatement. The third respondent had already received a final written warning for the same kind of failure. He also, on top of it all, sought to rely on false explanations for this conduct and showed no remorse or any kind of contrition when confronted with the wrong he had done. Had the first respondent exercised a proper and judicial discretion, and properly

[2] Act 66 of 1995, as amended.

considered the facts, he would have realised that there were no prospects of the restoration of the employment relationship between the parties. On the undeniable facts, reinstatement was inappropriate as contemplated by section 193 (2)(b) of the LRA.

[22] The applicant raised, as a further ground of review, the first respondent's decision to award back pay equivalent to eighteen months' salary. It was argued that this was grossly excessive and could not amount to the proper exercise of judicial discretion. The problem is that the first respondent gave no reasons for such an award. In particular, he failed to consider the substantial cause of the delay in finalising the arbitration, as occasioned by the third respondent. The applicant submits that four months' back pay ought to have been awarded.

Review Test

[23] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,[3] the Court held that *"the reasonableness standard should now suffuse section 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?..."*[4]. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[5] the Court applied this reasonableness consideration as follows:

> '… 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 any consequence if their effect is to render the outcome unreasonable.'

[24] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly,

[3] (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).
[4] Id at para 110.
[5] (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[25] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[6] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.[7]

[26] The court will now proceed to consider the review application by the applicant against the above principles and the test applicable to review applications.

<u>Evaluation of grounds of review</u>

[27] The applicant's main ground for review of the arbitration award on substantive fairness is the first respondent's failure to consider the actual charges within the context of the evidence presented. In other words, the first respondent ought not to have limited his assessment of the evidence to the clear wording of the charges and he should have read into the charges that the third respondent sold the bags to another customer, that he failed to deliver the bags, and that the third respondent

[6] *Fidelity* at para 102.
[7] See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC); [2015] 4 BLLR 394 (LAC) at para 12.

continuously lied to the customer as to the reason why the bags had not been delivered.

[28] The charges against the third respondent, on which he was found guilty and for which he was dismissed, state as follows:

> 'Charge(s):
>
> 1. Poor customer service and Gross Negligence
>
> In that between the 13/12/2020 to 09/03/2021 you failed without proper cause to perform your duties with the proper care required in that you failed to communicate to a customer about his delivery and the delay thereof which resulted in a customer logging a complaint on the 09/03/2021.
>
> 2. Bringing the company name into disrepute
>
> In that between the 13/12/2020 to 09/03/2021 you failed to communicate to the customer about his delivery and the cause of the delay which resulted in a customer logging a complaint on the 09/03/2021 thereby bringing the company name into disrepute.'

[29] Before analysing the ground for review, it is important to have regard to the outcome of the disciplinary enquiry, as well as the appeal hearing. This is necessary to evaluate the applicant's submission, inter *alia,* that the presentation of the document showing that there were bags available was not in support of a new charge, but to substantiate the reason for dismissal.

[30] The minutes of the disciplinary enquiry, which was held in absentia, reveal that the evidence in respect of charges 1 and 2 was that the third respondent failed to deliver the ten bags from 13/12/2020 to 09/03/2021. The customer continuously called the third respondent with no delivery taking place. The customer was called as a witness who confirmed that he paid for the ten bags and that it was not delivered. The chairperson, based on this evidence, found the third respondent guilty of bringing the company name into disrepute and of gross negligence. More

specifically, in the letter of sanction, it is stated that the reason for finding the third respondent guilty of the two charges is that he failed to provide good customer service and which resulted in a complaint being laid against him. It is also stated that the third respondent failed to ensure that the bags purchased by the customer were delivered on time and as per the invoice. With respect to charge 2, it is stated that the company name was brought into disrepute due to the third respondent's lack of good care and poor service provided to the customer, which led to the company being given a bad image. It also states that the chairperson cannot find any other reasonable sanction to be applicable except to apply a sanction of dismissal. It is stated that the charges are all serious and could have had dire implications for the business going forward. It is also stated that the third respondent was already given a final written warning for the same lack of good customer service.

[31] In the letter containing the appeal sanction, it is stated in response to the third respondent's appeal that the third respondent ignored the complaints from customers, which resulted in getting warnings and going to a hearing. The sanction of dismissal was upheld.

[32] The court can find no reference whatsoever, in the minutes of the disciplinary enquiry, the letter of dismissal, or the letter of appeal sanction, that the applicant relied on the third respondent's continuous lying to a customer and that there were indeed damaged cement bags available to be delivered. The allegation that there were enough bags available for delivery from 13/12/2020 to 09/03/2021, and that the third respondent continuously lied to the customer, featured for the first time during the arbitration proceedings.

[33] The first respondent found that the central issue is whether the third respondent failed to communicate with the customer regarding the delay with the order of damaged cement bags, which the customer had placed and paid for. Considering the wording of the charges, and the reasons that led to the third respondent being found guilty, and for which he was dismissed, the first respondent's conclusion as

to the central issue cannot be faulted, save for the added reasons referred to below.

[34] The applicant argues that the first respondent, when looking at and evaluating the charges formulated by the applicant, needed to look past the mere wording of the charges and had to establish what the charges actually entailed. In support of this argument, it is submitted that the courts have made it clear that it cannot be expected of employers to formulate charges with precision. All that is required is a formulation that enables the employee to understand the basis of the allegations against them to the extent that the employee is able to answer and defend themselves against the charges. In this regard, the applicant refers to the following *dictum* in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[8]:

> '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 ought to 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.'

[35] The applicant also refers to *Cape Gate (Pty) Ltd v Mokgara & others*[9] where it was said:

> 'I accept that the charges were not elegantly drawn. It must be borne in mind that Cape Gate is not a court of law. A disciplinary tribunal is not a court of law and the

[8] (2019) 40 ILJ 2477 (LAC); [2019] 12 BLLR 1304 (LAC) at para 15.
[9] (2022) 43 ILJ 1277 (LAC); [2022] 8 BLLR 683 (LAC) at para 21.

> drawing of charges need not form a model of criminal charges. It is sufficient if the employee is informed of the allegations against him to prepare for the hearing. What is necessary is that sufficient particulars of the charges or proffered against an employee, which must be covered in the rules of conduct of the company concerned, must be alleged…'

[36] The difficulty for the applicant in having formulated the charges in the way it was done is that the central issue is the failure to communicate with the customer, leading to alleged gross negligence, poor customer service and bringing the company name into disrepute. At best, it can be said that the charges refer to the third respondent's failure to deliver the ten bags to the customer despite the customer having paid for them. It is, however, one step too far to now argue, on review, that the first respondent ought to have read into the charge the third respondent's alleged "*continues lying*" to the customer. This is a completely different charge and ought to have been specifically included in the charge. It should also have been dealt with in the disciplinary enquiry and especially the appeal hearing. This was not done. In the court's view, to read the alleged *"continuous lying to the customer"* into the charge would have constituted a reviewable irregularity by the first respondent, and he was correct in not doing so. There would have been significant prejudice to the third respondent should the so-called insufficient characterisation of the two charges have been accepted to include an element of dishonesty.

[37] The first respondent's identification of the central issue does, therefore, not constitute a reviewable irregularity. Neither is this conclusion one that a reasonable decision maker could not reach based on the evidence presented.

[38] The same principles apply to the failure by the first respondent to consider the documentary evidence, presented during arbitration for the first time, that there were bags available during the period in question. This evidence was not presented during the disciplinary enquiry or the appeal hearing, and neither was this allegation relied on to find the third respondent guilty of the charges. The first respondent was correct in relying on the *Fidelity* judgment in concluding that he

was required to determine the fairness of the dismissal based on the true reason for the dismissal. The applicant's argument that the arbitration is a hearing *de novo* is correct. However, this does not allow an employer to provide new reasons to justify the dismissal of an employee. The applicant's argument that the document pertains to the reasons the third respondent was dismissed is not borne out by the evidence. The document was presented to establish a new reason for dismissal and not to substantiate the actual reasons why the third respondent was dismissed. The first respondent's decision to exclude the evidence was not one that a reasonable decision maker could not reach.

[39] This brings the court to the question whether the first respondent's decision that the applicant failed to lead evidence that the third respondent breached the rule was a decision that a reasonable decision maker could not reach. The evidence shows that the customer paid for ten damaged cement bags, which the third respondent agreed to deliver. For the third respondent to accept payment for the cement bags, it must have been available at the time of payment. On balance of probabilities, the cement bags were sold to another customer despite the bags already having been sold to the customer in question. Nothing was done for three months to ensure that the bags were delivered. The fact that there was communication does not negate the fact that there was poor customer service. It is unacceptable for a customer to pay for bags and then to wait for three months to receive the bags. The complaint to the head office was a valid complaint given the third respondent's negligence in this regard.

[40] The first respondent's finding, therefore, that the applicant failed to lead evidence that the third respondent breached the rules is one that a reasonable decision maker could not reach. At the very least, the first respondent ought to have found that the third respondent was guilty of poor customer service and bringing the company name into disrepute. The charges, after all, did not only envisage the failure to communicate with the customer but also the fact that there was no delivery over a period of some three months. The exclusion of the new reason to justify the dismissal, i.e., the continuous lying in the face of bags allegedly being

available, does not change the fact that the product either had to be delivered sooner, or that the customer ought to have been reimbursed. Or in the alternative that arrangements had to be made with the customer, as was done once the customer lodged a complaint to the head office.

[41] Had the first respondent arrived at the aforesaid reasonable conclusion, he would have been required to determine whether the third respondent's dismissal was for a fair reason. In the absence of the first respondent having addressed this issue, this court must assess the evidence presented and determine whether the outcome arrived at by the first respondent was nonetheless a reasonable one.

[42] The evidence shows that the offence committed by the third respondent would ordinarily have been met with a final written warning. The court does not agree that the third respondent's actions constituted gross negligence, which could possibly have been met with the sanction of dismissal for a first offence. The applicant placed much reliance on the final written warning during the internal disciplinary enquiry and the appeal hearing, and again during the arbitration proceedings. The applicant, however, faces an insurmountable difficulty in relying on the existence of the final written warning to justify the fairness of the third respondent's dismissal.

[43] The charges on which the third respondent was found guilty, and for which he was dismissed, were for the period 13 December 2020 to 9 March 2021. The final written warning, which the applicant relied on, was only issued on 6 March 2021. For the final written warning to have been fairly relied on to justify the dismissal in the context of progressive and corrective discipline, one must look at the third respondent's actions after the final written warning was issued. From the evidence presented, the third respondent immediately dealt with the complaint as soon as the complaint was received from the customer. The issue of the bags purchased and not delivered was resolved immediately.

[44] The applicant referred to *Transnet Freight Rail v Transnet Bargaining Council & others*[10] where it was said:

> 'Usually, the presence of a valid final written warning at the time of the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature. The principles of progressive discipline require such a re-offending employee usually to be considered irredeemable.
>
> … I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal.'

[45] The reliance on the final written warning in circumstances where the final written warning was issued some 3 days before the complaint was lodged was ill-advised and unfair. The third respondent's failures in respect of the charges ought to have been considered separate from the final written warning that was not in existence until three days before the complaint was lodged. This being the case, the appropriate relief to have been awarded is a final written warning, and not the sanction of dismissal which was much reliant on the existence of a final written warning.

[46] This being the case, the applicant's grounds of review in respect of the first respondent's failure to exercise his discretion in terms of section 193 (2)(b) of the LRA falls away. Since the appropriate sanction was that of a final written warning, the appropriate relief must be that of reinstatement. Insofar as the first respondent therefore reinstated the third respondent, albeit for the wrong reason, the court finds that the outcome arrived at, i.e., that the third respondent be reinstated, is one that is supported by the evidence and is a reasonable outcome.

[47] This then brings the court to the order that the third respondent must be reinstated with retrospective effect and be paid eighteen months' salary as back pay.

[10] (2011) 32 ILJ 1766 (LC); [2011] 6 BLLR 594 (LC) at paras 42 – 43.

Although the first respondent failed to give reasons for awarding eighteen months' back pay, this court does not deem it necessary to pronounce on the first respondent's failure to give reasons for his decision. The court is of the view, given that the third respondent was indeed guilty of the charges, that reinstatement must be with limited back pay, if any.

[48] The applicant argued that the appropriate back pay would have been four months' salary. Although the court is of the view that no award as to back pay would also have been reasonable, the court accepts the applicant's version as to what they believed would have been appropriate back pay. The first respondent's decision to award eighteen months' salary as back pay was therefore one that a reasonable decision maker could not reach, and the court therefore finds that the back pay must be limited to four months' salary.

[49] The remaining grounds for review relate to the first respondent's finding that the third respondent's dismissal was procedurally unfair. In this regard, the court agrees with the applicant's grounds for review and that the first respondent's decision that the dismissal was procedurally unfair is one that a reasonable decision maker could not reach. The first respondent determined this issue based on the third respondent's version and appears to have completely disregarded the evidence of the applicant's witnesses. A perusal of the transcribed record shows that the version of the applicant's witnesses ought to have been preferred to that of the third respondent's version that he was on approved leave. The evidence does not support the third respondent's version, and there was most certainly no reason to completely reject the evidence of the applicant's witnesses regarding the failure by the third respondent to attend the disciplinary enquiry.

[50] Further to this, and in any event, the applicant is indeed correct in its submission that the appeal hearing, in which the third respondent fully participated, cured any procedural issues that might have arisen from the third respondent's failure to attend the disciplinary enquiry. The first respondent's decision therefore that the

third respondent's dismissal was procedurally unfair is one that a reasonable decision-maker could not reach, especially given the appeal hearing that was held.

[51] In the premises, the following order is made:

<u>Order</u>

1. The application for the arbitration award to be reviewed and set aside is granted. The award is replaced with the following order:

   1.1. The third respondent's dismissal is found to have been substantively unfair, and procedurally fair.

   1.2. The applicant is ordered to reinstate the third respondent with a final written warning valid for twelve months as of the date of reinstatement, i.e., within fourteen days of the date of this order, and to pay to the third respondent back pay of four months' salary in the amount of R103 075.64 within fourteen days of this order.

   1.3. The third respondent is ordered to report for duty within fourteen days of the date of this order.

2. No order is made as to costs.

[redacted]

C. de Kock

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant:	A J Posthuma from Snyman Attorneys
For the Third Respondent:	M Thys
Instructed by:	Butler Attorneys