REPORTABLE

SUMMARY

CASE NO.: LCA 67/2009

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

EDGARS STORES (NAMIBIA) LIMITED v LAURIKA OLIVIER AND OTHER

PARKER J

2010 June 18

Labour Law - Appeal – Employer's disciplinary committee dismissing one employee and giving final written warning to the other employee both of whom had engaged in a fight at the workplace – Arbitrator finding dismissal substantively unfair because of employer's application of different punishments for the same misconduct or for similar misconduct – Appeal against arbitrator's decision – Court confirming arbitrator's decision on the facts and circumstances of the case.

Labour Law - Reinstatement – Reinstatement of employee after dismissal – Principle that reinstatement carrying no automatic retrospective connotation affirmed – Court finding that *in casu* reinstatement is appropriate on the facts and circumstances of the case – Consequently, Court confirming arbitrator's

award of reinstatement at a future date but not award of backpay of remuneration from date of dismissal to date of reinstatement – Court awarding instead reasonable compensation for loss of remuneration during period of dismissal.

Held, that an award of backpay from the date of dismissal to the date of reinstatement should not automatically follow an award of reinstatement. Taking into account the facts and circumstances of the particular case, a reasonable amount should only be awarded as compensatory award for the period between date of dismissal and date of reinstatement.

Held, further, that, as a general rule, it is wrong and unfair for an employer to mete out different punishments for the same or for similar misconduct.

Held, further, that in Labour Law, fairness lies at the root of its rules and procedures.

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

EDGARS STORES (NAMIBIA) LIMITED **Appellant**

and

LAURIKA OLIVIER **First Respondent**
LABOUR COMMISSIONER **Second Respondent**

***CORAM*: PARKER J**

Heard on: 2010 May 28
Delivered on: 2010 June 18

JUDGMENT

PARKER J: [1] This is an appeal in which Mr. Kavendjii represents the appellant (i.e. the respondent in the arbitration) and Mr. Murorua the 1st respondent (i.e. the applicant in the arbitration). The 2nd respondent is the Labour Commissioner; and it would seem he has been cited because he has an indirect interest in the outcome of the appeal. No order is ought against him. This is an appeal from a tribunal; that is, an arbitration tribunal in terms of the Labour Act, 2007 (Act No. 11 of 2007).

[2] In determining this appeal I hold that an arbitration tribunal established in terms of the Labour Act, 2007, is a tribunal within the meaning of Article 12 (1) (a) of the Namibian Constitution, and so the constitutionally guaranteed right to fair trial under that

provision is applicable to any such tribunal. That being the case, in my view, the principles developed by the Courts concerning the deciding of appeals by an appellate court must perforce apply to the present appeal. In this regard, it has been said that the principles justifying interference by an appellate Court with the exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised on judicial grounds and for sound reasons, that is without bias or caprice or the application of a wrong principle, the appellate Court will be very slow to interfere and substitute its own decision (*Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 at 724H-I; *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka and Others* Case No. LCA 47/2007). It follows that in an appeal the onus is on the appellant to satisfy the appellate court that the decision of the court or tribunal below is wrong and that that decision ought to have been the other way (*Powell v Stretham Manor Nursing Home* [1935] AC 243 (House of Lords) at 555).

[3] *In casu*, in what respect does the appellant say the decision of the arbitrator is wrong, entitling the Court to interfere with the arbitrator's decision? In her award, the arbitrator concluded that the dismissal of the 1st respondent by the appellant is 'substantially unfair' in terms of the Labour Act 2007 because, according to the arbitrator, the disciplinary committee of the appellant's applied 'inconsistent' punishments which adversely affected the 1st respondent when the disciplinary committee sat on the 1st respondent's disciplinary hearing. It is the contention of the appellant that the disciplinary committee did not apply 'inconsistent' punishments. Mr. Kavendjii submitted that the appellant was justified in considering the circumstances surrounding the breach of a rule of the disciplinary code of the appellant in that the 1st respondent attacked a fellow employee twice and she showed no remorse and vowed that she would continue her conduct until they were both dismissed. Thus, according to counsel, such conduct of the 1st respondent

is serious enough to warrant her dismissal. Mr. Kavendjii submitted further that the instant case was not comparable 'with the others involving horse play' or suchlike behaviour where the employees involved were not dismissed by the same employer, i.e. the appellant.

[4] The long and the short of Mr. Murorua's submission contrariwise is this: 'the 1st respondent's dismissal by the appellant was substantially unfair and thus without a fair reason due to non-compliance with the parity principle.' Accordingly, it is Mr. Murorua's submission that the arbitrator's decision is not wrong and so this Court *qua* appellate court should not interfere with the arbitrator's decision.

[5] On the record, I find that the following are not disputed or are, in my opinion, indisputable. The genesis of this matter lies in the 1st respondent and a co-employee (Mr. Willem Rooi) being charged as follows: 'Assault or Manhandling in that on 20/02/2009 you allegedly got into a fight on the sales floor which resulted in serious breach of the company regulations and made the relationship between yourself and colleagues, customers and management intolerable.'

[6] It would seem the two employees pleaded guilty to the charge at the aforementioned disciplinary hearing conducted by the appellant. The 1st respondent was dismissed by the disciplinary committee and as respects Mr. Rooi, the committee recommended to Management to 'seriously warn him against love affairs at the work place'. It appears to me clear that the 1st respondent-Mr. Rooi episode is not an isolated incident, neither is it alien to the appellant's workplace. There have been several suchlike episodes in the very recent past.

[7] In sum, whether one characterizes the episodes as fracas, assault, fighting, horse play or 'childish reaction', the irrefragable fact that remains is that there is nothing in what occurred between the 1st respondent and Mr. Rooi to write home about. One might even say that that sort of behaviour appears to be part of the working life of the appellant's employees at the workplace; and, *a fortiori*, the appellant is fully aware of it. If that is the case, as I say it is, why then should the appellant find the 1st respondent-Mr. Rooi 'assault or manhandling' or 'fight' anything to punish anyone for; or punish one participant in the 'assault or manhandling' or 'fight' more severely than the other participant or, indeed, than other employees who had in the recent past participated in suchlike conduct. It does not make sense; it is unfair in law, in my opinion.

[8] In this regard, I am not at all persuaded by the appellant's argument that the 1st respondent broke a rule, and the attendant penalty for such breach is dismissal. That may be so; with respect, counsel's argument adds no weight. The critical question that still remains is why should the 1st respondent alone, from among other participants in such conduct, as aforesaid, suffer such fate; that is, dismissal, which is the 'capital' punishment in the scheme of penalties in labour law. Mr. Kavendjii's response is that the 1st respondent's conduct and her attitude thereafter are not comparable to those of the others. I do not, with respect, agree, for the observations I have made above.

[9] It follows that the South African case of *SA Commercial Catering & Allied Workers Union & Others v Irvin & Johnson Ltd* Labour Appeal Court (CA 10/98) (Unreported), which Mr. Kavendjii referred to me, is not of any real assistance on the point under consideration. As I have demonstrated previously, I am not convinced that the 1st respondent alone, and not the other participants in similar conduct, deserved to be

dismissed for behaving in a manner which, as I have found above, appears to be commonplace at the workplace of the appellant's commercial establishment, and it seems nobody has been dismissed for such conduct, at least regarding the cases referred to on the record.

[10] One must not lose sight of the fact that like a tall concrete fence built around a Roman Catholic convent, Labour Law protects employers and employees who wish to be protected in labour and employment relations. From the record, the sort of conduct that the 1st respondent and Mr. Rooi participated in appears to be a way of life among employees, and is tolerated by the appellant; tolerated in the sense that other participants in such conduct in the recent past have had only a slap on the wrist, compared to the punishment dished out to the 1st respondent, as aforesaid.

[11] In Labour Law, fairness is at the root of its rules and practice. It cannot be seriously argued on any pan of scale that the sort of conduct of some employees of the appellant that abounds the present record and which the appellant's disciplinary hearings dealt with on different occasions in the recent past is so different in nature from the 1st respondent's conduct that the participants in such conduct in the past should be treated differently from the 1st respondent. In my opinion, no amount of theorizing about the parity principle and the inconsistency principle can put a different colour on this irrefragably unfair reality.

[12] In a matter like the present, one must always keep in one's mental spectacle the facts and circumstances of the particular case. A closer look at the facts and circumstances of the instant case and the aforegoing reasoning and conclusions propel me to the

inexorable and reasonable conclusion that the appellant has not shown that the arbitrator did exercise her discretion for unsound reason or that she exercised her discretion with bias and caprice or that she applied a wrong principle when she held that the dismissal of the 1st respondent is substantively unfair on the basis that an inconsistent punitive measure was applied unfairly in the case of the 1st respondent.

[13] Moreover, in the instant matter, there is not a grain of evidence on the record tending to show that the employer-and-employee relationship between the appellant and the 1st respondent has broken down irretrievably due to the 1st respondent's conduct which landed her before the disciplinary hearing conducted by the appellant, as aforementioned. As Mr Murorua reminded the Court, the utterance which appears to have swayed the appellant's disciplinary committee, namely, 'I will not stop until someone is dismissed', or words to that effect, were thrown in by the chairperson of the disciplinary committee. There is no evidence on the record proving that those words were uttered by the 1st respondent and to whom they were uttered or that they uttered at all. I find that the appellant has not discharged the onus cast upon it to establish that the trust relationship between the appellant and the 1st respondent has been breached (*Edcon Ltd v Pillemer NO & Others* [2010] 1 BLLR 1 SCA). What Mr. Kavendjii did was merely to refer to this Court *Model Pick 'n Pay Family Supermarket v Mwaala* NLLP 2004 (4) 1999 NLC when there is no evidence on the record whose consideration would have called in aid the authority in *Mwaala* supra. That being the case, it is my view that the authority in *Mwaala* cannot assist this Court.

[14] From the aforegoing reasoning and conclusions, I hold that the appellant has not established that the arbitrator did exercise her discretion for unsound reason or that she

exercised her discretion with bias and caprice or that she applied a wrong principle when she held that the dismissal of the 1st respondent is substantively unfair. It follows that, in my opinion, the arbitrator cannot be faulted in that regard. This conclusion disposes of the appeal against the decision of the arbitrator that the dismissal of the 1st respondent by the appellant is substantively unfair.

[15] The matter does not rest here. Is this Court entitled to interfere with the arbitrator's award of (a) reinstatement, (b) order of transfer of the 1st respondent 'to another Department', and (c) costs?

[16] I have carefully considered the record, including particularly the arbitrator's reason for deciding that dismissal is not an appropriate punishment in the circumstances of the case. Having done so, I come to the conclusion that the arbitrator is not wrong in so holding. I think her award of reinstatement cannot also be faulted in principle. The facts and circumstances of the instant case are such that they make the cases where reinstatement was refused by this Court, e.g. *Bank Windhoek v Magnaem Mumbala* Case No. LCA 48/2008 (Unreported) and *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka and Others* supra, distinguishable. Be that as it may, it would now be gravely unfair to order the appellant to put the 1st respondent in 'the position she held prior to her dismissal or alternatively … a similar position,' considering the fact that about two years have passed since the 1st respondent's dismissal following the disciplinary hearing, and it is not far-fetched to say that looking at the business of the appellant, that position could not have remained vacant for that period. Thus, any order of reinstatement must be such that it does not prejudice any other employee who might have been put in the position that the 1st respondent held before her dismissal (*Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka*

and Others supra). There is no evidence on the record that such is the case, but it would be reasonable to so suppose, so as not shoot ourselves in the foot.

[17] I must add that in a case like the present, a court or arbitrator, when determining an amount of compensation, ought to take into account the extent to which the employee's own conduct contributed to the dismissal. In the instant case, the 1st respondent's own misconduct contributed markedly to her dismissal. Additionally, since I have already held that reinstatement does not carry automatic connotation, it is wrong and unfair to award backpay from date of dismissal to date of reinstatement as an automatic consequence of an award of reinstatement (*Chegutu Municipality v Manyora* 1997 (1) SA 662 (ZSC)). Taking these two factors into account, I conclude that the arbitrator's award thereanent compensation cannot stand undisturbed by this Court.

[18] As to costs; in my opinion, no section 118 (of the Labour Act 2007) ground exists for the grant of an order of costs.

[19] It follows that the appeal against the arbitrator's decision that the 1st respondent's dismissal is unfair fails. That decision is confirmed. Nevertheless, in view of the aforegoing reasoning and conclusions concerning award of backpay and reinstatement, it is reasonable for this Court to interfere with the order made by the arbitrator thereanent, as I do. In the result, the order of the arbitrator is altered to read:

(1) The appellant must reinstate the 1st respondent in a position comparable to the position she held before her dismissal. The reinstatement takes effect from 1 August 2010.

(2) The appellant must pay to the 1st respondent on or before 31 August 2010 an amount equal to six months' remuneration at the time of her dismissal.

(3) The appellant must issue to the 1st respondent within one week of resuming work upon her reinstatement a last written warning which should remain effective for not less than 24 months.

(4) There shall be no order as to costs.

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PARKER J

COUNSEL ON BEHALF OF THE APPELLANT: Mr Kavendjii

Instructed by: Hengari, Kangueehi & Kavendjii Inc.

COUNSEL ON BEHALF OF THE RESPONDENT: Mr Murorua

Instructed by: Murorua & Associates