REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 637/12

In the matter between:

WHIP FIRE PROJECTS (PTY) LTD **Applicant**

and

MEIBC **First Respondent**

S H CHRISTIE **Second Respondent**

BARBARA ANN LEWIS **Third Respondent**

Heard: **30 May 2013**

Delivered: **24 July 2013**

Summary: Review and cross-review. Dismissal procedurally and substantively unfair. Six months' remuneration awarded as compensation. Award reasonable. Review and cross-review dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] The employee, Ms Barbara Ann Lewis[1], was dismissed by the applicant. She referred an unfair dismissal dispute to the Metal & Engineering Industries Bargaining Council (MIBCO).[2] The arbitrator, Ms Sarah Christie,[3] found that the dismissal was procedurally and substantively unfair. She found, though, that the employee had contributed to a breakdown of the employment relationship. She awarded compensation equivalent to six months' remuneration. The applicant seeks to have the award substituted with an award that the dismissal was fair. The employee has filed an application for cross-review. She seeks an award of maximum compensation in terms of s 194 of the LRA[4], i.e. 12 months' remuneration.

Background facts

[2] The employee was a debtors' and creditors' clerk from October 2007 until her dismissal on 2 February 2012. She was dismissed following two separate disciplinary hearings. The first hearing was chaired by Mr CJ Vermeulen, wearing one of the many hats – or robes -- he has donned in this dispute. The allegations of misconduct in the first hearing were the following:

> "1.Insubordination;
>
> 2. Gross negligence;
>
> 3. Failure to comply with the companies [*sic*] policies and procedures."

[3] The employee was suspended without a hearing from 6 December 2011 until the first disciplinary hearing took place on 13 December 2011. At that hearing, she was found guilty on the first two allegations and given a final written warning valid for nine months.

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[1] The third respondent.

[2] The first respondent.

[3] The second respondent.

[4] Labour Relations Act 66 of 1995.

[4] During the course of the first hearing, the employee was being questioned by the company's MD, Mr Watt. He alleged that she had issued an invoice without an order number. She denied it. The following discussion ensued:[5]

> "AW: Do you put your job on that?
>
> BL: Yes.
>
> AW: Do you?
>
> BL: Yes.
>
> ...
>
> AW: So you won't put your job on the line?
> BL: Business potential?
>
> AW: So you will or you won't?
>
> BL: No I won't, because you are going to twist it.
>
> AW: I am going to twist it?
>
> BL: You do.
>
> AW: I don't twist anything.
>
> BL: You are a very dishonest person."

[5] The employee continued to, as she put it, justify her statement. She alleged that Watt had asked her to produce a document about someone's leave and she had said to him, "I'm sorry, I don't lie".

[6] This statement led to the company calling the employee to a second disciplinary hearing on 26 January 2012. This time, the alleged misconduct was stated to be:

> "Falsely accusing the employer of dishonesty".

[7] Again, the employee was suspended without a hearing. This time the chairperson was a Mr Neethling (a colleague of Vermeulen's). He found the employee "guilty" and imposed a sanction of a final written warning valid for 12 months. However, Watt decided to dismiss her summarily on 2 February 2012.

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[5] BL is the employee, Barbara Ann Lewis. AW is the MD, Alan Watt.

The arbitration award

[8] The arbitrator found that the employee had made the statement that the MD is a dishonest person and that that was calculated to destroy the employment relationship. However, she took into account that the employee was not wholly responsible for the breakdown. She continued:

> "Watt demonstrably held her in contempt. He insulted her by stating that she was overpaid. He belittled her, apparently considered her as an unemployed woman who, out of kindness and friendship, had been hired by his mother in law when Mrs Lewis was going through a difficult time. There was no reliable evidence to support this opinion. But it is evident that Watt's attitude towards the very basis of her tenure at Whip Fire that he did not consider her as making a sufficiently valuable contribution to the enterprise. Here too I do not consider he had a reasonable basis for this opinion."

[9] The arbitrator concluded that the working relationship had been irreparably broken down; that the employee had precipitated this by her accusation; but that the MD, Watt, played a significant part in this.

[10] With regard to procedural fairness, the arbitrator found that it was not fair of Watt to suppress the finding of the external chairperson. She found that, even if Watt retained the executive discretion to decide the matter over the head of the chairperson's recommendation, his decision to conceal it and then to make a decision on his own was not fair.

[11] Turning to relief, the arbitrator considered section 194 (1) of the LRA that provides that, if a Commissioner considers that dismissal was unfair, compensation must be 'just in equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration'. She noted that the employee had tried to mitigate her loss by finding modest alternative employment; that prospects of future employment were limited; and that the conduct of the MD contributed to the breakdown of the employment relationship. The arbitrator considered six months' remuneration to be just and equitable compensation in all the circumstances. She declined to order costs.

Evaluation / Analysis

[12] Before dealing with the merits, I need to deal with a preliminary point raised by the employee and pertaining to the *locus standi* of the applicant's representatives.

In limine: locus standi

[13] At the arbitration, the parties now before Court were represented by the same people, i.e. Messrs *Vermeulen* and *De Kock.* On that occasion, Mr Vermeulen ostensibly appeared as a representative of the Employers' Service Organisation of South Africa (ESOSA). Surprisingly, when this matter was heard before this Court on 30 May 2013, the same Mr Vermeulen purported to be appearing as counsel, instructed by Bellingan Marais attorneys. What is even more surprising is that Mr Vermeulen objected to the employee being legally represented at the arbitration, even though he was representing the employer and he is a practising advocate (albeit not a member of the Bar).

[14] This game of litigious ducks and drakes continued after the arbitrator had handed down her award. The application for review was ostensibly signed by its managing director, one Alan Douglas Watt; yet the applicant appointed the address of an entity known as Human Energy Management (HEM), represented by one Ernst Viljoen, as its service address. At the arbitration, when questioned by the arbitrator, Mr Vermeulen said that HEM is a consultancy and that he is part of that consultancy. The notice delivered by the applicant in terms of rule 7A(8) was signed by the same Viljoen on behalf of HEM.

[15] In her answering affidavit the employee quite correctly raised an objection to the *locus standi* of HEM and Viljoen to deliver pleadings in this Court on behalf a party. HEM is a labour consultancy. In terms of s 161 of the LRA, the following people may appear in any proceedings in the Labour Court:

15.1 a legal practitioner;

15.2 a director or employee of the party; and

15.3 a member, office bearer or official of that party's registered trade union or registered employer's organisation.

[16] Mr Viljoen and HEM do not fall under any of these categories. HEM is a labour consultancy. However, a week before the hearing of this matter, on 23 May 2013, Bellingan Muller attorneys delivered a notice that they had been appointed as the applicant's attorneys. On the day of the hearing, Mr *Vermeulen* then appeared as counsel instructed by those attorneys.

[17] In these circumstances, and with Mr *De Kock's* leave, I allowed Mr Vermeulen to represent the applicant. Unfortunately, he is not a member of any bar and thus not subject to the ethical scrutiny of any professional body.

The review

[18] Mr *Vermeulen* argued that the arbitrator's findings with regard to substantive fairness were not reasonable. He argued that the MD was justified in his opinions about Lewis and that the arbitrator's finding that he had contributed to the breakdown in the relationship was unreasonable.

[19] With regard to procedural fairness, he conceded that the MD should have given the employee an opportunity to be heard before overriding the decision of the chairperson of the disciplinary hearing. However, he argued that the employee still had a fee opportunity to state a case and that she was not prejudiced during the hearing.

[20] I do not agree with either submission. The arbitrator properly applied her mind to the questions of both substantive and procedural fairness. The conclusions that she reached on both issues are not so unreasonable that no reasonable arbitrator could have come to the same conclusion. The award passes the reasonableness test set out in *Sidumo*.[6]

The cross-review

[21] Mr *De Kock* argued that the arbitrator's award of six months' compensation was unreasonable.

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[6] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[22] In support of his argument, he stated that the employee had worked under difficult circumstances and that her actual loss amounted to more than 12 months' remuneration. This may be so; but the award is for compensation, not damages. The arbitrator properly applied mind to the question of compensation and gave reasons for her decision. The award on compensation is not unreasonable.

Conclusion

[23] The applications for review and cross review must fail. With regard to costs, I take into account that neither party was successful. In law and fairness, a costs award is not appropriate.

Order

[24] The applications for review and cross-review are dismissed.

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Steenkamp J

APPEARANCES

APPLICANT:	CJ Vermeulen
	Instructed by Bellingan Muller, Bellville.
THIRD RESPONDENT:	C de Kock
	Instructed by Carelse Khan, Table View.