REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT
(HELD AT DURBAN)

Case: D 317/10
D276/10
Reportable

In the matter between:

TOYOTA S.A MOTORS (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

SULLIVAN, LESTER (*N.O.*) Second Respondent

BARENDSE, CHRIS Third Respondent

Date of hearing: 23 September 2011
Date of judgment: 6 June 2012
Issues: (Double jeopardy – employer convening a fresh hearing to review sanction – failure of manager to advise IR of intended deviation from code as required – fresh hearing not procedurally unfair – arbitrator's finding of substantive unfairness upheld)

JUDGMENT

LAGRANGE, J:

Introduction

1] There are two applications before the court: one is to review and set aside the arbitration award handed down by the second respondent on 23 March 2010 under case number KNDB7366-09 ('the award'), the other is to make the award an order of court.

Brief Chronology

2] Mr C Barendse, who is the third respondent in the review application, was dismissed on 24 March 2009 for "effecting an unauthorised repair to a company vehicle". In terms of the applicant's disciplinary code, making an unauthorised repair to a vehicle warranted dismissal even for a first offence. According to the company, the rule is important because when a leased vehicle was resold to a third party the company had to provide a complete history of the vehicle, and obviously if it was unaware that an un-authorised repair had been affected it might prejudicially affect its reputation and might compromise the safety of the vehicle.

3] Evidence was tendered by the company that other employees had been dismissed for making unauthorised repairs to their vehicles. Significantly, in those cases, the unauthorised repair had only been discovered by the company when the vehicle was inspected at some

later stage.

4] Barendse started working for the applicant on 1 May 2004. He held the position of Senior Coordinator and Trainer at the applicant's Dent Repair Training Centre. One of the benefits Barendse enjoyed as a co-ordinator was the use of a fleet car for his personal use. In this instance Barendse had leased a silver Toyota sedan from the applicant subject to the terms of the TSA Fleet Division, Durban, Controllers User Guide.

5] On Saturday, 1 November 2008, Barendse damaged the vehicle at a residential complex when an automated gate closed on the left front fender and bumper of the vehicle. Barendse pushed out the damaged fender so the car could be driven. As a result of the collision or as a result of manipulating the fender, the paintwork on the fender was chipped. The next day Barendse sanded down the damaged paintwork and put primer on it to ensure there was no further rust damage. He made no attempt to paint over the primer and the damage was readily visible.

6] On 3 November, Barendse left Durban early to visit his mother, who was apparently seriously ill. During his journey, he was phoned by the firm's investigator, Mr Lovell, who enquired about the accident. Mr Lembede, an investigator at the firm, had been informed about the accident by the caretaker of the premises where the gate had been damaged by the vehicle. Barendse had provided the caretaker with all his contact details including his work details. After discussing the accident with Lovell and with the firm's fleet department, Barendse said that it had been agreed he should bring the vehicle in when he returned from leave. However, he also spoke to his line manager, Mr de Witt, who told him to return immediately. He did so

even though he had already reached Umtata by that stage. He arrived back in Durban at 17h00 and took the vehicle to the fleet department the following day. Eventually, the fender was repaired by an authorised repair company.

7] In a statement made by Barendse to the security and loss control section of the company, he said, amongst other things:

"It was difficult for me to be mobile so I took the fender off and repaired and primed it so that it would not rust. I know that what I did is against company policy and procedure and it won't happen again. On Monday I called fleet department and was advised to bring vehicle for inspection which I did on 04/10/08. They then told me I was not supposed to tamper with company property and that I was liable for the excess."

8] On 19 February 2009 de Witt issued Barendse with a written warning for making unauthorised repairs to the vehicle. The written warning issued by de Witt did not specifically refer to the misconduct in the terms it is described in the disciplinary code but the description of the offence set out in the warning is sufficiently clear. The details of the offence were described in the warning form as follows:

"On Saturday, 1 November 2008 Clinton had a sliding gate closed on his lease vehicle. In order to drive his vehicle he bent the fender back into position. He then primed the fender to prevent rust without prior authorisation from myself. The unit was presented on the Monday for inspection. Doing any repair further than is necessary to drive the

vehicle must be authorised prior to repair.

It is understood that this was done to prevent rust as he was on leave that week, but that cannot be accepted."

9] In a memorandum dated 24 February 2009 and headed "Allegation of unauthorised repairs to company vehicle" prepared by de Witt for the company's IR department, de Witt detailed his investigations and reported the following under the heading 'Finding/Conclusion':

"Company policy compels an employee to report an accident and incident to TSA fleet within 48 hours (...). Mr Hill's phone call to Barendse on November 3, being within 48 hours of the incident effectively absolved Barendse from this obligation.

One is left to ponder whether Barendse's ad hoc' partial repair' was the beginning of a conscious and deliberate attempt to undertake in unauthorised repair to a company vehicle, or whether it is, as Barendse contends, an honest and genuine attempt to prevent unnecessary corrosion taking place.

Having presented his vehicle for inspection in a primed condition, one might conclude that there was no attempt to' hide' the repair. However, one is still left to question whether Barendse would have presented his vehicle for inspection had he not received a phone call from Mr Hill. It would be extremely difficult to prove that Barendse would not have reported the incident and/or presented his vehicle for inspection at TSA Fleet within the specified time frame. I therefore can

only conclude that Barendse has no case to answer in this regard.

However I consider the application of primer to the unit as an extreme measure that should not have been undertaken without authorisation either from TSA fleet or myself. Given Barendse's position within TSA, the application of primer may be seen as a 'minor' repair in his eyes, I nonetheless judge his action to be ill considered and thoughtless.

Barendse has, on numerous occasions, contacted myself over weekends informing me of work-related matters. I'm of the opinion that he should have sought authority to apply primer before doing so. I can find no reason why he made no attempt to contact me. Barendse himself can offer no explanation.

It is therefore my intention to issue Barendse with a written warning for' failure to follow company standards and/or procedures'."

10] It is apparent that de Witt was not candid with the HR Department, because he had already issued the warning to Barendse a few days before this expression of his 'intention'.

11] On 9 March 2009, the industrial relations department of the company advised Barendse that the decision relating to the matter had been reviewed and set aside and that a fresh hearing would be convened with an independent presiding officer. The notice to Barendse was specifically headed "*Re: review of enquiry – unauthorised repairs to vehicle*." The letter also states: "*the matter will be heard afresh, with an independent presiding officer. He will be advised of the time and venue for the disciplinary enquiry*."

12] Barendse was issued with a notice to attend a disciplinary enquiry on 12 March 2009. The charge he was called to answer was: "*effecting unauthorised repairs to a company vehicle under your control in violation of company policies and procedures on 02. 11. 2008*."

13] Summarising de Witt's evidence at the fresh enquiry, the chairperson noted that in his discussions with Lembede, de Witt had said he did not regard it as a serious case and Barendse had not made any attempt to hide the damage. The chairperson also records that de Witt used his managerial prerogative and issued Barendse with a written warning. De Witt had further testified that he was asked to draft a memo to the HR manager on which the IR manager would comment, following a meeting he had with the IR and HR managers. De Witt claimed that after two days he phoned the IR manager, Ms Edy, and she indicated she had no problems with his actions. De Witt also confirmed that in his opinion Barendse was not trying to deceive the company and had intended to contact it regarding the incident.

14] In fact, by the time de Witt had advised Edy on 24 February 2009 of his 'intention' to issue Barendse with a written warning for failure to follow company standards and, or alternatively, procedures, he had already issued the warning to Barendse on 19 February 2009. At the arbitration, Edy claimed that de Witt had not told her that the fender had been pushed out: he had merely indicated that Barendse had applied some primer to protect an area of rust where the paint had been chipped.

15] Dladla was a witness at the second enquiry, but not at the arbitration. He confirmed the policy of the company regarding repairs to vehicles. He also confirmed that an emergency repair was one that had to be

made to allow the vehicle to be used again, but he was not in a position to say if emergency repairs were justified in this instance. He accepted that Barendse had not tried to hide the damage and had been honest in his dealings with him.

16] Barendse objected to the enquiry proceeding because he was being subject to double jeopardy by being disciplined for something for which he previously been charged and issued with a warning for. His protest was to no avail and the chairperson proceeded with the enquiry. In his findings, the enquiry chairperson accepted that although Barendse did make unauthorised repairs to the vehicle he did not try to hide it. However, because Barendse did not lead evidence in person to give the chairperson an opportunity to weigh the evidence he was satisfied that there was not enough mitigating evidence to warrant a deviation from the sanction of dismissal. The chairperson was clearly influenced by the notion that any deviation from the recommended sanction of dismissal would erode the severity attributed by the firm to this kind of misconduct. Consequently, he terminated Barendse's services.

17] Barendse appealed against the finding on the basis that the disciplinary process had been procedurally unfair and that he had been unfairly subjected to a second disciplinary process in respect of the same misconduct. The appeal was dismissed. On the question of Barendse's claim of double jeopardy, the appeal chairperson maintained it was the company's prerogative to review a decision if the company felt the decision was too lenient.

18] At this point it must be remembered that no mention was made in the disciplinary enquiry of any welding repairs having been made to the vehicle, even though the IR specialist, Ms Edy, said in her evidence

at the arbitration that they were aware of the welding on the vehicle before the disciplinary enquiry had been convened. However, it seems she must have been referring to the arbitration hearing and not the second internal enquiry.

19] From the evidence of Kilian and Edy, a principal reason for wanting to convene a fresh disciplinary enquiry was that de Witt had not consulted with the IR Department before issuing a warning. Above the list of categories of transgressions and the associated disciplinary action, which appears in the section of the Disciplinary Code dealing with transgressions, the following is stated: "*Should any deviation from this code be anticipated the Industrial Relations Department must be informed prior to taking a decision.*"

20] Another primary concern of the IR department was that the sanction was too lenient in relation to the company policy on unauthorised repairs. Effecting unauthorised repairs to company vehicles was classified as a category 4 transgression, which carried a sanction of dismissal even for a first offence. Although Barendse had been charged with this, de Witt found him guilty of the less serious offence of failing to follow company standards and/or procedures. This misconduct was classified as a category 2 transgression carrying a written warning as the sanction for a first offence.

21] According to Edy a further reason for the second enquiry was that the repairs done by Barendse had been more extensive than what de Witt conveyed to her when they discussed the matter together with the HR director on 24 March 2009. In this regard, she testified that she was under the impression that the employee had simply applied a bit of primer to protect an exposed area of chipped paint from rusting, whereas the fender had been pressed out and panel beaten.

22] Edy, who had approximately one year's service at the firm, denied there was a recognised allowance made for so-called 'emergency repairs' which could be undertaken so the vehicle could be driven to an authorised repairer. However, Killian, who had worked at the firm much for about twenty years, conceded that such an allowance was recognised. The applicant's representative at the commencement of the hearing also expressed the view that there were repairs which could be classified as 'emergency repairs' but contended that the repairs made were not of an emergency nature. Barendse had said it was necessary to bend the fender back as it had caught on a tyre and the vehicle could not be driven without bending it back.

23] One other consideration affecting the decision to hold a fresh enquiry was that the IR department had been advised that the majority union at the workplace was showing an interest in the case. Barendse appears not to have been a member of the union. The union had apparently expressed concerns about the case and was watching to see what the final outcome would be. It seems the union believed that the applicant might have been treated too leniently vis-a-vis other individuals who had been dismissed for making unauthorised repairs to their leased vehicles

24] From a policy perspective, the IR Department was of the view that the misconduct described in Toyota's code made no reference to whether or not the employee in question had attempted to conceal the repair, and therefore it was irrelevant that Barendse had made no effort to conceal the repairs in this instance. Despite interpreting the offence as one of strict liability, Kilian did concede that the persons, whom he could recall being dismissed for making unauthorised repairs to vehicles, were employees whose unauthorised repairs were only discovered when the cars were returned to Toyota.

25] At the arbitration hearing new evidence on repairs to the car was led by a claims negotiator employed by Alexander Forbes, Mr Lovell, who processes Toyota's claims. He testified that when the vehicle was returned after a month by the approved panel beaters which had repaired it, it was noticed that the fender was mis-aligned. The repairer was summonsed and when the car's bonnet was opened it was realised that the fender had been welded onto the wheel arch of the vehicle. According to Lovell's hearsay evidence, the repairer's representative said he had not noticed the repair before. Welding work also did not appear on the invoice from the repair company.

26] Lovell claims that he had shown the welding to Barendse, in Dladla's presence, and Dladla had then advised Barendse that this was contrary to company policy and there would be an investigation into it. Contrary to Lovell's testimony, Barendse was adamant that he was not shown the alleged welding work on the vehicle. He pointed out that if welding work had been done on a car, it could just as well have been done by panel beaters who repaired it. Barendse could only recall that Lovell had merely made a remark that there was welding on the fender.

27] No witness was called from the repair company to confirm that the welding had been done before it conducted repairs. The applicant's representative at the arbitration pressed Barendse on how it could have happened that the fender had been welded onto the wheel arch of the vehicle if he had removed the fender to panelbeat it, unless he had thereafter welded it himself. Barendse explained that even though he had the expertise to do the welding, he had neither the time nor the equipment to make a welding repair that weekend. Barendse did not investigate the matter because he assumed that the repairs had been done by the authorised repairer so there was no

reason for him to concern himself with it. He assumed that the authorised repairs had been done to the satisfaction of the applicant's fleet department.

The arbitrator's award

28] The arbitrator dealt with the matter in two parts. Firstly he considered whether or not the decision to hold a second hearing was fair. Secondly, he considered whether the decision to dismiss the third respondent for making an unauthorised repair was fair.

The fairness of the disciplinary enquiry

29] According to the arbitrator, the applicant's justification for holding the fresh enquiry, after Barendse had already been issued with the warning by de Witt, was twofold. Firstly, de Witt had not advised the IR department that he was intending to deviate from the guideline on the sanction of dismissal for the misconduct in question. Secondly, by failing to dismiss Barendse, de Witt had not followed the recommended sanction of dismissal contained in the code. The arbitrator found that neither of these justifications were sufficient to warrant the fresh enquiry which led to Barendse's dismissal.

30] The arbitrator considered the dictum in ***Branford v Metrorail Services (Durban) & others*** **[2004] 3 BLLR 199 (LAC)**, in which the Labour Appeal Court held that, in the circumstances of the matter before it, *"... (i)t would manifestly be unfair for the company to be saddled with a quick, ill informed and incorrect decision of its employee who misconceived the seriousness of the matter and hurriedly took an inappropriate decision leading to an equally*

inappropriate penalty."[1] The arbitrator found that in this matter de Witt did not take a decision which was ill informed or incorrect, nor had he misconceived the seriousness of the matter. He noted that de Witt's general manager, Mr H McAllister, had believed that the original decision de Witt had taken was correct. It is also clear from the Killian's evidence at the arbitration that McAllister was not willing to withdraw the warning unless instructed to do so in writing.

31] The arbitrator concluded that the real reason for holding the second enquiry was that the company was unhappy with the sanction of a warning and wanted a second opportunity to secure the preferred sanction of dismissal. However he did not attribute any bad faith to the applicant, because he accepted that Kilian genuinely believed it had the right to set aside the initial warning. The arbitrator qualified his conclusion somewhat by saying that if de Witt had not been honest when he issued the warning to Barendse a second hearing might have been acceptable. However he was persuaded that de Witt was an honest witness and had issued the warning in good faith. In any event, he found the warning was substantively fair. The arbitrator then said at paragraph 23 of his award:

"*Having found that the second hearing was unfair, this would normally complete the award and the applicant would be reinstated. However I am aware there are factions within the respondent who consider the sanction of the first warning unfair. I will, therefore also deal with what would be the sanction even if there had been no previous hearing.*"

32] From the passage just quoted, it is apparent that the arbitrator treated the very holding of the fresh enquiry as something which

1 At 209,[15]

made the dismissal substantively unfair, irrespective of whether or not a sanction of dismissal was appropriate after hearing the evidence at the arbitration. His implicit finding that procedural unfairness made the dismissal substantively unfair, appears in the arbitrator's mind to have been a distinct basis for finding that the warning imposed by de Witt was fair on its own merits.

The fairness of the sanction of dismissal

33] The arbitrator noted that the applicant had classified the offence in the disciplinary guideline as a category four offence which warranted dismissal. The applicant had emphasised the importance of the rule prohibiting unauthorised repairs because it was important for it to have a complete history of the vehicle when the vehicle was sold. Unauthorised repairs could also compromise safety features of a vehicle.

34] The arbitrator accepted evidence of Kilian that a number of people had been dismissed for making unauthorised repairs to their vehicles, but he noted that in those cases the repairs had not been disclosed and had only been detected when the vehicles were inspected at a much later stage when the vehicles were returned to the firm.

35] On the question of the gravity of the offence, the arbitrator concluded that the sanction of dismissal in the guideline was intended to be applied to cases of employees who deliberately concealed

unauthorised repairs. In Barendse's case there was no prejudice the company would suffer because it knew of the accident and the vehicle was repaired by an approved repairer. In the circumstances, the arbitrator found that a sanction of dismissal was totally inappropriate and the original sanction of a first written warning was in order.

36] The employer believed that Barendse had been dishonest in a number of respects, namely that: it was improbable that the fender could have been damaged to such an extent that it would have damaged the car tyre; the welding discovered on the vehicle could not be reconciled with the applicant's statement that he merely pressed the fender back into shape and put some primer on the damaged paintwork, and he failed to disclose the damage immediately to his superior, de Witt, at the time of the incident, but only did so after he had been contacted by the investigating officer while he was en route to Port Elizabeth.

37] However, the arbitrator was clearly impressed with his honesty as a witness. He also noted that there was evidence from de Witt that the fender could indeed have damaged the tyre and could have been damaged by the gate as alleged by Barendse. A factor that weighed heavily with the arbitrator was that Barendse made no attempt to conceal the damage to the paintwork nor did he attempt to conceal his identity from the caretaker of the building where the gate was damaged. He accepted that Barendse could have been understandably distracted by concern for his mother, who was seriously ill, and that might have affected his decision not to phone his supervisor immediately.

38] The arbitrator then considered the significance of the evidence of the

alleged unauthorised welding on the vehicle. Much was made of this by the applicant in the review proceedings. On the evidence, he concluded that Barendse had not done the welding on the vehicle, as he had neither the time nor the tools nor the motive to do so. He also noted that even the chairperson of the disciplinary enquiry had found that Barendse did not attempt to conceal the repairs he had made to the fender.

[39] The arbitrator ordered the company to retrospectively reinstate Barendse to the date of his dismissal.

Grounds of review

[40] The applicant attacks the arbitrator's award in a number of respects. It submits that the arbitrator's primary finding that there was a second enquiry which rendered the dismissal unfair was unreasonable because, amongst other things, there had in fact not been an initial enquiry. The basis for this contention was that the written warning had been invalidly issued at a time when de Witt was still in the process of obtaining authority in terms of the disciplinary code under the advice of the Industrial Relations department to discipline Barendse. The applicant claims that the arbitrator ought to have had regard to the evidence of Edy, on this issue.

[41] In its supplementary affidavit, the applicant raised additional grounds to justify the full disciplinary enquiry. It argued that the written warning was for a lesser charge, and that when de Witt was liaising with the IR department he did not convey the full facts of the incident to it. In particular, it argued that de Witt had not received all the facts from Barendse, and he had not considered the evidence of the welding, which meant that the fender could not have been removed

as alleged by Barendse.

42] The applicant also complains that the arbitrator's finding on the merits of the dismissal was distorted by his alleged fixation with the question of Barendse's honesty. As a result of this, the applicant argues that the arbitrator fundamentally misconstrued the essence of the charge which was mainly about whether or not an authorised repair had been made, and not with any associated dishonesty. In effect, the applicant submitted that it had a right and a need to enforce an absolute prohibition on the un-authorised repair of vehicles, because of its potentially unlimited liability to third parties it might later sell its vehicles to.

43] While trying to downplay the significance of Barendse's honesty as a relevant factor, the applicant also argued that it was evident from the nature of the repairs done that an attempt was made to conceal them. Therefore, in so far as honesty was a relevant issue in charactersing the misconduct, Barendse's conduct was sufficiently dishonest to justify his dismissal. It is apparent from the applicant's formulation of this ground of review that it was also struggling to separate the issue of dishonesty from the making of unauthorised repairs: on the one hand it wanted to emphasise a strict liability approach based on the policy prohibiting unauthorised repairs, on the other it wanted to portray Barendse's conduct in the same light as others who had made unauthorised repairs and had not disclosed them.

44] In a related point, the applicant also claimed that the Lovell's evidence of the inspection of the vehicle with the repairer, cast serious doubt on Barendse's version. The applicant argues that the arbitrator failed to take this into account when he wholeheartedly

accepted Barendse's version. It submits that he ought to have made an adverse credibility finding against Barendse instead. It maintains the arbitrator overlooked the discrepancy between Barendse's claim that he removed the fender to panel beat it, yet Lovell noticed that the fender was welded to the wheel arch, which meant it could not have been removed as Barendse claimed, unless he welded it back on.

[45] The applicant also claims that the arbitrator simply ignored the evidence of Edy. It argued that her evidence went to the heart of what the arbitrator had to consider in relation to De Witt's evidence, namely his credibility and the true nature of the representations made by Barendse to him, on which he had based the written warning. In particular, the applicant notes that De Witt had misrepresented to Edy that he was intending to discipline Barendse when he had already done so.

Evaluation

The arbitrator's finding that there was a second hearing rendering the dismissal unfair

[46] It is difficult to find fault with the arbitrator's finding that Barendse was subjected to a second hearing on the same issue. In the company's closing argument at the arbitration hearing it even stated in its written heads of argument: "*The fact that the employee was afforded a fresh enquiry before another chairperson is manifestly fair."* (emphasis added). Moreover, a sanction had been imposed on Barendse.

[47] The real issue is whether or not the fresh enquiry was justified. The company sought to rationalise the second hearing on the basis that the sanction imposed by de Witt potentially exposed it to a claim of inconsistent treatment, and this is what justified it 'reviewing' the first sanction after a fresh enquiry. The arbitrator was alive to the applicant's argument that the alleged invalidity of the first warning arose because de Witt had not complied with the requirement of submitting the matter to the HR department before determining that the sanction was considered by the arbitrator, as paragraph 18 of his award makes clear:

> *"In support of its first claim that holding a second hearing was fair, the respondent pointed out that its procedures had not been followed. Inter alia the person who had issued the first warning had not followed procedures in advising the Industrial Relations Department that he intended deviating from the Guide which laid down the applicant should have been dismissed for doing unauthorised repairs. Mr de Witt who had issued the final written warning, had also failed to follow the Guide in ensuring the applicant was dismissed."*

[48] Although the code states that the manager must inform the IR department of the intended sanction beforehand if it deviates from the code, the proviso itself makes it clear that the decision still rests with the manager. Nothing suggests that he needed 'authorisation' before he could impose a lesser sanction than the one prescribed by the code. It would be odd if it were otherwise, because then it would mean the sanction might be determined by someone other than the chairperson without that person having heard the evidence, and the chairperson would have no discretion in determining an appropriate sanction irrespective of mitigating and aggravating factors. The disciplinary code itself also does not contain any limitation on the

powers of managers to impose disciplinary action and holds managers and chairpersons of enquiries responsible for establishing guilt and deciding on appropriate disciplinary measures. Thus, even if he had not notified the IR department of his intention in advance of actually issuing the warning, there is nothing in the code to suggest it did not lie within the scope of his authority to do so.

[49] Kilian did testify that a directive existed to the effect that a full enquiry had to be convened in the event that an employee is charged with misconduct which could result in dismissal or a final written warning. Howver no evidence of this directive was produced. The existence of the directive was also not corroborated by any other witness nor did it arise in cross-examination of de Witt.

[50] However, while I am not persuaded that the requirement to inform the IR department of the sanction he was intending to impose before he did so, made the warning invalid *per se*, I do believe that his failure to do so thwarted the operation of mechanism which, in principle, was designed to reduce inconsistency. In the circumstances, the employer was deprived of an opportunity to use the mechanism and this was unfair. By so saying, I do not want to convey the impression that the IR department was deprived of exercising a veto over the manager's choice of sanction: that is an interpretation which the proviso cannot sustain.

[51] Although the arbitrator was mindful of this issue as mentioned above, his analysis on the fairness of the second enquiry focussed exclusively on the genuine character of the first enquiry and the fairness of the sanction imposed by de Witt. He appears not to have considered the prejudice to the firm of being deprived of using the regulating mechanism contained in the proviso. If one considers the

broader justification for holding a fresh enquiry which was emphasised in *Blanford's* case - namely that the test for determining when a fresh enquiry can be held is a matter of fairness and not whether exceptional circumstances exist[2] - I believe that the employer did make out a case that it was fair to conduct a fresh enquiry at the time, given de Witt's failure to advise the IR department of his intention to deviate from the ordinary sanction before taking a final decision.

52] The arbitrator's failure to consider this aspect of the employer's justification for a fresh hearing, deprived the employer of a fair hearing on the issue of the fairness of the second enquiry.

53] In view of this finding, strictly speaking it is not necessary to consider some of the other grounds of review relating to the finding that the second hearing was unfair. However, since the issues raised under those grounds of review have some bearing on the arbitrator's findings on the substantive fairness of the dismissal and the grounds of review relating to that finding, I address them below.

The arbitrator ignored the different subject matter and charge under consideration in the fresh enquiry

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2 Blanford at 2278, [15], viz:

"Although during the hearing of this appeal Mr Bingham, for the appellant, contended that the test laid down in Van der Walt's case was that a second enquiry was permissible only in exceptional circumstances, that is not borne out by the dictum in para [12] quoted above. In that paragraph it is quite clear that Conradie JA considered fairness alone to be the decisive factor in determining whether or not the second enquiry is justified. The learned judge of appeal mentioned the issue of exceptional circumstances merely as one of the two caveats and not as the actual or real test to be applied. Therefore, in my view, it is incorrect to contend that the test espoused in Van der Walt is that a second enquiry would only be permissible in exceptional circumstances. The current legal position as pronounced in Van der Walt is that a second enquiry would be justified if it would be fair to institute it."

[54] On the matter of whether the arbitrator properly considered the supposedly distinct subject matter of the two enquires, it is true that de Witt found Barendse guilty on a charge of not complying with company standards and, or alternatively, procedures. Nevertheless, in both inquiries the applicant was charged with the same offence of making unauthorised repairs to a company vehicle. It was for this offence that he was dismissed. In the circumstances, the arbitrator cannot be criticised for not making a distinction between the subject matter of the two enquiries, as there was none to be made on this basis. Barendse faced the same potential sanction in both instances. The fact that he was found guilty of a 'lesser' charge on the first occasion does not change the substantive nature of both enquiries. In fact, in finding Barendse guilty of not complying with company policies and procedures, de Witt could not have reached that conclusion without effectively finding that Barendse had made unauthorised repairs.

The arbitrator failed to consider that de Witt did not convey all the facts to the IR department and he was unaware of the welding of the fender

[55] It is clear de Witt concealed from the IR department the fact that he had already issued the warning. The applicant also argued that when de Witt was liaising with the IR department he did not convey the full facts of the incident to it. This referred to the fact that the fender had been pressed back into shape and not merely that some filler had been used to fill in a dent. Edy complained that in her meeting with de Witt on 24 February 2009 he did not convey the extent of the repair to her. However, as she herself said, whether she even met with de Witt or not, it did not matter at that stage because the warning had already been issued. Thus any misrepresentation that might have been made to Edy by de Witt about the extent of the

repairs done by Barendse, this had no bearing on whether the warning had been issued in ignorance of the extent of the repairs done. De Witt himself was well aware that the repair consisted of pressing out the panel and filling the dent, as evidenced by his own letter to J Ngcobo of the IR department which he issued the same day he met Edy.

[56] It is true de Witt was unaware of evidence of the fender being welded to the wheel arch at that time. Assuming the welding had been done by Barendse, if de Witt had been made aware of this at the time he investigated the incident, I agree he would have been less likely to have believed Barendse's version that he had merely performed some temporary repairs to minimise further damage and make the car drivable. However, the welding work was only raised for the first time at the arbitration, and therefore it could not logically have been a reason which caused the company to convene the fresh enquiry.

[57] In passing, I observe that it is remarkable that nobody raised the issue of welding on the wheel arch by the time the fresh enquiry was held, given that the authorised repairs appear to have been made in November or December 2008 and the fresh enquiry only took place in March 2009. Moreover, Lovell testified that Dladla had said the matter would be investigated, but even though some months elapsed from then until the fresh enquiry took place, there was no evidence it was pursued further. Had it been, it is reasonable to suppose it would have featured prominently at the second enquiry.

[58] I have already dealt with the reason why the arbitrator's finding on the fairness of the fresh enquiry should be set aside. It also raised another ground seeking to rely on an analogy between Barendse's matter and the case of ***BMW (SA) (Pty) Ltd v Van der Walt*** ***(2000) 21***

ILJ 113 (LAC). In the *BMW* matter the employee in question had originally been disciplined on a lesser charge in circumstances where he knew that the employer was labouring under the mistaken impression that equipment removed from its premises belonged to him, whereas it still belonged to the company. However, in this instance the extent of the repair known to de Witt was the same as that which was presented to the chairperson of the fresh enquiry, namely that the fender had been pressed out and primer applied to the dent. The fresh inquiry was not instigated on the basis that the new evidence of the welding had come to light. The evidence of welding only came to light in the arbitration. Consequently, there was no reason to set aside the finding on the fairness of the second enquiry on this basis.

Evaluation of Barendse's credibility

[59] In a related ground of review, the applicant also claimed that the undisputed evidence of Lovell's inspection of the vehicle with the repairer, cast serious doubt on Barendse's version. The applicant says the arbitrator failed to take this into account when he wholeheartedly accepted Barendse's version. It submits that he ought to have made an adverse credibility finding against Barendse instead. The applicant claims the arbitrator overlooked the discrepancy between Barendse's claim that he removed the fender to panel beat it, yet Lovell noticed that the fender was welded to the wheel arch, which meant it could not have been removed as Barendse claimed, unless he welded it back on.

[60] The arbitrator did assess Barendse's credibility. What was decisive for him was that the primer had not been painted over and the

applicant had not attempted to conceal his employer's details from the caretaker of the premises where the damage was done to the gate. The arbitrator obviously felt that if Barendse had intended to finish the repairs himself so they would not be noticed, he would not have given the company details to the caretaker.

61] It is true the arbitrator did not specifically deal with the welding issue in relation to Barendse's credibility, but he concluded that he had not performed welding repairs on the vehicle because he had neither the motive, nor the means, nor the time to do it. In this regard, two aspects of the evidence on the welding should be highlighted. There was no evidence adduced to contradict Barendse's evidence that he did not have welding equipment. Further, his evidence that the fender was unbolted and re-bolted to the body after it had been pressed out, was corroborated by Mr Heath who assisted him, whereas the hearsay evidence of Lovell on whether the panelbeaters performed the welding on the vehicle was uncorroborated.

62] It is correct as the firm's representative, Mr Maeso, put to Barendse that the only two possibilities were that he had done the welding or the panel beaters had done so. Lovell said that the panelbeaters would have charged for the welding, which was outside the scope of the quotation. The quotation from the panel beater indicated that repairs were to be done to the fender and the bumper. Under the item 'strip & assemble' on the quote an entry for parts appears, which might also suggest that the panelbeaters would not simply have left the fender panel in place. If they removed the panel then the welding could only have been done by them.

63] In the end, the issue of when the welding was done was an issue to be determined on the probabilities. The applicant would have it that

Barendse's credibility should have been determined on the basis of the probabilities on the welding question. The arbitrator clearly believed that the employer had failed to establish as a matter of probability that Barendse had done the welding. It is possible, he might have concluded otherwise, but his assessment of the probabilities on whether or not Barendse or the panelbeaters did the welding is not irrational on the evidence before him. He did not have to decide who was right, but merely whether the firm's version was the more probable explanation. I do not believe his conclusion on this issue was one that no reasonable arbitrator could have reached, nor that his assessment of Barendse's credibility was unreasonable.

Arbitrator's consideration of Edy's evidence

64] The applicant contends that if the arbitrator had considered Edy's evidence he would have been compelled to make an adverse credibility finding about De Witt. The reasons it relies on are set out in paragraph [45] above.

65] The principal relevance of de Witt's evidence to the matter was threefold. Firstly, it concerned whether he took disciplinary action in terms of the code. Secondly, it related to whether he had canvassed his intention to issue the warning with the IR department before he did so. Thirdly, it concerned whether he had concealed the extent of the repairs to the vehicle, which might have justified the firm holding a fresh enquiry.

66] All these issues have been canvassed already in paragraphs [46] to [58] above. In the light of that analysis, it is not clear to me that Edy's evidence could have led to different conclusions being reached on those questions. I am not persuaded therefore that the arbitrator's

failure to deal expressly with Edy's evidence deprived the applicant of a fair consideration of evidence relevant to the determinative issues.

The arbitrator's independent findings on the merits

67] As mentioned, the arbitrator considered the question of whether the sanction of dismissal was appropriate, quite apart from his finding that the holding of a second enquiry rendered the dismissal substantively unfair in his view. The applicant also complains that the arbitrator was fixated on whether there was an element of dishonesty in Barendse's act of making repairs to the vehicle, when he ought to have realised this was irrelevant to the charge of making unauthorised repairs.

68] The arbitrator firstly addressed the claim that dismissal was the only appropriate sanction. He pointed out that the disciplinary code was intended to be a guide to fair and progressive discipline as stated in clause 2 of the Guide. He further found that the sanction of dismissal was intended to be applied to employee's who deliberately concealed unauthorised repairs, whereas in Barendse's case the prejudice the rule was intended to prevent – namely the risk of the company selling vehicles without being aware of unauthorised repairs made to them – was not present. On this basis he found the written warning issued by de Witt was the correct sanction.

69] It is important to note that the arbitrator did not find that the rule against making unauthorised repairs only applied if such repairs were not disclosed. He was dealing with when it was appropriate for the sanction of dismissal to be imposed without a prior warning being issued. Given the evidence that other employees who had been

dismissed for breaching the rule were employees whose unauthorised repairs had been discovered much later by the company, I cannot say his finding was unreasonable.

[70] One might quibble whether or not the arbitrator should have found that the offence of which Barendse was found guilty should have been altered from a breach of company policies and procedures to the more specific charge of making unauthorised repairs, but as discussed above, the finding that he committed a breach is premised on a breach of the rule against unauthorised repairs and for the purposes of progressive discipline that fact could hardly be ignored if he were subsequently charged for making unauthorised repairs. This is a matter on which two arbitrators might reasonably differ. Likewise the fact that de Witt only issued a written warning rather than a final written warning as a measure of the seriousness of the offence, is something on which arbitrators may reach different conclusions without being irrational.

[71] In the circumstances there is no reason to interfere with his findings on substantive fairness or the relief of reinstatement which the arbitrator ordered.

Costs & Relief

[72] Since the applicant is only successful to a limited extent and the substantive findings remain unchanged, I belief it is fair and equitable for the applicant to pay the third respondent's costs.

[73] The second respondent applied for the award to be made an order of court. There is no reason not to make the award an order of court subject to the substitution of findings which are set aside for the reasons cited above. Obviously, in respect of the original award of

backpay, the amount stipulated in the award dealt only with the backpay until the date of the award, which was a period of one year, but it follows from the order of reinstatement that he is also entitled to claim backpay from the date of the award until the date of this judgment.

Order

[74] It is ordered that:

a. The second respondent's findings that the third respondent's dismissal was procedurally and substantively unfair, in so far as the third respondent was subjected to a second disciplinary hearing, are set aside for the reasons set out in paragraphs [50] to [52] above, and are substituted with a finding that the holding of a fresh enquiry, in the circumstances, was not procedurally unfair and did not result in the third respondent's dismissal being substantively unfair for that reason.

b. The application to review and set aside the second respondent's award in so far as he found that the sanction of dismissal was unfair on the alternative basis set out in paragraphs 24 to 42 of his award is dismissed.

c. The application to review and set aside the second respondent's award, in so far as the relief he awarded and the reasons therefore, which are set out in paragraphs 43 to 51 of his award, is dismissed.

d. The applicant must pay the third respondent's costs.

Subject to the substitution of the second respondent's findings set out in paragraph [74] a above in this order, the second respondent's award is made an order of court.

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R LAGRANGE
JUDGE OF THE LABOUR COURT

FOR THE APPLICANT:	**B Macgregor of Macgregor Erasmus**
FOR THE THIRD RESPONDENT:	**G O Van Niekerk, SC instructed by Derik Jafta & Co**