IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO J4656/99**

In the matter between:

LEON LLOYD Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

RICHARD BYRNE Second Respondent

HIGHVELD DISTRICT COUNCIL Third Respondent

JUDGMENT

JAMMY AJ

The Applicant was employed by the Third Respondent from 1 March 1994 until his dismissal on 8 January 1998, following a Disciplinary enquiry, progressively held on three dates in November and December 1997 and terminating on that date.

Faced initially with four allegations of misconduct in that enquiry, the Applicant was found guilty on three of them. An appeal, which he noted against his dismissal, was unsuccessful.

A dispute relating to what he alleges was the unfairness of that dismissal was then referred by him to the South African Local Government Bargaining Council where conciliation was attempted and failed and a certificate to that effect was issued on 26 October 1998. The Applicant then referred the matter to the First Respondent for arbitration, which was conducted by the Second Respondent as Commissioner, on 19 August 1999.

Having initially been employed by the Third Respondent as Deputy Regional Engineer and subsequently as Deputy Director: Engineering, the Applicant, at the date of his dismissal, served as Acting Director: Engineering. One of his functions as such was the approval of building plans in the area of jurisdiction of the Third Respondent.

In the end result, the Second Respondent upheld the disciplinary finding of the Applicant's guilt on two of the three charges referred to arbitration. In the charge sheet initially furnished to him and recorded by the Second Respondent in his Award, these were formulated as follows –

1: That you engaged in remunerative work outside the Highveld District Council's service without first requesting and receiving the said Council's permission; alternatively that you committed yourself to (such) remunerative work.

4: That you wilfully acted in a detrimental way towards the Highveld District Council and/or its discipline and/or order by considering and/or approving work in your official capacity at the said Council which you did privately.

A second element of the referral of his dispute by the Applicant to arbitration, related to his allegation of procedural unfairness in his dismissal. That was sourced, he submitted, in the Third Respondent's failure to adhere to aspects of the Disciplinary Procedure forming part of an Industrial Council Agreement gazetted on 28 October 1994 and which, notwithstanding the Third Respondent's contentions to the contrary, the Second

Respondent found to have been applicable to the employment relationship between the Applicant and the Third Respondent.

It is common cause that, on 11 September 1997, the Applicant received notification, in the form of a Memorandum from the Chief Executive Officer of the Third Respondent, to the effect that he was suspended in terms of Section 10.3.1 of the Conditions of Employment **"pending an investigation into alleged misconduct by yourself"**. The Memorandum contained no details of that allegation. The next communication to the Applicant, on 25 September 1997 informed him –

> "**… that the investigation has been completed as can be seen in the attached copy of a letter dated 22 September 1997, from Messrs Brandmuller-Taljaard".**
>
> A disciplinary hearing, he was told, "**will be held in respect of the allegations as indicated in the Attorney's letter. A charge sheet and notice of the date of Disciplinary Hearing will be served on you."**

The letter from Messrs Brandmuller-Taljaard referred to is a key aspect of this litigation. It bears the heading

> "**Investigation into alleged irregularities (Engineering Department)"**
>
> and proceeds to record that -
>
> "**This investigation was instituted after certain allegations were made by one of the consultant engineering firms of the Highveld District Council with respect to irregularities in the Engineering Department. These allegations were *inter alia* that:**
>
> **Mr Leon Lloyd in his capacity of Acting Regional Engineer was not allocating work projects evenly amongst all the consultant engineer firms.**
>
> **Mr Lloyd was doing outside work without permission of the Council.**

3 There were/are irregularities in the relationship between Mr Lloyd and certain of the consultant engineering firms.

4 For Mr Lloyd was doing work for private clients which he was approving in his capacity as Regional Engineer".

The substance of the investigation was then presented in detail and the report concluded with recommendations in the following terms –

No further action be taken against Mr Lloyd in respect of the allegation that he was not allocating work evenly amongst all consultant engineering firms. However the manner of allocation should be set in a policy format, which should also indicate all factors to be considered. This would assist in the prevention of abuse to the system.

2 A disciplinary enquiry be convened as soon as possible at which Mr Lloyd must be given the opportunity to respond to the following allegations:

2.1 doing outside work without permission of Council;

compromising his position as Regional Engineer as a result of his relationship with DLM and Posthuum Plant Hire;

approving his own work for private clients in his capacity as Regional Engineer.

3 Consideration should be made of the fact that there is no clear evidence of any of the above from 31 July 1996 to date hereof.

. It is that report and those recommendations which, as I have stated, constituted the basis for the disciplinary charges subsequently formally brought against the Applicant and it is that sequence of events which, he submits, constituted the essence of the procedural

irregularity and unfairness of the action taken.

. The preamble to the Disciplinary Procedure incorporated in the Conditions of Service referred to records in Clause 10.2.2 that **"the following procedure shall be followed by the Council and the employee concerned so as to protect the interests of the Council and of the employee"**.

. The Applicant then refers to Clause 10.2.2.1 –

> "**Any accusation against an employee shall be brought in writing before the head of department concerned or his authorised representative by the person making the accusation.**"

. The next Clause, 10.2.2.2, requires that any such accusation **"shall be investigated by the head of department or his authorised representative"**, who shall then **"decide whether the accusation warrants a disciplinary hearing or not, and shall inform the person making the accusation accordingly in writing"**.

. The accusation against him, the Applicant submits, made, according to the report of the investigating Attorneys, **"by one of the consultant engineering firms"** of the Council does not satisfy that requirement in that there is no suggestion that it was made in writing and nor is the complainant identified. The allegations which he ultimately faced were presented *ab initio* in the form of that report and never, **"in writing before the head of department concerned or his authorised representative by the person making the accusation"**. The process of investigation, report and recommendation by the delegated Attorneys, was a consequence of the accusation and could not have constituted it. It is apparent from his Award that the Second Respondent was apprised of and directed his attention to, this submission. This is what he says in the course of his reasoning –

> "**Lloyd has also argued that the process was defective as the employer did not expose who the complainants were, nor bring them into the Hearing to be examined and cross-**

examined. This argument was based on an alleged contravention of the Conditions. The Applicant party was however, unable to indicate any specific provision of the Conditions to support this argument. Para 10.2.2 of the Conditions refers to an 'accusation'. This could refer to a complaint or a charge. There is however, no compulsion on the part of the employer to divulge as to the exact sources of the complaints, nor to submit these sources to cross-examination".

5. In reaching that conclusion, the Applicant submits, the Second Respondent did not apply his mind to the material non-compliance by the Third Respondent with the Conditions of Employment and in the result, the disciplinary process, it is contended, has not been duly instituted and all further steps in that process and more particularly, the investigation by Attorneys Brandmuller-Taljaard upon which the charges against the Applicant were based, are consequently irregular. The Second Respondent, in that context, confining himself as he did to the question whether or not there was an obligation on the employer to divulge the source of the complaints and to submit them to cross-examination, therefore misdirected himself.

6. A further procedural irregularity lies, the Applicant says, in the manner in which his appeal was processed. The relevant provisions of the Disciplinary Procedure provide a right of appeal by an employee against an adverse finding which is to be exercised within ten working days and, when so lodged, requires the Chairman of appeal committee constituted to hear it, to -

"… appoint a person who shall act as prosecutor during the Hearing and shall advise such prosecutor, the employee charged and his trade union or representative, as the case may be, in writing of the date, place and time of the hearing, which shall take place within ten working days of the date on which the appeal is received by the town clerk or his authorised representative".

7. The evidence before the Second Respondent, it is submitted, revealed in the first instance that no such prosecutor was appointed by the chairman of the appeal committee and secondly that the appeal hearing was initially delayed, then aborted and then,

following further negotiations at the Bargaining Council, reinstituted, with the actual hearing taking place only on 29 June 1998, more than five months after he was dismissed.

8. These issues are cursorily and dismissively dealt with by the Second Respondent in his Award. He says this –

> **"The Applicant also argued that the Respondent failed to comply with provisions relating to the Applicant's right to appeal. The evidence is however that an appeal was eventually held, even though the first one was aborted. There is a written record of all the stages of the disciplinary process, from the suspension letter, a transcript of all meetings, written decisions as well as written reasons for these decisions, and a letter of dismissal. From the evidence before me, there is nothing outstanding that was unfair to Lloyd, or prejudicial to him, or that contravened R1828 such as to cause me to conclude that the disciplinary procedure was unfair. As such I have found that the disciplinary process was fair".**

9. The Disciplinary Procedure in question in this dispute is incorporated in a gazetted Industrial Agreement found by the Second Respondent, as I have said, to apply to the parties in their employment relationship. Its provisions as such are unambiguous and peremptory and there is nothing in their substance which, in my opinion, vests in any of the parties thereto or in any functionary thereunder, such as the chairman of the disciplinary enquiry or of the appeal committee, or in any independent adjudicator of disputes arising therefrom, such as the Second Respondent, a discretion to vary, waive, ignore or otherwise depart from its provisions.

10. The Brandmuller-Taljaard investigation report and recommendations, which constituted the launching pad for the disciplinary action pursued against the applicant by the Third Respondent, was manifestly not an **"accusation against an employee … brought in writing before the head of department concerned or his authorised representative by the person making the accusation."** What it was in fact, was the

subsequent investigation which the procedure obliges the head of department or his representative to carry out or procure following the receipt, in prescribed form, of the accusation concerned.

. Similarly, the defined time periods, participants and rules of conduct applicable to the appeal procedure, allow for no discretionary deviation. Whilst it is correct that, in the context that the appeal was eventually heard, that right was not denied to the Applicant, the failure by the chairman of the appeal committee to appoint a prosecutor as required by the relevant provision, cannot be excused on the basis that the requirement was substantially complied with. The appeal committee could not act in the dual capacity of adjudicator and prosecutor and whether or not the presence and participation of someone filling that formal office might have made a difference to the end result, is a matter for speculation.

. An agreement forged by negotiation in a Bargaining Council is a collective agreement and it is a trite principle that parties to such an agreement must be bound by their own rules. The procedures followed in the disciplinary action against the Applicant were, in the respects to which I have referred, therefore irregular. The evidence of that irregularity, in the specific respects to which I have referred, was presented to the Arbitrator in the course of the hearing. In reaching his conclusion **“that the disciplinary process was fair”,** his failure to have applied his mind to the requirements of the Disciplinary Procedure as an element of the Applicant’s Conditions of Employment, is apparent.

. With regard to the allegations of substantive unfairness, I can find no fault with the Second Respondent’s conclusion, on the issue of the Applicant’s engagement in private remunerative work, that whether or not he was eventually paid, his preparation of invoices in that regard unquestionably indicated an initial intention to be rewarded. It is not disputed that he did so without requesting or receiving the requisite authority and his protestation of innocence in that regard is negated by the preponderance of probabilities against him.

. With regard to the remaining charge on which the disciplinary finding of his guilt was

upheld by the Second Respondent, namely that he **“wilfully acted in a detrimental way towards the Highveld District Council …”** in approving work in his official capacity which he did privately, the evidence before the Second Respondent was less compelling. There was however nothing in the conclusions reached by him in that regard, to suggest either that he did not apply his mind in reaching those conclusions, or that, on his assessment, they were not justified. The challenge which the Applicant mounts to the Second Respondent’s determination on that aspect of the matter has the trappings more of an appeal than a review and in that context, I can find no reason to interfere with it.

. In the result, the Second Respondent’s determination that the Applicant’s dismissal was substantively fair is not in my view open to question. The procedural unfairness of that dismissal having being determined by me to have been established however, and having regard to the provisions of section 193(2)(a) of the Labour Relations Act of 1995 (“the Act”), the Applicant is in my view entitled to relief. The form of that relief, in the circumstances of the matter, cannot in my opinion appropriately involve his reinstatement and for that reason, must comprise compensation within the limitations provided for by the statute. The governing provision of the Act in that regard is Section 194(1). If a dismissal is unfair only because the employer did not follow a fair procedure, the employee is entitled to compensation equal to the remuneration lost by him between the date of his dismissal and the date of conclusion of the adjudication process. This Court has consistently held that compensation on that basis must be subject to the same limitation as is applicable in terms of Section 194(2), relating to substantively unfair dismissals, and may not exceed an amount equivalent to twelve months remuneration.

. The order which I accordingly make is therefore the following:

The finding of the Second Respondent in his Award dated 4 October 1999 under Case No MP9172 that the dismissal of the Applicant by the Third Respondent was procedurally fair, is reviewed and set aside.

The Second Respondent’s determination in that regard is substituted by the following

"The dismissal of the Applicant by the Third Respondent on 8 January 1998 was procedurally unfair"

The Third Respondent is ordered to pay compensation to the Applicant as a consequence of his procedurally unfair dismissal in an amount equivalent to twelve months remuneration, calculated on the basis of the Applicant's rate of remuneration prevailing as at the date of his dismissal, 8 January 1998.

Payment of that amount is to be made to the Applicant within twenty-one days of the date of this Judgment.

Each party having been only partially successful in their submissions to and in the conclusions reached by this Court, there is no order as to costs.

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B M JAMMY

Acting Judge of the Labour Court

Date of hearing: 29 May 2001

Date of Judgment: 20June 2001

Representation:

ant: Advocate R Venter instructed by Van Deventer & Campher, Attorneys

Respondent: Mr A P Brandmuller: Brandmuller-Taljaard Attorneys.