IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.:JR1704/02

REPORTABLE

In the matter between:

RAND WATER BOARD	**APPLICANT**
AND	
THE COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**1ST RESPONDENT**
FAIZEL MOOI, N.O.	**2ND RESPONDENT**
JERRY METHULA	**3RD RESPONDENT**

NKABINDE AJ

JUDGMENT

NKABINDE AJ:

[1] This is an application to review and set aside the award issued by the second respondent. The second respondent found that the dismissal of the third respondent ("the employee") by the applicant is substantially fair but procedurally unfair. The second respondent then awarded the employee compensation in the amount of R205.088.00 being the equivalent of eight months' remuneration calculated at he employee's rate of remunerate per month when dismissed. At

the outset of the hearing of this application the third respondent applied for condonation of the late filing of his opposing papers. The request was acceded to as the applicant did not oppose the granting of the relief sought.

[2] The applicant challenges the award on the grounds, *inter alia,* that:-

2.1 the terms of the disciplinary code are mere guidelines which are not to be absolutely adhered to;

2.2 no evidence of real prejudice suffered as a result of non-adherence was tendered; and

2.3 the second respondent failed to apply his mind when considering whether or not compensation was appropriate in the circumstances.

The employee opposes the relief sought.

[3] In order to have full appreciation of the issues in this matter it is necessary to briefly deal with the facts and circumstances which gave rise to his application. The employee was employed by the applicant as a Manager: Community based services. He reported to the General Manageress: Marketing and Communication, Ms Letsoalo. Apparently ten employees reported to him. Few months after his appointment the applicant's management received complaints regarding interpersonal relationships between the employee and his subordinates and that staff morale in his department was low. The employee was then trained and counselled. The training and counselling processes bore not fruits. The applicant suspended him on full pay on 18 June 2001 and gave him notice to attend a disciplinary hearing on charges relating to his inability to manage and create a conducive working environment within his department thereby leading to a breakdown of a relationship of trust between himself and his subordinates and his general manager. The employee was found guilty of the charges preferred against him. He was dismissed with effect from 12 December 2001 and paid one

month's remuneration in lieu of notice. He appealed against the dismissal. The dismissal was confirmed on appeal. He then referred the dispute for conciliation and ultimately to arbitration which resulted in the award which is the subject matter of this application.

[4] The alleged procedural unfairness found by the second respondent is based on technical points, that-

(a) the person nominated by the Section Head (Ms Letsoalo) was not of equal standing with her in terms of the applicant's disciplinary code;

(b) the appeal Chairman was not of the correct level of Management also in terms of the disciplinary code; and

(c) that in regard to the appeal hearing no evidence was tendered that written reasons for the appeal decision were given in terms of the disciplinary code.

[5] Clause 4 of the disciplinary code deals with procedure. The preambler provisions thereof provides as follows:

"General

The procedure to be adopted will depend on the nature of the behaviour to be remedied and the work standard that has been breached. In general, poor work performance will be dealt with in terms of the procedure set out in paragraph 4.1; infringements of work standards that will result in corrective action are set out in 4.2, 4.3 and 4.4; and the procedure prior to a possible termination is set out in 4.5.".
(My underlining for emphasis)

[6] Sub-clause 4.6 of the code provides, *inter alia*, that:-

"The Section Head or his nominee should be the Chairperson of the hearing unless the Section Head or his nominee is of the opinion that he will not be impartial, in which event another Chairperson of equal standing must be nominated. ...".

[7] A proper construction of the preambler provision of the code manifestly show that the provisions relating to the procedure are of general application. This is also borne by the fact that the drafter of the code deemed it fit to specify, in

sub-clause 4.5.3, what the essential elements are for a hearing to constitute a fair one. It is noteworthy that but for the appeal chairperson's failure to give written reasons for his decisions, all other essential requirements are met.

[8] As to who should have been the chairman of the disciplinary hearing, the provision of sub-clause 4.6, above, are unambiguous to require much elaboration. Either the Section Head or her nominee should be the chairperson of the hearing: The Section Head appointed Mr Duncan as her nominee as she had personally been involved in the counselling process of the employee. It is a matter of concern that no evidence was tendered either to the fact that the nominee (Mr Duncan) and/or the chairperson of the appeal hearing were impartial or that the manner in which the chairpersons were appointed resulted in material prejudice being suffered by the employee. On a proper construction of the ordinary meanings of the words used in the relevant provisions of the code it follows that there was no material breach of the code concerning Mr Duncan's appointment and that of the chairperson of the appeal hearing as she was ranking one level above Mr Duncan in hierarchy. In any event the issues raised by the employee at the arbitration were, as correctly found by the second respondent, technical.

[9] The only procedural irregularity which appears to exist relates to the failure by the chairperson of the appeal hearing to give reasons for her decision as required under sub-clause 4.5.3. Counsel for the applicant submitted that evidence was not tendered to the effect that such failure resulted in the employee suffering real prejudice. It is contended, on behalf of the employee, that it is impossible for the employee to prove prejudice and further that the applicant having admitted that the second respondent failed to furnish reasons cannot have its cake and eat it. It is remarkable that the second respondent considers the said procedural unfairness technical but awarded compensation to the employee. The employee did not ask for written reasons supposedly because the unavailability

thereof was insignificant as that did not hinder his referral of the dispute to the CCMA. It would, in my view, be highly technical and wrong to regard such technical procedural defect on the part of the second respondent as constituting procedural unfairness justifying the compensation awarded or at all, particularly in the absence of evidence of any loss or prejudice suffered as a result thereof. In Dube & Others v Nasionale Sweisware (Pty) Ltd (1998) 19 ILJ 1033 (SCA) the Court held that the company's disciplinary code and standard disciplinary procedural provisions contained therein are not obligatory. I share the same view with regard to the procedural provisions in clause 4.

[10] The award is challenged lastly on the ground that the second respondent did not apply his mind when considering a question of compensation. It is conceded, on behalf of the employee that the second respondent should not have applied the calculation for compensation for procedural unfairness regulated in terms of the unamended section 194. This concession is well made.

[11] Section 48 of Act No 12 of 2002 (which came into operation with effect from 30 June 2002) amends the then section 194 of the LRA to introduce a greater degree of discretion in the awarding of compensation for procedurally and substantively unfair dismissals. The amendment also clarifies rights to compensation by setting the maximum compensation in the case of both procedural and substantive unfair dismissal. The provisions of the amended section (s194), enjoins a commissioner who considers compensation to be an appropriate remedy to exercise his/her discretion and award a just and equitable compensation in the circumstances.

[12] A proper analysis of the second respondent's award reveals, in my view, that, he awarded compensation on an erroneous understanding that the relevant provisions required that compensation must be not less than the amount of

remuneration the employee would have been paid between the date of his dismissal and the last day of the hearing of the arbitration. He clearly invoked the provisions of the unamended s 194 of the Act. The LAC in Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89 at 99G remarked that:-

"...compensation need not necessarily be awarded upon a finding of a procedurally unfair dismissal; another option is to grant no consequential relief."

[13] It is clear that the approach and award of the second respondent are open to serious criticism. He clearly failed to apply his mind in considering whether or not compensation was indeed appropriate and what was just and equitable in the circumstances.

[14] The question now remains whether this Court should exercise its wide discretion in terms of the provisions of s 145(4) of the Act, namely either to refer the matter back for a fresh determination regarding compensation or itself resolve the dispute on the papers. It is contended, on behalf of the employee, that this Court is in as good a position as the second respondent or any administrative body to make the decision itself. The available evidential material consists only of the employee's monthly gross remuneration, the date of his dismissal and the fact that he wanted compensation. In my view these facts do not lay evidential basis to enable this Court to exercise its discretion in favour of confirming the compensation awarded or awarding any compensation to the employee as envisaged by s 194 of the LRA. The SCA in Dube, *supra,* held further that the technical procedural irregularity which might have resulted from the co's failure was not of any material consequence in so far as the subjective state of mind of the employees was concerned.

[15] Now, weighing all the circumstances of the case and giving effect to the legislative bench mark the discretionary award of compensation, on the facts before me, must be nil. To put it differently compensation should not have been

awarded.

[16] In the premises I make the following order:

1. That the arbitration award issued by the second respondent on 25 August 2002 is set aside with costs and the following order is substituted therefor:

"The third respondent's dismissal is substantially and procedurally fair".

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B.E. NKABINDE
ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the Applicant	:	Adv. T C Tiedemann
For the third Respondent	:	Mr. RT Maddern
Hearing date:	:	13 November 2003
Date of Judgment:	:	23 February 2004