Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C 814/2016

In the matter between:

KIDROGEN (PTY) LTD	**First Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**First Respondent**
WINNIE EVERETT (*N.O.*)	**Second Respondent**
BG NCUBE, A ERASMUS & C PRINS	**Third, Fourth and Fifth Respondents**

Heard: 7 February 2018

Delivered: 31 July 2018

Summary: (Review – reasonableness – finding respondents not guilty of dishonesty unreasonable on the evidence before the arbitrator except on a credulous evaluation of the evidence – finding on substantive fairness set aside – finding on procedural fairness for failure of chairperson to recuse himself following a complaint to the bar council about his conduct upheld, but no compensation due in light of misconduct of respondents)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review an arbitration award in which the arbitrator, Ms W Everett, found that the dismissals of the third, fourth, and fifth respondents ('the respondents'), namely Mr BG Ncube ('Ncube'), Mr A Erasmus ('Erasmus') and Mr C Prins ('Prins') were procedurally and substantively unfair.

Background

[2] The respondents had been employed by the applicant ('Kidrogen') initially on fixed term contracts starting in 2011. In September or October 2014, they were employed on an indefinite term contracts. Kidrogen is a vehicle operating Company providing the city of Cape Town with integrated rapid transport services known as My City. It was formed when five taxi associations concluded an agreement with the city to relinquish their vehicles and licenses in exchange for equity in Kidrogen. The respondents were all former taxi operators and as part of the agreement were appointed to senior executive positions in Kidrogen, viz: Chief Executive Oficcer (Ncube), Chief Financial Officer (Erasmus) and Chief Operating Officer (Prins).

[3] The respondents were dismissed on 20 June 2016 after prolonged disciplinary proceedings led to them being found guilty of gross dishonesty in that:

3.1 they allowed manual alterations in their employment contracts to be made, which varied their annual monthly total cost of employment (TCOE) in an unlawful and dishonest manner (charge 1(a));

3.2 in October 2014 they unlawfully and dishonestly received a higher TCOE salary compared to the salary they were entitled to as recorded

in the remuneration committee report that was approved by the applicant's board of directors (charge 1(b));

3.3 they unlawfully and dishonestly received back-all pay in varying amounts in October 2014 (charge 1(c));

3.4 they enriched themselves by receiving payment in the form the 13th cheque December 2014 in an unlawful and dishonest manner (charge 1(d));

3.5 they unlawfully and dishonestly received a thirteenth cheque in December 2013 (charge 1(e)), and

3.6 (f) they unlawfully and dishonestly received a discretionary bonus during December 2014 for the period 1 May 2013 to 30 April 2014 (charge 1(f)).

The arbitration award

[4] The arbitrator found that the essence of the dispute concerned whether or not the respondents had unlawfully and dishonestly received various adjustments to their salaries, back pay and thirteenth cheques contrary to the principle of Total Cost of Employment (TCOE) remuneration packages adopted by Kidrogen's board as recommended in a Remuneration Committee (Remco) document and captured in their contracts of employment. There is also a dispute as to whether they were entitled to a performance bonus.

[5] The relevant passages in the 2014 Remco report drawn by Mr B Lodewyk of Grant Thornton ('Lodewyk') read:

5. Key principles underpinning the Executive remuneration policy

The Executive remuneration policy is based on the application of the following 4 key principles or foundations.

5.1 Internal consistency: …

5.2 External competitiveness:…

5.3 8 A total cost of employment approach (TCOE): this means that the policy seeks to establish the principle of "no hidden" or "additional cost" to

employment. This further means that the Remco recommendations to the board entail the total cost of Executive remuneration, with the exclusion only of additional remuneration that could be awarded on the basis of performance.

5.4 A performance –based incentive model: this means that the policy provides for the introduction of an Executive performance-based incentive scheme that allows Company Executives to earn a performance-based bonus based on the incentive scheme outlined in Performance Bonus Policy for Executives.

Paragraph 6 of the report dealt with the benchmarking of executive salaries within the transport industry. After setting out the various comparators, the recommendations made were that the CEO, COO and CFO should receive R 1,224,729.00, R 800,000.00, and R1, 025,434.00 respectively as their annual remuneration. In terms of the existing recorded remuneration of the respondents only the C00's remuneration was recommended for an upward adjustment. The recommended salaries for the CEO and CFO respectively remained the same as their existing remuneration. The benchmarking portion of the report concluded as follows:

In this context, subject to any additional input from the Board, the committee recommends that the TCOE recommendations for 2014/15 be in line with the figures outlined in the "Kidrogen current" column in the table above and remain unchanged until the milestone 5 has been achieved.

The Executives are eligible to receive the annual wage/salary increases that applies to the bargaining council employees (SARBAC). The required adjustment to be made and reviewed by Remco and approved by the board on an annual basis effective 1 July.

The fifth 'milestone' to be achieved was the last rollout of the final MyCiti route in terms of Kidrogen's contract with the city. The concluding paragraph of the report stated:

8. Recommendations pertaining to the 2014/15 financial year

It is recommended that in respect of the 2014/15 financial year the board:

8.1 approves the Executive remuneration policy principles outlined in section 5 of this report.

8.2 approves the undertaking of an annual review of Executive remuneration, including the undertaking of a benchmarking process, at least 2 months prior to the end of the financial year.

8.3 notes the benchmark information provided in section 6 of this report.

8.4 approves the performance-based incentive scheme outlined under the policy of performance bonus for Executives puts into place mechanisms to allow for the monitoring and assessment of Executive performance in terms of the scheme.

8.5 approves the car allowances scheme outlined in the policy.

8.6 approves the annual increases for Executives, not exceeding the annual bargaining council increase for staff that fall within the bargaining council structure, subject to the Company policy be developed and submitted to REMCO.

8.7 approves the recommendations pertaining to the Key Performance Areas for the positions of CEO, COO and CFO outlined in section 8,9 and 10 of this report.

9.8 approves the 2014/15 Executive remuneration recommendations outlined in directors remuneration applicable to non-Executive board members.

9.10 requests the Remuneration Committee to, based on the TCOE and Performance – based incentive scheme recommendations in this report, instruct the Company's legal advisors to prepare employment contracts for the three Executive management positions addressed in the report.

[6] At a board meeting of Kidrogen on 29 May 2014, the following resolutions were taken arising from the Remco report as appears from this extract of the minutes:

The Chairperson highlighted that the only difference in the recommendation by the Remuneration Committee was the remuneration of the Chief Operating Officer

It was RESOLVED for because the will will all or are a a for all will (…)

That the annual remuneration package of the Chief operating Officer of R 800 000.00 be approved.

It was RESOLVED: (…)

That the board of directors approve:

- the Executive remuneration policy principles outlined in section 5 of the remuneration committee report;
- the undertaking of an annual review of Executive remuneration, including the benchmarking process, at least 2 months prior to the end of the financial year;
- the performance-based incentive scheme outlined under the policy of performance bonus for Executives and puts into place mechanisms to allow for the monitoring and assessment of Executive performance in terms of the scheme;
- the recommendations pertaining to the Key Performance Areas for the positions of CEO, CEO and CFO outlined in section 8, 9 and 10 of the Remuneration Committee report.

(emphasis added)

It is clear from the resolution that the board only adopted aspects of the Remco report. The reference to sections 8, 9 and 10 of the report referred to sections setting out the key performance indicators of the CE0, COO and CFO respectively. The minutes of the Board meeting also record that Bowman Gilfillan should prepare employment contracts for the three executive management positions addressed in the remuneration committee report.

[7] The relevant provisions in the respondents' contracts of employment were identical except for differences in the quantum of the package. The relevant provisions of Erasmus's contract read:

8 REMUNERATION

8.1The Executive's package shall be based on a "total cost of employment" basis (TCOE) being an amount of R ~~1,025,434.32~~ *R 1 115 764.20* per annum, representing the total cost to the Company of employing the Executive and encompassing the following:

annual salary in terms of clause 8.5 below;

thirteenth cheque in terms of clause 8.6 below; and

any benefits paid by the Company on the Executive's behalf in terms of clause 8.7 below

8.2 The TCOE shall exclude additional remuneration that could be awarded on the basis of performance in terms of clause 9 below.

8.3 Subject to clause 8.4, the Executives TCOE shall be reviewed by the Company's remuneration committee on an annual basis at least 2 months prior to the end of the Company's financial year.

8.4 The first annual review of the Executives TCO E terms of clause 8.3

shall only be conducted 2 months prior to the end of the Company's financial year in the financial year in which milestone 5, being the final milestone to be rolled out in terms of the 12 year contract concluded between the Company and the City of Cape Town on 30 August 2013 (…), has been achieved.

8.5 Salary

8.5.1 the Executive's gross monthly salary shall be R ~~78 879.56~~ R *92 980-35* (…) per month (the Salary).

…

8.5.4 The Company may review the salary annually without any obligation to increase it. Any adjustment to the salary will be dependent on a range of factors that may vary from time to time, which will be determined in the Company's sole discretion. Consequently, there should be no presumption or expectation of an increase.

8.6 Thirteenth Cheque

In addition to the salary referred to above, the Executive shall be entitled to a thirteenth cheque equal to his monthly salary, less any applicable tax (…) but shall not exceed the TCOE. Notwithstanding the foregoing, in respect of the year 2014, the Thirteenth Cheque shall be prorated with reference to the number of months worked in 2014. …

…

9. DISCRETIONARY BONUS

9.1 The Company may, at its discretion, pay to the Executive a discretionary bonus from time to time.

> 9.2 the amount of such discretionary bonus, if any, shall be determined with reference to the Company's financial performance and shall be calculated as follows: …
>
> …
>
> 9.4 payment of a discretionary bonus, if any, shall be effected to the Executive during the month of December following the end of the Company's financial year in terms of which discretionary bonus was calculated.
>
> …
>
> 9.7 Nothing in this clause guarantees payment of a bonus or gives rise to a legitimate expectation of any payment. Furthermore, in the event the Company pays the Executive a discretionary bonus in terms of this clause, Executive hereby acknowledges and agrees that such bonus is of a voluntary, gratuitous and discretionary nature, and that there shall not arise, either out of a once-off recurring payment of this nature, any obligation on the part of the Company to make such bonus payments, whether in respect of the past or in the future

(italicised and ~~ruled~~ text represent alterations in manuscript)

[8] The Remco report was discussed again at the board meeting of 28 August 2014, at which all of the respondents were present. It was noted that the contracts of employment were nearly finalised. Lodewyk made certain recommendations regarding the provision of car allowances and the inclusion of an annual increase. No decision was taken on these recommendations save to say that the chairperson "…confirmed that an equitable proposal be put together by B G Ncube and his team for the board to consider, for recommendation, in terms of recognition of the key individuals."

[9] The arbitrator characterised the respondents' defence as essentially being that the Remco document and the subsequent contracts of employment prepared on that document erroneously captured the TCOE principle as they appeared to exclude a thirteenth cheque, increases and performance bonuses. It was the respondents' contention that the adjustments made to their remuneration, for which they were subsequently charged, were simply

to give effect to the Remco document. Moreover, they maintained that the employer was inconsistent because the acting CEO, after their suspension, was paid the same remuneration package as one of the applicants, which ought not to have been the case if the applicants were not entitled to the payments they received.

[10] The arbitrator admitted evidence of the alleged error in the calculation as she regarded it as necessary to determine the substantial merits of the dispute as required by section 138 of the LRA, despite objections by the employer that this was in breach of the parole evidence rule. Moreover, the document in which the error originated was the Remco document and not the contracts of employment which were consequent to that.

[11] In relation to the Remco document, the arbitrator's critical findings may be summarised as follows:

11.1 The Remco document was self-contradictory because it purported to create a system of remuneration based on TCOE, but that is not what it created, because travel and car allowances were not included in the calculation even though the only items of remuneration that was supposed to be excluded were performance bonuses.

11.2 The board compounded the problems of the Remco report by specifically approving some recommendations but not others while resolving that the report should form the basis of contracts of employment. Consequently the report created uncertainty around entitlements and its own recommendations.

11.3 The applicants had contended that the report was erroneous in particular because it reflected TCOE as an amount that was lower than the actual TCOE paid at that time. The arbitrator accepted that it could not have been the intention of the Board or Remco that they would earn less than what they were earning before. In relation to the specific charges, she found that:

[12] In relation to the charges, the arbitrator's findings, stated briefly, are set out below:

12.1 Charge 1(a). She accepted that it was not for the respondents to approve a handwritten correction on their contracts affording them an unexplained 8.8% increase. She found that on the strict reading of the contracts that they were not entitled to the altered amounts but she also accepted that it was never intended they would have earned less than they did before because their salaries were now divided by 13 to provide for a thirteenth cheque and it was probable that the TCOE had been incorrectly stated which resulted in a flawed contract. Nevertheless she found it was not for the respondents to approve a correction, but they were obliged to take the alteration to the board for approval because it amounted to a change in the contract of employment. Nonetheless, the arbitrator declined to make a finding who had instructed the changes to be made to correct the supposed error, and in the absence of being able to determine that issue, she decided that she could not say that the alterations were made dishonestly. The fact that the changes had not been approved by the board she attributed to the negligence, incompetence and lack of corporate governance of the board as a whole.

[13] Charge 1 (b) and (c). These two charges are essentially interrelated and the arbitrator's conclusions flow from finding on the first charge.

[14] The arbitrator found that the Remco document did provide for a recommended SARBPAC increase but that, this still required board approval and that the applicants accepted the payments without board approval being granted. She accepted the CEO's defence that he merely approved the payments "for processing" because the payments for processing after they had been prepared by the office manager and accountant. Once again, the arbitrator saw this as a demonstration of negligence on the part of the directors but not of any dishonest intent on the part of the respondents, whom she found genuinely believed they were entitled to the increase because it was awarded in previous years and it was provided for in the Remco document, albeit it "somewhat ambiguously". Remarkably, what the arbitrator failed to deal with at all is that, the October 2014 increase followed immediately after an increase the previous month of

9.5%, giving the respondents a total annual increase of 19% over the two months.

[15] Charge 1(d) concerned the receipt of a 13th cheque in December 2014. The arbitrator reiterated her reasoning that it would not make sense for the applicants to receive less than they previously did by excluding a 13th cheque and although they were not entitled to it, based on the wording of the documents their receipt of it was merely irresponsible and not dishonest.

[16] Charge 1(e) concerned the receipt of a 13th cheque in December 2013, which the arbitrator found was a continuation of previous annual bonuses and there was no dishonesty involved in their receipt of this payment.

[17] Charge 1(f) concerned the payment of a discretionary bonus for the period 1 May 2013 to 30 April 2014 which was paid in December 2014. The arbitrator found that although this was in conflict with the entitlements on the face of the documents and that the wrong months we used in the calculation, the applicants had simply relied on a calculation done by others and had accepted payment. Once again, she agreed that these payments ought to have been approved by the board, but could not find that the applicants had been dishonest. Lodewyk had conceded under cross-examination that the payment of this discretionary bonus in December 2014 calculated on the period January 2014 to November 2014 was irregular.

[18] The arbitrator's concluding findings are stated in summary, form paragraph 37 of her award:

> "Overall, my finding is that on strict reading of the contract of employment, which the respondent's representative adopted, the three directors were not entitled to a number payments they received. It is not in dispute that the applicants received and accepted these monies, and that Erasmus approved the payment. But they did not make the calculations or prepare the payments for processing. It is not difficult to conclude that this was wrong, but I cannot find it was dishonest. Dishonesty involves deceitful intent and this the employer has failed to prove."

[19] The arbitrator added that the respondents, were made executive directors without any experience and had relied heavily on the advice from the City of Cape Town and various other experts. Further, the documents on which

the contracts were based were confusing. She also accepted that they were grossly negligent in signing for receiving payments but they were never charged for negligence the employer had to stand or fall by this charge of dishonesty.

[20] The arbitrator also endorsed the respondent's contention that effectively the charges were simply used as a way to oust them by another clique. She found this claim was supported by the evidence that the new acting CEO's earnings were in line with Ncube's, instead of being reduced, which demonstrated that the board was selective when it came to applying the TCOE principle.

[21] Lastly, the arbitrator found that their dismissals were procedurally unfair because the chairperson had refused to recuse himself after they had laid a complaint against him at the Cape Bar Association concerning his alleged intoxication. The arbitrator was of the view that such a serious complaint against him was sufficient grounds for them to have a reasonable apprehension he might have been biased against them whether or not he was in fact biased. Even though he was appointed to conduct the hearing by the employer, the employer ought to have cancelled his appointment at that stage or agreed that he recuse himself. The arbitrator dismissed another procedural complaint about the chairperson proceeding with the enquiry in the respondents' absence when they failed to attend the hearing despite knowing that the enquiry would proceed on that day. On the basis of the chairperson's non-recusal, she found the dismissals were also procedurally unfair.

[22] Despite their dismissal being substantively and procedurally unfair the arbitrator awarded them 6 months remuneration as compensation rather than reinstating them. Her rationale for not reinstating them was as follows:

> The bottom line is I would be failing my duty to make an appropriate award if I were to reinstate the applicants. As executives, however they came to be appointed, they have responsibilities. By receiving monies to which they were not entitled, and failing to ensure board approval for a number of payments, they demonstrated incompetence and negligence.

In addition, in determining the relief, the arbitrator took into account that the respondents would not find equipment to work or similar salaries elsewhere as they were not qualified to do such work.

Grounds of review

[23] In the main, the applicant argues that on the evidence before her, the arbitrator could not have reasonably concluded that the respondents were not dishonest. In particular, the applicant submits that, in so far as it was alleged by the respondents that amendments they signed for in the contracts were to rectify an error in the contract, their conduct in doing so could not reasonably be construed as mere negligence, incompetence or poor corporate governance. In circumstances, where the respondents declined to refer the amendments back to the board, the applicant contends their conduct could only have been construed as dishonest. In addition, their conduct in receiving increases in two consecutive months amounting to 19% overall could not be in anyway construed as mere incompetence, negligence or poor corporate governance.

[24] It also takes issue with her finding that she could not consider the appropriateness of their dismissal for gross negligence because they were not dismissed for that reason, but could consider the fact that she found them grossly negligent as the principal reason for not reinstating them.

[25] The applicant further contends the arbitrator should not have allowed the admission of the evidence of the chairperson of Remco to the effect that there were errors in the Remco report, because the board had considered those recommendations and they had been translated into the respondent's contracts of employment. The applicant's representative at the arbitration hearing objected to the introduction of this evidence on the basis that it amounted to the admission of extraneous evidence as to the interpretation of the respondents' employment contracts and therefore disregarded the parole evidence rule. Moreover, the consequence of admitting that evidence materially affected the arbitrator's findings in deciding that the respondents were not guilty of dishonesty.

[26] Lastly, the applicant argues that the arbitrator erred in law in deciding, because she accepted that there were errors in the Remco report, that the contracts of employment entered into with the respondents were therefore flawed.

Evaluation

[27] Starting with the last mentioned ground first, the difficulties with the arbitrator's reasoning start with her glib acceptance that the REMCO document was contradictory, and further supposedly complicated by the board adopting some recommendations and not others. There was simply no basis except on the most superficial reading of the REMCO report for concluding that it was contradictory. It clearly distinguished items such as a transport allowance which fell outside the TCOE principle. The board's intentions were also clear enough. It was not obliged to adopt everything in the REMCO report and did not. The arbitrator appears implicitly to have adopted the view that when the contracts were drawn up, they should have represented some sort of amalgam of what was in the REMCO report and what the board approved, instead of taking as her starting point that anything in the contract which had not been approved by the board was at least potentially suspect.

[28] In presenting their case, the respondents had made much of the fact that the recommended TCOE remuneration figures for all three of them were not expressly adopted by the board and therefore not everything in the contracts had the board's imprimatur. But it is very obvious from the sentence preceding the board resolution adopting the COO's salary in August 2014 that the board only expressly referred to his remuneration because it represented a departure from the recommended determination of the CEO's and CFO's recommended salaries, which the board implicitly endorsed. Moreover, all of the respondents initially signed the contracts with those salaries in them.

[29] However, the arbitrator then came to the inexplicable conclusion that the contracts were 'flawed'. The legal nature of this conclusion is elusive, though it suggests a defect that required correction and appears to have provided the arbitrator with a springboard for affording the respondents'

extraordinary latitude in the interpretation and even amendment of their contracts. Firstly, it suffers from its own logical flaw, namely, merely because the board did not endorse all recommendations of Remco, it does not follow that the contracts which accorded with the board's resolutions had some inherent defect. The arbitrator should have accepted that unless there was some material difficulty in interpreting what should have been in the contracts because of an ambiguous reference in the board's resolutions to the REMCO report, the contracts as approved by the board set out the respondent's terms and conditions of remuneration.

[30] She ought then to have assessed if the additional remuneration actually received by the respondents, but not due to them under their contracts and which amounted to R 554, 533.95, R 463, 107.72 and R 357,831.38 for the CEO, CFO and COO respectively, could plausibly have been received in the naïve but *bona fide* belief they were probably entitled to them. In this regard, it is important to note that despite suggesting the contracts were flawed, the arbitrator nevertheless found that the respondents were not entitled to: the salary increase of approximately 9.5 % in October 2014 in the absence of board approval which they did not obtain; the payment of a thirteenth cheque in December 2014; the payment of discretionary bonuses in December 2014, in the absence of board approval and based on the wrong financial figure.

[31] Had the arbitrator not started with the notion of a flawed and unclear contract, but accepted that the terms of the contracts were clear, she would necessarily had to scrutinise the reasons advanced by the respondents for justifying their unquestioning receipt of the sums in question in that light. However, because she accepted the suggestion that the respondents' entitlements were blurry, it was easier to arrive at a conclusion that they were simply careless in checking on their entitlements and were misled into receiving enormous windfalls that were not due.

[32] This material misconstruction of the evidence relating to the REMCO report, the board resolutions and the contracts, impacts on the merits of the first ground of review. Erasmus as the CFO sought to rationalise the respondents' acceptance of the bounty that came their way as *bona fide*.

On the one hand, he portrayed himself and the other respondents as proverbial ‘babes’ in the corporate wood, who were not equipped to deal with the roles they found themselves in. He repeatedly and disingenuously avoided trying to use the word ‘approved’ for his authorisation of the expenditure in question. He expected the arbitrator to simply accept that if a request to ‘release’ funds came from the financial administrative staff, who assured him it was in order, he would simply sign off on the expenditure. Strangely, despite pleading ignorance of how the figures were arrived and that he took all requests for payments on trust, he doggedly defended every erroneous payment made in their favour as being aligned with their understanding of what they were entitled to. His spirited defence of every payment as justified, is hard to reconcile with a claim that they were simply passive recipients of such largesse, which they assumed was due to them because they were told by others that was the case. Moreover, Erasmus’s evasive testimony under cross-examination hardly conveyed the impression that he was unable to understand the terms of the contract, but rather that he was unwilling to accept the clear implications thereof.

[33] Certain of the transactions he approved, positively yelled out for an explanation how the respondents could possibly have believed they did not need board approval for them.

33.1 Firstly, they simply endorsed handwritten amendments to their contracts which they knew had taken some months’ to finalise and which altered the remuneration the board had approved, particularly in circumstances where the original contracts had only very recently been concluded. Those amendments entailed a significant alteration of the basic remuneration of over 8% of the TCOE package. The only rationale Erasmus could come up with for this adjustment was that it was to include SARBAC increases but he could not explain why the percentage did not equate to the SARBAC increase. He could offer no credible explanation based on the contract why they should have got that increase and sedulously avoided conceding that neither clauses 8.3 nor 8.4 of the contract had been met, which were both pre-requisites for any adjustment of the their TCOE packages. It is extremely difficult to understand how the arbitrator could have

understood that the amendment of their contracts without so much as a nod to the rest of the board, given the very clear conditions in clauses 8.3 and 8.4, could have been done in good faith.

33.2 Secondly, quite apart from the fact that neither the board resolutions nor the contracts reflected their entitlement to the SARBAC increases as recommended in the REMCO report and despite clauses 8.3 and 8.4 of the contracts, the arbitrator accepted that they did not act in bad faith in receiving an October increase after receiving one the previous month adding up to a nearly 19 % increase on the their basic remuneration without an involvement of the board.

33.3 Further, it was evident Erasmus was well aware of the difference between the thirteenth cheque and discretionary bonus from an email he sent to one of the financial staff. Despite the discretionary nature of the performance bonus and the fact that it was clearly something for the Company to decide to award, this too was simply accepted as having been granted without any board resolution, and even though it entailed the payment of amounts close to three months' salary each. Only the most selective reading of the contractual provisions relating to the payment of this bonus could have led any of the respondents to believe that it was a matter which did not require the Company to deliberate on first and formally decide on.

[34] In short, only on a most credulous evaluation of the evidence, could the arbitrator have concluded that the respondents' acceptance of unauthorised payments which raised their TCOE remuneration by at least 30 % above what the board approved in the same year they had agreed to the original TCOE was entirely *bona fide* and received in the genuine belief that none of these payments required board approval despite the board deliberations on the original TCOE. The same goes for the arbitrator blithely accepting the *bona fides* of the respondents in accepting payment of the discretionary bonus.

[35] In the circumstances, I am satisfied that even if it might not have been a reviewable irregularity for the arbitrator to admit evidence of the REMCO report, there is sufficient reason on the other grounds of review to find that

no reasonable arbitrator could have concluded that the respondents were *bona fide* in accepting the payments they did, solely on the supposed say so, of financial staff. Accordingly, she could not reasonably have found they were not guilty of dishonesty.

[36] The applicant also challenges the arbitrator's finding that their dismissal was procedurally unfair based on the failure of the chairperson to recuse himself after the disciplinary hearing had endured for nearly a month, but when a complaint was lodged against him based on his alleged intoxication on one occasion near the end of the enquiry. I cannot say the arbitrator's conclusion that he ought to have recused himself in the circumstances, even if there may have been an element of opportunism in lodging the complaint, and that it could be construed as procedurally unfair that he did not do so. Nonetheless, because of my view on the substantive fairness of the respondents' dismissals, I do not think any compensation is warranted for such unfairness.

Substituted finding and costs

[37] In the light of the above, I am satisfied that the respondents' were not entitled to the various payments mentioned in the charges for which they were dismissed and that overall, their conduct in receiving all those payments was dishonest and warranted their dismissal. Insofar as the finding of procedural unfairness stands, it does not warrant any compensation in my view given the extent to which they were unlawfully enriched by their dishonest conduct.

[38] On the question of costs, I am inclined to award costs against the respondents, but in view of the fact that they were understandably defending an award in their favour, I have declined to do so.

Order

[1] The arbitration award of the second respondent dated 13 November 2016 issued under case number WECT 11309-16, is reviewed and set aside, save that her finding that the third, fourth and fifth respondents dismissals' were procedurally unfair is upheld.

[2] The second respondent's finding that the third, fourth and fifth respondents' dismissals were substantively unfair is substituted with a finding that their dismissals were substantively fair.

[3] No order is made as to costs.

_____

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	C de Kock instructed by Carelse Khan Attorneys
RESPONDENT:	L Ackermann instructed by Bernadt, Vukic, Potash & Getz.