Not reportable

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case No: C119/2019

In the matter between:

LUDICK FINANCIAL SERVICES **First Applicant**

And

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER L MARTIN (*N.O.*) **Second Respondent**

J [....] J [....] N [....] **Third Respondent**

Date of Set Down: 2 September 2021
Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 18 November 2022.

Summary: (Review – Arbitrator failing to deal with material evidence – arbitrator misdirecting himself by fashioning arguments not advanced by the employee – Award one that no reasonable arbitrator could have arrived at on the evidence - Award set aside and substituted)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an opposed review application of an award handed down by the second respondent ('the arbitrator') on 6 February 2019 in which the dismissal of the third respondent, Mr J N [....] ('N [....] '), was found to have been procedurally and substantively unfair.

[2] N [....] worked for the applicant ('LFS') as a junior underwriter from 8 August 2016 until 5 July 2018 when he was dismissed. At the time of his dismissal, N [....] earned R12,100.00 per month. N [....] was dismissed after a disciplinary enquiry; in which he was found guilty of on two of four charges, namely the following:

> 2.1 Disrespectful, aggressive and insolent behaviour towards his manager and colleagues on 3 and 18 May.
>
> 2.2 Sending a fraudulent document to Liberty Life.

[3] The arbitrator found that the dismissal of N [....] was both substantively and procedurally unfair. He ordered that LFS pay N [....] R144,000.00 in compensation, the equivalent of 12 months' salary. N [....] had asked for relief in the form of reinstatement, but the arbitrator decided against such relief because the circumstances surrounding his dismissal would have made a continued workplace relationship intolerable. The applicant ('LFS') wishes to review and set aside the arbitration award.

[4] Owing to the prevailing Covid-19 pandemic, argument was presented in a virtual hearing using Zoom.

Outline of incidents in which the alleged misconduct arose

[5] It is common cause that on 3 May 2018, Ms A van Dyk ('van Dyk'), the office manager, called N [....] into her office. The applicant alleges the following:

5.1 A heated exchange took place between N [....] and van Dyk.

5.2 N [....] was allegedly aggressive and threatening. It was a matter of dispute if he leaned over van Dyk's desk and pointed his finger at her during this interaction.

5.3 Van Dyk testified she felt threatened by this exchange.

[6] Van Dyk had called him in to her office because she perceived his attitude had changed and she wanted to find out what was wrong. N [....] testified that he kept to himself after an incident on 23 April. On that day, van Dyk had expressed her irritation with N [....] for being out of the office for about three hours when he had been performing a work related errand and another personal errand for her. On 3 May, he demanded an apology from her particularly because she had exclaimed in a WhatsApp to him at the time of his absence, "Fuck!!!!! You almost 2 and a half hours. Come on man." It seems to have been common cause that casual swearing was not unusual in the office environment. He felt he was unfairly criticised because van Dyk knew he was also on a personal errand for her. He felt victimised for this and that it justified his subsequent interactions with his managers.

[7] Ms M Baard ('Baard'), who was the claims manager and N [....] 's line manager, heard N [....] screaming and shouting in van Dyk's office and went to investigate. Her evidence was that he was swearing and pointing a finger in van Dyk's face. She did not believe the swearing was directed at van Dyk as such. It seems N [....] was repeatedly shouting "Fuck you!, Fuck you Tino!", a seeming reference to van Dyk's WhatsApp rebuke directed at him. N [....] claimed he was simply speaking loudly. Baard said she tried to calm him down and told him he could not address a manager like that. Eventually Baard said she had to leave van Dyk's office because she could not tolerate his aggression. Van Dyk then recalled her to

her office because she claimed N [....] had just accused her (van Dyk) of swearing at him during their previous interaction. Baard returned to van Dyk's office and confirmed that she never heard van Dyk swearing at N [....] . He was the one who was swearing. Ultimately, van Dyk asked N [....] to leave her office because she could not deal with him any longer.

[8] The same day, at N [....] 's request, Ludick-Marx called him, Baard and van Dyk to a meeting. Ms C Ludick Marx was, LFS's CEO and director, He was still aggrieved about the criticism of his prolonged absence from the office. Ludick-Marx also asked what happened in van Dyk's office. N [....] had approached the CEO because he was dissatisfied with van Dyk's criticism of his absence on 23 April. After hearing about the incident Ludick Marx told N [....] off about the way he had addressed van Dyk and cautioned him about how he should behave to superiors. When he left the CEO's office he slammed the door hard.

[9] The next events relating to the charges against N [....] took place on 18 May 2018. There were two instances that day when van Dyk told N [....] off for being on his phone. When van Dyk raised the issue with him, at first challenged why he could not be on it and later denied he was using it. She claimed he slammed his phone down on the desk on the second occasion. He did not deny she addressed him on this, but disputed that he was on his phone. N [....] also refused to sign and hand in a FAIS document all staff had to complete, ostensibly because he wanted to get a lawyer to look at it first and said he would hand it in the next day. These interactions made van Dyk feel she could not approach him without receiving a hostile response from him and she felt threatened by his behaviour. She claimed that he was singing 'victimisation in his chops' and dancing around the office. N [....] never directly denied this.

[10] Van Dyk reported the situation Ludick-Marx, who sent an email to N [....] , informing him that he had been suspended and that he must leave the premises. Van Dyk testified he deliberately took his time when she asked him to read the email. When N [....] was asked to leave the office, he sang, danced, came within close proximity of van Dyk and swore at her to get out of the way. He demonstratively hugged staff members before leaving, but not van Dyk or Baard. He does not deny

standing up close to her, but denies swearing at her to get out of the way: he testified he simply asked her politely to move out of his way. He claimed two other witnesses in the internal enquiry did not say they saw him dancing, but they were not called to testify at the arbitration to corroborate his version.

[11] Baard confirmed that part of van Dyk's account, which she personally witnessed. She came out of her office because she saw N [....] standing close up against van Dyk. She said that he was dancing in front of van Dyk, and taunting her saying 'Is this the Tino you want?'. Baard said she had never seen anything like his behaviour. She said she could see van Dyk was still and fearful he might do something. Baard told him to take the printed email of his suspension and leave the office. On his way out he brushed close to van Dyk and accused her of touching him. She immediately denied touching him. He was recording this on his phone at the time. Baard saw the interaction and her impression was he deliberately brushed up close to van Dyk so he could record his allegation that she touched him. When cross-examining Baard, he claimed that van Dyk had pushed him twice in the back on his way out, out of sight of everyone, but he never put this to van Dyk herself.

[12] Van Dyk, Baard and Ludick-Marx all claimed they felt threatened and intimidated by N [....] 's aggressive behaviour that day.

[13] In relation to the second charge, it was common cause that, in his CV which he sent to Liberty Life, N [....] falsely referred to two of his financial adviser colleagues, Ms Panday and Ms Fakir, as the admin/underwriting manager and claims manager respectively. Ludick-Marx testified that they were both junior employees with no management status. It is common cause, that after submitting the CV to Liberty Life, N [....] asked both of them to accept his descriptions of them if anyone asked. N [....] expressly acknowledged he could not use his actual line managers, and justified the titles he attributed to Panday and Fakir on the basis that they effectively 'managed' their own portfolios, a claim which Ludick-Marx disputed.

The award

[14] On the alleged disrespectful, aggressive and insolent behaviour towards his manager and colleagues on 3 and 18 May, the arbitrator's reasoning was the following:

> 14.1 An audio clip that N [....] played of the conversation between himself and van Dyk in her office on 3 May 2018 did not demonstrate aggression on his part, but rather disappointment and anxiety in having to defend himself against accusations that he took too long while running her personal errands.
>
> 14.2 The fact that van Dyk and Baard did not mention N [....] leaning over van Dyk's desk and pointing his finger in her face during the meeting later with Ludick-Marx on 3 May shows that it probably did not occur.
>
> 14.3 Marx did not afford N [....] an opportunity to state his side of the story at the meeting in her office on 3 May. She also disclosed his HIV status to van Dyk and Baard in that meeting, without his permission. This resulted in frustration and justified N [....] slamming the door when he left her office.
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> 14.4 After N [....] received the letter of suspension on 18 May, the evidence suggested that N [....] 's behaviour was 'arrogant' rather than disrespectful, insolent or aggressive. The arbitrator relied on the testimony of a colleague of N [....] , Mr K Willemse ('Willemse'), to reach this conclusion. Willems did not give evidence at the arbitration, but only did so in the disciplinary enquiry, though his written statement made shortly after the incidents was tendered as evidence by N [....] . The arbitrator also said that N [....] 's display of 'bravado' was justified due to the unfair manner in which he had been treated by LFS. N [....] was treated unfairly because Ludick-Marx had disclosed N [....] 's HIV negative status without his consent to his colleagues and his mother. Ludick-Marx and van Dyk also went out of their way to go to N [....] 's house to get a medical certificate from him when he reported he was booked off work but did not provide the doctor's certificate.

14.5 N [....] showed at arbitration that he does not seem to be an aggressive or violent person and raised his voice out of frustration rather than anger. He proved that the ethos of the office and the nature of the relationship between himself and management was such that he was not acting in an aggressive, insolent or disrespectful manner on the two days in question.

14.6 Consequently, the arbitrator concluded that N [....] was not disrespectful, insolent or aggressive towards his colleagues.

[15] On the allegedly fraudulent CV sent to Liberty Life, the arbitrator reasoned as follows:

15.1 The fact that N [....] referred to Panday and Fakir as ‘managers’ on his CV was untruthful, but was not necessarily designed to deceive the reader into believing that the information could be relied on. N [....] did not have the intent to defraud LFS nor to bring it into disrepute when he stated that Panday and Fakir were managers. There was no evidence to suggest that this brought LFS into disrepute, and no adverse consequences were suffered by anyone as a result.

15.2 N [....] had good reason to not use LFS’s managers as referees because he was treated unfairly by them. He did not do this to gain an advantage, but rather to avoid any unfair disadvantage he might attract by placing his real managers as referees. N [....] ’s conduct in citing Panday and Fakir as managers was therefore justified and did not warrant dismissal.

[16] The arbitrator concluded that in the circumstances, the dismissal of N [....] was substantively unfair.

[17] On the question of procedural fairness, the arbitrator concluded that:

17.1 The evidence shows that N [....] was afforded an opportunity to state his case and to call and cross-examine witnesses in the disciplinary hearing.

17.2 However, Neethling required N [....] to sign a particular part of the written record of his testimony, which demonstrated bias.

The arbitrator consequently found that the dismissal of N [....] was procedurally unfair.

[18] As the arbitrator was satisfied that a continued employment relationship between LFS and N [....] would be intolerable he ordered LFS to pay him R144,000.00 as compensation, a sum to twelve months' salary. In making this order, the arbitrator considered the following; the dismissal was substantively and procedurally unfair, seven months had passed since the dismissal, N [....] is young and should not struggle to find other work and that he probably will have difficulty finding employment in the financial industry.

The review

The grounds of review

[19] According to LFS, the flaws in the arbitrator's reasoning led to him to reach unsustainable findings which justified setting the award aside. Those flaws can be summarised as follows:

19.1 The commissioner simply disregarded much of the evidence presented by LFS, in particular the testimony of most of them that they felt threatened and intimidated by the level of aggression that N [....] had displayed in the office.

19.2 The commissioner fabricated a justification for N [....] 's behaviour which he had not raised, finding that his behaviour was arrogant and anxious due to unfair treatment rather than aggressive. This amounts to misconduct by the commissioner.

19.3 The arbitrator made factual findings on issues that were not raised in evidence. Thus, for example the arbitrator found, based on a selective recording of the latter part of N [....] 's exchange with van Dyk on 3 May, that

he was speaking loudly to van Dyk because he was attempting to defend himself against what he was accused of, whereas in fact it was he who alleged van Dyk swore at him and she called Baard back to defend herself.

19.4 At times, the arbitrator had displayed clear bias against LFS in his assessment of evidence. For example, the arbitrator characterised his behaviour as mere bravado, whereas LFS's witnesses had testified that on 18 May, when he was suspended, he was aggressive and started dancing and behaving tauntingly. He also invaded van Dyk's personal space by coming to stand very close in front of her. Instead the arbitrator chose to rely on the evidence of Willemse, who only testified at the disciplinary enquiry, and even then was highly selective in what he chose to consider relevant in Willemse's written statement.

19.5 The commissioner excused N [....] 's dishonesty in relation to the misrepresentations he made in his CV. This was irrational and wrong in law. In the CV that N [....] submitted for a job application with Liberty Life he had cited two other staff as referees, referring to them as his Administration Manager and Claims Manager respectively. He sent a WhatsApp message advising that they should acknowledge the managerial designation he had attributed to him if anyone called.

19.6 The commissioner was wrong in law when he concluded that because Neethling (the chairperson of the disciplinary hearing) had asked N [....] to sign next to an admission he had made, that he was biased and so the dismissal was procedurally unfair. The applicant claims this does not indicate bias because Neethling always required employees to sign on the record next to an admission made by them.

19.7 If the commissioner had not made the errors above, he would have concluded that N [....] was disrespectful, insolent and aggressive on 3 and 18 May and that this insolence was serious and repetitive. In consequence, the commissioner would also have found that the decision to dismiss N [....] was substantively fair.

[20] In the event the court does not set aside the arbitrator's findings of substantive and procedural unfairness, LFS argues that an award of 12 months' salary is excessive as it is wholly out of proportion with N [....] 's period of employment.

Legal principles

[21] It is now trite that the primary question for determination on review is: Was the decision one that a reasonable commissioner could not reach?[1] The question is not whether the decision was right or wrong, but rather whether it was so unreasonable it cannot be sustained on the evidence.

[22] The court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 28 ILJ 964 (LAC) said:

> "[98] It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review."

[23] S145 of the Labour Relations Act (LRA) states that any party in an arbitration who alleges a defect in the arbitration proceedings may apply to the Labour Court for an order setting that award aside. S145(2) elaborates on what a 'defect' means. N [....] argues that LFS is really advancing grounds of appeal rather than grounds of review. He contends that LFS's founding and supplementary affidavits do not

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[1] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC).

expressly refer to any of the defects set out in s145(2) of the Labour Relations Act (LRA), namely they do not contain allegations that the arbitrator committed misconduct, a gross irregularity or exceeded his powers. Relying on the case of *Lekota v First National Bank of SA Ltd* (1998) JOL 2743 (LC), the third respondent contends that this makes the review a materially defective one. However, the court in *Lekota* did not hold that a party reviewing an arbitration award has to explicitly state in the papers that the commissioner committed one of the defects in s145(2). For example, an allegation in the papers that the arbitrator was biased is tantamount to claiming that the arbitrator committed misconduct. Furthermore, in *Sidumo & Another v Rustenburg Platinum Mines & Others* (2007) 12 BLLR 1097 (CC), the court held that s145 of the LRA is now suffused by the standard of reasonableness. The applicant did allege in its papers that the arbitration award was not one that a reasonable arbitrator would have made, and so the review was not materially defective.

Evaluation

[24] The selective approach of the arbitrator to the evidence before him is notable. On any reading of the evidence of the employer's witnesses, and even taking account the written statement of Willemse, which the arbitrator found to be exculpatory, it is clear that N [....] behaved in a hostile and most disrespectful way towards van Dyk when he was suspended on 18 May. His openly taunting behaviour toward her in front of other staff and going to stand right up against her, then attempting to create the impression she had touched him was demeaning of her authority and threatening. Remarkably, the commissioner also ignored a WhatsApp message in which N [....] stated that he wanted to be fired which strongly suggests he was hoping to provoke LFS into dismissing him[2].

[25] The arbitrator simply did not make any serious attempt to grapple with this evidence. Moreover, even if account could be taken of Willemse's written statement, which N [....] placed reliance on, on the whole it tended to corroborate important

[2] [1] On 9 May 2018, Napoleon sent a WhatsApp message that said the following:

"She wont ask me coz she knows im gana tell her junk to her face! Im legit not scared anymore coz i want them to fire me guys!! Thats all im saying!!"

aspects of the oral evidence of the employer's witnesses about this incident. The applicant alleges that the commissioner failed to properly consider all the evidence presented by LFS when deciding if N [....] was indeed disrespectful, insolent and aggressive. It is also extraordinary that the arbitrator did not even consider that this took place after N [....] had already unequivocally stated in WhatsApp messages on 9 May 2018 that he wanted to be fired.

[26] Similarly, his confrontation with van Dyk in her office on 3 May, was loud enough to be heard from Baard's office. Baard could not cope with the way he was behaving in van Dyk's office and felt compelled to leave. Ultimately, van Dyk could not continue to take it either, causing her to tell him to leave her office. Solely on the basis that there was no evidence that Baard or van Dyk had not reported the finger pointing allegation to Ludick-Marx during the subsequent meeting called by the latter at N [....] 's instance, the arbitrator discounted the probability of their evidence on that issue. It is debatable whether this was sufficient reason to disbelieve them on the probabilities, given other evidence of N [....] 's physically demonstrative behaviour and the undisputed account of his highly agitated state on 3 May and that it was not disputed that van Dyk could not get a word in edgeways when he was haranguing her about the incident on 23 April. However, even if the arbitrator's discounting of the evidence of his alleged finger pointing should be accepted on the basis that it was a tenable finding, if not the most plausible one, the remaining evidence of N [....] 's disturbing behaviour on those days was simply overlooked or glossed over. The arbitrator plainly chose not to grapple with the other evidence in any meaningful way.

[27] In light of the arbitrator's failure to grapple with a large portion of the material evidence which pointed to the conclusion that N [....] was insolent, aggressive and disrespectful, it is apposite to recall what the Labour Appeal Court said in *Maepe v Commission for Conciliation, Mediation & Arbitration & another* (2008) 29 *ILJ* 2189 (LAC) :

> "[8] … Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other

of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account."

[28] The arbitrator impermissibly sought a justification for N [....] 's hostile behaviour towards van Dyk in his sense of grievance about the incident on 23 April and other allegedly unfair conduct of management. That he had a sense of being aggrieved there is no doubt, but he never claimed that this is why he behaved in the manner complained of. N [....] 's own defence to the claims of aggressive conduct complained of was to deny it took place or to minimise it and that is what the arbitrator should have focussed on. N [....] had not admitted the behaviour he was accused of but sought to justify it. An arbitrator should avoid fashioning a case for a party which the party has not advanced.[3] N [....] 's defence of the arbitrator's reasoning is that the arbitrator was not providing him with a defence, but simply that the arbitrator was determining the true nature of his behaviour. There is some merit in that contention, but it remains true that the arbitrator adopted this as exculpatory or mitigating behaviour, which N [....] did not admit had taken place and did not even advance these arguments in mitigation, in the event he was found guilty by the arbitrator.

[29] In finding that N [....] 's conduct on 3 and 18 May was merely arrogant the arbitrator plainly did not give serious regard to the evidence of van Dyk or Baard. Elsewhere he characterises N [....] 's conduct as 'bravado' rather than aggression. Why displays of 'arrogance' or 'bravado' towards line managers in the presence of other staff is somehow excusable behaviour was not explained by the arbitrator. In any event, acts of 'bravado' are not devoid of threatening connotations

[30] The arbitrator's treatment of N [....] 's misrepresentation of colleagues as managers with specific responsibilities borders on sophistry. It is difficult to interpret

[3] See *Rustenburg Platinum Mines Ltd v CCMA* (2007) 28 ILJ 1114 (LC)

his analysis as anything but a somewhat contrived attempt to diminish the seriousness of the misrepresentation.

[31] It is obvious that if N [....] made the representation to 'avoid any unfair disadvantage' the aim of making the representation was to give Liberty Life a false impression that any references obtained from these colleagues would in fact be references from managers who dealt with him in the course of their work and could vouch for his performance. He asked his colleagues to go along with the deception only after he had already submitted the CV with the misleading description of their jobs. What the arbitrator sidesteps is the inescapable inference that the representation could only have been made with a view to misleading a prospective employer about the identity of the workplace superiors who could comment on his performance and conduct. Fraud cannot be justified on the basis that you might attract a disadvantage by being honest, even if one believes the disadvantage is unfair. The arbitrator's rationalisation of this demonstrated an unacceptable degree of bias on his part.

[32] The commissioner also concluded that the dismissal was procedurally unfair because Neethling asked N [....] to sign next to an admission made during the disciplinary enquiry, and this indicated bias. The commissioner did not explain why he reached this conclusion, despite Neethling also acquitting N [....] of two of the four charges he faced and being granted an appeal. Although commissioners are not required to give detailed reasons for their decisions, they must not leave a reviewing court unaware of why a decision was made. The applicant argues that it could not be construed as indicating bias on Neethling's part as he always required individuals to sign next to admissions made in the course of disciplinary hearings. It was apparent that Neethling took care to confirm N [....] was willing to confirm the concession The procedure adopted by Neethling is somewhat unusual and might be perceived as unduly interrogatory in character. As long as an even handed approach is adopted to concessions made by both parties such a practice it would not be beyond the bounds of the fair conduct of the 'investigation' that an employer must conduct in terms of Item 4(1) of Schedule 8 to the LRA. In any case, the arbitrator should have focussed on whether N [....] had a fair opportunity to answer to the charges before him in deciding if his dismissal was procedurally fair.

[33] The commissioner therefore failed to apply his mind to all the evidence presented. Had he done so he could not have avoided finding N [....] guilty on both charges, and that he was not deprived of the opportunity to a fair hearing. Consequently, the award stands to be set aside.

[34] Given the amount of time that has passed since the award was handed down, it would not be appropriate to refer the matter back to the CCMA for arbitration.

The substantive and procedural fairness of the dismissal

[35] In the course of the analysis above, the substantive and procedural fairness of N [....] 's dismissal have to a large extend already been canvassed in so far as N [....] 's guilt on the charges and procedural fairness of his dismissal are concerned. In the light of that, I am satisfied on a balance of probabilities that he was guilty of the charges for which he was dismissed and taking into consideration the entire internal disciplinary proceedings, his dismissal was not procedurally unfair.

[36] It remains to determine if his dismissal was an appropriate sanction for the misconduct in question. In *Environserve Waste Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2016] ZALCPE 23 (15 November 2016), the court said the following:

> "[15] It is accepted that the offence of mere insolence is not in itself sufficient to result in a dismissal. What is defined as 'mere insolence' will obviously depend on the circumstances and the conduct in question, and its effects. However, for insolence to justify a dismissal, it must by all accounts be wilful and serious, with the result that the employment relationship irretrievably breaks down. Examples of gross insolence include some as already indicated above, and may extent to inter alia, verbal abuse and/or tirades which may be laced with crass profanities, making personal or crude insults or gestures toward a superior, coupled with violent conduct in some instances, or even making physical or other threats."

[37] N [....] 's gross insolence *in casu*, which was also clearly intended to undermine van Dyk in particular, was strongly insubordinate in character. His antics were either within earshot of, or in the presence of other more junior staff, which is an aggravating factor. It is true that van Dyk had sworn once in her WhatsApp message to him expressing her irritation with his whereabouts on 23 April. It was inappropriate, though it was in a private communication to him.as coupled with physically intimidation. N [....] was aggressive, threatening and disrespectful to senior management. This means that the misconduct was serious enough that the continued employment relationship became intolerable.

[38] During the meeting with Ludick-Marx, Baard and van Dyk on 3 May, it was apparent that Ludick-Marx tried to persuade N [....] not to be aggressive or disrespectful towards his line managers. That discussion did not prevent his aggressive response to van Dyk when she complained that he was on his phone despite being expressly told he should not be. His bizarre antics on being suspended confirmed he was set on a confrontational path with his superiors and tended to confirm he was hoping to prompt management to dismiss him. There is no evidence he regretted any of his conduct even by the time the arbitration took place. In the circumstances, I am satisfied that the prospect of corrective disciplinary measures being applied was untenable and that the employment relationship had irreparably broken down.

[39] Consequently, I am satisfied his dismissal was also substantively fair.

Order

[40] The arbitration award issued by the Second Respondent under case number WECT13232-18 on 6 February 2019 is reviewed and set aside and substituted with the following order:

40.1 The dismissal of the employee was substantively fair.

40.2 The dismissal of the employee was procedurally fair.

[41] There is no order as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Appearances :

For the Applicant	L Myburgh instructed by Greenberg and Associates
For the Third Respondent	C Sauls of Herold Gie Attorneys