THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 755 / 14

In the matter between:

PSA obo ANDREW RAE **Applicant**

and

THE GENERAL PUBLIC SERVICES SECTORAL BARGAINING COUNCIL **First Respondent**

M J MATLALA N.O. (AS ARBITRATOR) **Second Respondent**

THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION **Third Respondent**

Heard: **14 September 2016**

Delivered: **6 April 2017**

Summary: Bargaining council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA – application of review test set out – determinations of arbitrator compared with evidence on record – commissioner's decision irregular and unsustainable – award reviewed and set aside

Misconduct – inconsistency – principles considered – dismissal of employee contrary to requirement of consistency – dismissal unfair

Misconduct – issue of appropriate sanction – principles considered – progressive discipline justified – dismissal inappropriate sanction and unfair – dismissal of employee substantively unfair

Practice and procedure – award reviewed and set aside – appropriate relief considered – Section 193(2) considered – exceptions do not apply – reinstatement awarded

Practice and procedure – determination of back pay in the case of reinstatement – principles considered – back pay limited

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JUDGMENT

SNYMAN, AJ

Introduction

[1] If this was not an actual case that came before this Court, one could be forgiven for believing it was a tale coming straight out of a Hollywood script – there is a diplomat in Paris, an embassy function, followed by a night of partying and drinking, that ended in the body of a deceased young woman being found in the apartment of the diplomat. But it was real life, with the incident featuring in the foreign and local press, and resulted in the diplomat losing his job and ending his career. This tragic story then came before a bargaining council arbitrator to decide the fairness of the dismissal of the diplomat.

[2] The second respondent was the arbitrator appointed by the General Public Service Sectoral Bargaining Council (the first respondent) to decide the fairness of the dismissal of Mr Andrew Rae, the diplomat concerned and the individual applicant in this matter. As will be dealt with hereunder, most of the factual matrix in this matter was common cause, and what the second respondent was called on to decide was whether dismissal of the individual applicant was an appropriate sanction. The arbitration commenced on 10

October 2013, continued over a number of days over the next two months, and finally concluded on 18 December 2013.

[3] In an arbitration awarded dated 24 February 2014, which was handed down on 7 March 2014, the second respondent upheld the dismissal of the individual applicant, concluding that dismissal was indeed a fair sanction. It is this arbitration award that now forms the subject matter of the review application brought to the Labour Court by the applicant, in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[4] The applicant's review application was filed on 15 April 2014, which was 1(one) day outside the 6(six) weeks' time limit under Section 145[2], within which to bring a review application. The applicant applied for condonation for such late review application, and in an order dated 8 June 2016, Van Niekerk J granted the application for condonation and ordered that the applicant's review application be set down for hearing on the merits thereof. The applicant's review application is therefore properly before this Court for determination, which I will now proceed doing, by first setting out the applicable factual matrix.

The relevant background

[5] The individual applicant was a diplomat in the employ of the third respondent, commencing employment in August 2007. On 14 February 2012, the individual applicant received his first foreign posting to the South African Embassy in Paris, as First Secretary of the Director of the UNESCO desk. The individual applicant was dismissed on 6 May 2013, on two charges of misconduct relating to what was in essence breaching the third respondent's rules and bringing the diplomatic service into disrepute.

[6] The events giving rise to this matter happened on 31 August and 1 September 2012. On the afternoon of 31 August 2012, a social event was held at the Embassy. The individual applicant attended the event where he had a few beers. At about 18h00, the individual applicant and some of his friends left the

[1] Act 66 of 1995.
[2] Section 145(1)(a) reads: 'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award - (a) within six weeks of the date that the award was served on the applicant …'

event at the Embassy for a night on the town, at a restaurant called Tribecca, where they had drinks until about 22h00. The individual applicant's friends then went to a housewarming party at another apartment, but the individual applicant decided not to join them and left to his own apartment.

[7] The individual applicant did not stay in his own apartment for long. He stated he was bored, and he decided to go out again and went to a night club called Le Standard, fairly close to the apartment. The individual applicant found several of his friends at the club, and they continued drinking. In the course of the night at the club, a French woman, one Victoria, joined him and his friends. The party continued at the club until about 03h00, when the individual applicant then invited five guests, which included his friends and Victoria, to his apartment for further drinks. They continued drinking to 09h00 that morning, and the individual applicant passed out at about 09h30.

[8] The individual applicant awoke at about 19h00 that Saturday evening, 1 September 2012. He noticed Victoria lying asleep in the spare bedroom, and he did not know when she went to sleep. Two of the other guests were also still in the apartment, listening to music, and waiting for the individual applicant to let them out. When these two guests tried to wake Victoria, they were unable to do so as she was not breathing.

[9] The paramedics were then summoned, who unsuccessfully tried to revive Victoria, and pronounced her deceased on the scene. The Police were then summoned, and an investigation then followed. The official cause of death of Victoria was found to be "pulmonary oedema', being excessive fluid on the lungs.

[10] The incident came to the attention of the French press. An article appeared in the Le Parisien on 3 September 2012. It mentioned that a 26 year old woman was found dead after a late night party, in the apartment of the First Secretary. The article described the 'diplomat' as having co-operated with the investigation, and a post mortem would follow. The Le Figaro published a similar article also on 3 September 2012. A Metrofrance.com article followed on 5 September 2012, and added that a toxicology report showed drugs in the woman's system and she had died of pulmonary oedema. None of these articles implicated the individual applicant in any wrongdoing or in fact having

been intoxicated. The local South African press also then picked up on the story, with similar articles appearing in a number of publications.

[11] The third respondent has a code of conduct in place that regulates the conduct of its overseas diplomats ('the Code'). Clause C5.2 provides that an employee must act responsibly as far as the use of alcoholic beverages are concerned. Clause 4.5.2 of the Code provides that even if an employee is off duty, the employee remains a public servant and as such must behave responsibly so as to not embarrass the public service.

[12] Takalani Netshitenshe (Netshitenzhe'), the Ambassador: Budapest, was tasked to investigate the entire matter. He interviewed a variety of parties, conducted an in loco inspection, and filed a formal report dated 15 October 2012. He found that there was no evidence of any kind that the individual applicant was involved in drug use or supplied any drugs to his friends or received drugs from them. He also did not find that the individual applicant was responsible for the death of Victoria. But Netshitenshe did accept that the individual applicant behaved irresponsibly, did breach the Code, and in bringing the guests to his apartment under the circumstances that he did he breached security. Netshitenshe made a number of recommendations, which included that disciplinary action be taken against the individual applicant, but also that the third respondent needed to address what seemed to be a larger problem that existed with regard to conduct of diplomats abroad, in the same context as the incident concerning the individual applicant.

[13] The third respondent then decided to pursue disciplinary charges against the individual applicant. In a charge sheet dated 7 December 2012, three charges were tabled against the individual applicant. The first charge was that the individual applicant acted in an irresponsible manner insofar as the use of alcohol was concerned and thus he violated clause C5.2 of the Code. The second charge related to the conduct of the individual applicant bringing the third respondent into disrepute, in that he excessively consumed alcohol to the extent of becoming unconscious, which was widely publicized in the media. The third charge was a gross negligence charge, resulting from the fact he had passed out from excessive alcohol consumption.

[14] The disciplinary hearing then took place at the Embassy in Paris from 18 to 20 February 2013. It was presided over by another Ambassador, being Ambassador George Johannes ('Johannes'). In a written finding dated 18 March 2013, Johannes found the individual applicant guilty of charges 1, 2 and 3 against him, and imposed the sanction that his security clearance be revoked, and that he be recalled back to the country and be dismissed upon return. What is however apparent from the finding of Johannes is that his decision to dismiss was primarily focussed on the nature of the misconduct itself, and paid very little attention to the issue of an appropriate sanction *per se*.

[15] The individual applicant appealed his dismissal on 4 April 2013. In a written finding dated 2 May 2013, the appeal chairperson upheld the findings of guilty of the individual applicant on the first and second charges, but overturned the finding of guilty on the third charge by concluding that gross negligence had not been proven. The appeal chairperson also dealt with the issue of an appropriate sanction, and set aside the revoking of the security clearance of the individual applicant, reinstating it. But the appeal chairperson upheld the sanction of the recall of the individual applicant, followed by his dismissal. The finding was received by the individual applicant on 6 May 2013, which was then the date of his dismissal.

[16] The applicant then challenged the dismissal of the individual applicant as an unfair dismissal dispute, by way of a referral to the first respondent on 24 May 2013, and, as stated above, this dispute ultimately came before the second respondent for arbitration. The parties concluded a pre-arbitration minute in the course of the arbitration proceedings. In particular, and in terms of this pre-arbitration minute, the individual applicant admitted guilt to all the 'elements' of charges 1 and 2 against him, and all the second respondent was called on to decide was whether dismissal was an appropriate sanction for his misconduct on these charges.

[17] Following the conclusion of the arbitration proceedings, and in the arbitration award referred to above, the second respondent upheld the dismissal of the individual applicant as being fair. This is the conclusion that is challenged by the applicant on review.

The test for review

[18] The appropriate test for review is settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] Navsa AJ held that the standards as contemplated by Section 33 of the Constitution[4] are in essence to be blended into the review grounds in Section 145(2) of the LRA, and remarked that 'the reasonableness standard should now suffuse s 145 of the LRA'. The learned Judge held that the threshold test for the reasonableness of an award was: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[5]

[19] Pursuant to the judgment in *Sidumo*, and in every instance where the constitutionally suffused Section 145(2)(a)(ii)[6] is sought to be applied to substantiate a review application, any failure or error of the arbitrator relied on, must lead to an unreasonable outcome arrived at by the arbitrator, for it to be reviewable. In my view therefore, what the applicant must show to exist in order to succeed with a review in this instance, is firstly that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to exist, the applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the existence of the error or failure, that would equally be the end of the review application. In short, in order for the review to succeed, the error of failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[7] the Court said:

> '… A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the

[3] (2007) 28 ILJ 2405 (CC).
[4] Constitution of the Republic of South Africa, 1996.
[5] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[6] The Section reads: 'A defect referred to in subsection (1), means- (a) that the commissioner ... committed a gross irregularity in the conduct of the arbitration proceedings.'
[7] (2013) 34 *ILJ* 2795 (SCA) at para 25.

particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[20] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[8] said:

'…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[21] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[9] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.[10] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[11] it was held:

[8] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was also followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.
[9] See *Fidelity Cash Management* (*supra*) at para 102.
[10] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[11] (2015) 36 ILJ 1453 (LAC) at para 12.

> '…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[22] Of importance in this matter, considering the grounds of review raised by the applicant, is the concept of an error of law, and how this kind of case is contemplated to be dealt with under the review test. In line with the review test summarized above, the mere existence of an error of law would be insufficient to substantiate a successful review application, unless that error of law has the result of an unreasonable outcome. In *Head of Department of Education v Mofokeng and Others*[12] the Court held:

> '… Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.'

[23] In *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others*[13] it was said:

> 'Since the advent of the Constitution of the Republic of South Africa 1996 (the Constitution), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the power to review every error of law provided that it is material; that is that the error affects the outcome. …'

[12] (2015) 36 *ILJ* 2802 (LAC) at para 32.
[13] (2016) 37 ILJ 1819 (LAC) at para 21. See also *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) at para 12; *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593 (LAC) at para 30.

[24] In *Opperman v Commission for Conciliation, Mediation and Arbitration and Others*[14] the Court specifically dealt with a situation where the applicant sought to review and set aside an award of substantive fairness on the basis of an error of law, and in particular contending that the arbitrator grossly misapplied the law pertaining to inconsistency. The Court said:[15]

> 'In the case before me, the arbitrator committed an error of law by referring to and then not following the dictum of Basson J in *Rennies.* But even if that in itself does not make the award reviewable, it led to an unreasonable result. It must be reviewed and set aside on that basis.'

[25] Therefore, the applicant, in relying on an error of law on the part of the second respondent, would have to show that this error materially affected the outcome arrived at, rendering it unreasonable.

[26] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

Grounds of review

[27] The applicant's case and grounds for review must be made out in the founding affidavit, and supplementary affidavit.[16] As was said in *Northam Platinum Ltd v Fganyago NO and Others*[17]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[14] (2017) 38 ILJ 242 (LC) at para 5
[15] Id at para 25. See also *SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight and Logistics Industry and Others* (2016) 37 ILJ 708 (LC) at para 36.
[16] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.
[17] (2010) 31 ILJ 713 (LC) at para 27.

[28] In the founding affidavit, the applicant raised a number of review grounds, which can all be summarized into the following principal grounds:

28.1 The second respondent failed to consider material evidence in deciding whether dismissal was an appropriate sanction, considering his failure to refer to any of this evidence in his award;

28.2 The second respondent failed to consider that the trust relationship had not broken down, having regard to the fact that following the incident, the individual applicant was not suspended, and continued to work for eight months in the same capacity and attended to all his duties and to his UNESCO portfolio;

28.3 The second respondent failed to apply the law correctly or at all where it came to considering the issue of inconsistency as raised in the arbitration by the applicant;

28.4 The second respondent failed to consider the totality of circumstances where it came to him deciding whether dismissal was an appropriate sanction.

[29] In the supplementary affidavit[18], the applicant in essence mostly elaborates on these same review grounds as raised in the founding affidavit referred to above, but just providing further detail and embellishment to motivate these principal review grounds. The applicant however added that the manner in which the second respondent dealt with the issue of inconsistency pertinently raised by the applicant, constituted an error of law which rendered the award reviewable.

[30] I will now consider the applicant's review application based on these grounds of review.

Evaluation: Dismissal as an appropriate sanction

[18] Filed in terms of Rule 7A(8) on 18 November 2014.

[31] From the outset, I must confess that I have a number of difficulties with the award of the second respondent, even as it stands. In his award, the second respondent records that neither in the arbitration nor in the pre-arbitration minute did the applicant contend that the third respondent acted unfairly in imposing the sanction of dismissal. Nothing can be further from the reality. The applicant specifically, in the pre-arbitration minute, and numerous times in the opening address in the arbitration, disputed that dismissal was an appropriate sanction, and called on the second respondent to decide whether the sanction of dismissal was too harsh. This would be an out and out fairness enquiry, even if it is not specifically called such. As was said by Ngcobo J in *Sidumo*:[19]

> '…The commissioner's starting-point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair'

[32] The second respondent in effect became fixated on trying to find a label reading 'unfairness', and then in not finding it, he inappropriately narrowed the enquiry he had to make. The second respondent completely failed to appreciate that a case of dismissal being an inappropriate sanction is synonymous with case of dismissal being unfair on the basis of the sanction of dismissal being unfair.

[33] The second respondent, in his award, refers to the judgment of *Sidumo* where the Constitutional Court dealt with the issue of an appropriate sanction, but unfortunately the second respondent simply does not seem to appreciate what this judgment actually says. The second respondent completely missed the *ratio decidendi* of the judgment in *Sidumo*. In fact, the second respondent in his award only refers to the judgment in *Sidumo* where reference was made therein to an earlier judgment in *Nampak Corrugated Wadeville v Khoza*[20], but the second respondent never dealt with ultimate conclusion arrived at by the Court in *Sidumo*. I am comfortable in concluding that the second respondent

[19] *Sidumo* (*supra*) at para 178. See also *Woolworths (Pty) Ltd v Mabija and Others* (2016) 37 ILJ 1380 (LAC) at para 15.
[20] (1999) 20 *ILJ* 578 (LAC).

seemed oblivious to all that he needed to consider in deciding whether dismissal was appropriate as specifically articulated in *Sidumo*.

[34] How should the second respondent, as arbitrator, then have decided the issue of the appropriateness of the sanction of dismissal? The answer is given by Navsa AJ in *Sidumo*, where the learned Judge said:[21]

> 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'

[35] Shortly after the judgment in *Sidumo* was handed down, the *ratio* in that judgment was dealt with by the LAC in *Fidelity Cash Management*[22], where the Court held as follows:

> 'In terms of the *Sidumo* judgment, the commissioner must –
> (a) take into account the totality of circumstances" (para 78);
> (b) consider the importance of the rule that had been breached" (para 78);
> (c) consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal" (para 78);
> (d) consider "the harm caused by the employee's conduct" (para 78);
> (e) consider ''whether additional training and instruction may result in the employee not repeating the misconduct";
> (f) consider "the effect of dismissal on the employee" (para 78);
> (g) consider the employee's service record.
>
> The Constitutional Court emphasized that this is not an exhaustive list. The commissioner would also have to consider the Code of Good Practice:

[21] *Sidumo* (*supra*) at para 78. This *dictum* was also referred to with approval in *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82.
[22] (*supra*) at para 94.

> Dismissal and the relevant provisions of any applicable statute including the Act.'

[36] Further following on the judgment in *Sidumo*, a number of other principles were crystalized out that would require consideration in assessing whether the sanction of dismissal is fair. The further principles are the issue of the breakdown of the trust / employment relationship between the employer and employee, the existence of dishonesty, the possibility of progressive discipline, the existence or not of remorse, the job function and the employer's disciplinary code and procedure.[23] However, and in general terms, what requires consideration by an arbitrator was articulated by Van Niekerk J in *Vodacom (Pty) Ltd v Byrne NO and Others*[24] as follows:

> '… the determination of the fairness of a dismissal required a commissioner to form a value judgment, one constrained by the fact that fairness requires the commissioner to have regard to the interests of both the employer and the worker and to achieve a balanced and equitable assessment of the fairness of the sanction …'

And in *Wasteman Group v SA Municipal Workers Union and Others*[25] Davis JA said:

> '… The commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner. …'

[23] See *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 22; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) at para 16; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at para 18; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) at paras 26 – 27; *City of Cape Town v SA Local Government Bargaining Council and Others (2)* (2011) 32 ILJ 1333 (LC) at paras 27 – 28; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38.

[24] (2012) 33 ILJ 2705 (LC) at para 9.

[25] (2012) 33 ILJ 2054 (LAC) at 2057G-I.

[37] Therefore, in terms of *Sidumo,* what the second respondent had to do was to determine if the third respondent as employer in dismissing the individual applicant acted fairly, and in doing so had to consider the totality of circumstances with reference to all the factors referred to above, as established by the factual matrix before the second respondent as a whole. The second respondent needed to analyse all the evidence, apply this analyses to all the requisite considerations identified above, and come to a properly reasoned conclusion as to whether dismissal was a fair or an unfair sanction. In *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others*[26] the Court said:

> '… Various components must be placed in the scales: an objective analysis of the particular facts of the case; adequate regard to the applicable statutory and policy framework; and adequate regard to the pertinent jurisprudence as developed by the courts. Only then can a value judgment, properly so called as a comparative balancing of competing factors, be made by the commissioner, producing as an end result an impartial answer to the central question whether or not the dismissal was fair. Reaching a value judgment in relation to competing factors will in many cases be fairly straightforward but in others it may be helpful to conduct the comparison process with reference to a common question, being how the factor relates to the relevant features of the employer's operational requirements. A proper assessment of those requirements underlies the determination of what is fair and at the same time provides an objective framework for a value to be placed on one factor and another.'

[38] A consideration of the second respondent's award and the reasoning contained therein leaves one with little doubt that he never did any of the above, nor conducted the kind of evaluation and assessment actually required of him. In *Maepe v Commission for Conciliation, Mediation and Arbitration and Another*[27] the Court said:

> '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

[26] (2010) 31 ILJ 2475 (LC) at para 19.
[27] (2008) 29 ILJ 2189 (LAC) at para 8. See also *Pack 'n Stack v Khawula NO and Others* (2016) 37 ILJ 2807 (LAC) at paras 19 – 20.

> 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.'

[39] As stated, and in finding that dismissal was not too harsh a sanction, the second respondent in his award relied only on a limited number of reasons. The second respondent considered the nature of the third respondent's 'business', so to speak, which he described as being to promote and uphold cooperation with the international fraternity where image is of paramount importance, and where negative publicity would harm this image. The second respondent also considered that the offences were serious, and because of the serious nature of these offences this would make further employment intolerable. That is the sum total of the factors relied upon by the second respondent.

[40] Applying the above dictum in *Maepe*, it would have been necessary for the second respondent to set out all his considerations on an appropriate sanction in his award, and it is therefore clear that the second respondent has failed to consider most of the factors he was required to consider, and certainly had no regard to the factual matrix as a whole. This failure is tantamount to the second respondent not discharging the duty that rested upon him to decide whether dismissal was a fair sanction. This would be the kind of gross irregularity contemplated by the review test I have articulated above. In *Solari v Nedbank Ltd and Others*[28] the Court said the following, specifically referring to the conduct of a commissioner when deciding if dismissal was an appropriate sanction:

> '… it is clear on the totality of the evidence before the commissioner that he did not properly consider all the evidence and therefore arrived at a conclusion that a reasonable decision maker could not reach then the award ought to be

[28] (2014) 35 ILJ 3349 (LAC) at para 29.

> set aside. The same will apply when the commissioner makes certain inferences from the proven facts that are totally out of sync with those facts. The inference reached without a proper consideration of the proven facts would be an unreasonable decision or a decision which a reasonable decision maker could not reach'

[41] With the manner of determination of the issue of dismissal as a fair sanction by the second respondent constituting a gross irregularity, the second part of the review test nonetheless necessitates a determination as to whether the second respondent's conclusion that dismissal was an appropriate sanction is a reasonable outcome, even if for other reasons or on other grounds. This determination requires that I must now consider the totality of facts and circumstances, and all of the sanction factors identified above, in order to decide whether the dismissal of the individual applicant was nonetheless a fair sanction.

I will commence with a consideration of the nature of the misconduct. I cannot help but think that its seriousness was exaggerated, because of the spectacle that followed. It must always be borne in mind that the individual applicant cannot be held accountable for the death of Victoria. He was also never charged with any misconduct relating to this. What the third respondent did was to try and infuse the unfortunate death of Victoria and all the circumstances relating thereto into the misconduct charges against the applicant to try to give it a different flavour. But the second respondent should have seen the charges for what they were, being that the individual applicant breached the rule where it came to excessive consumption of alcohol, which in itself, and for the reasons to follow, is not serious enough to justify a sanction of dismissal for a first offence. I accept that if it was proven that the individual applicant's conduct directly or indirectly caused, or contributed to, the death of Victoria, such as for example that he gave her drugs or spurred her on to drink more than she should have, the situation may well have been different. However, no such evidence existed. In simple terms, the evidence shows that all the applicant did was drink too much and pass out. It shows further that his only link to Victoria was that she was there in his apartment at his invitation, and where she was found after she died.

[42] I can understand the reason for this rule as contained in the Code. The fact is that the consumption of alcohol is not prohibited even where it comes to attending official embassy functions. The rule is clearly aimed at preventing the excessive consumption of alcohol by diplomats who represent the country, in order for them not to make a spectacle of themselves. This, thereby, prevents them from embarrassing the foreign services and country, which unfortunately is a situation which often accompanies the excessive consumption of alcohol.

[43] I believe that it was highly likely that if it was not for a dead body in the individual applicant's apartment, the fact that he went home after a night of drinking and passed out on his bed would not have led to his dismissal. As harsh as this may sound, the dead body in his apartment had nothing to do with the misconduct of his excessive drinking and passing out, even though this consideration may be relevant in another context, which I will deal with later. The second respondent's acceptance that just because the misconduct existed a dismissal was warranted, is simply not an appropriate and justified conclusion. In *Dikobe v Mouton NO and Others*[29] the Court held:

> 'It may be mentioned that the award is bereft of any consideration of the appropriate sanction, it seemingly being that the arbitrator took it for granted that guilt on the terms he found, warranted dismissal. That approach is, in principle, wrong …'

In the end, I am not satisfied that the misconduct in this case was serious enough to, *per se,* necessitate the dismissal of the individual applicant.

[44] Where there is some level of tolerance for alcohol consumption *per se*, which seems to be part and parcel of life in the diplomatic core, the surpassing by an employee of that level of tolerance requires progressive discipline before dismissal.[30] This is clearly an entirely different situation to those cases where an employee works in a dangerous working environment and where any consumption of alcohol would be a danger to the employee and his or her fellow employees, or would be even prohibited by law (such as the mining

[29] (2016) 37 ILJ 2285 (LAC) at para 24.
[30] Compare *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at paras 31 – 33.

industry), both being cases where a zero tolerance approach is essential.[31] In the kind of cases where a level of tolerance is permitted, it does not mean that employees escape being held accountable, if they exceed this level of tolerance. But what it does mean, is that the objective of discipline in such a case would have to be to impress upon the employee that he or she has transgressed and that this is considered to be misconduct, and that through the application of discipline it is ensured that this transgression does not happen again. The employee, who ventured out of the employment fold, so to speak, is brought back into the fold, but with conditions attached to resist a repetition of the misconduct. In *Timothy v Nampak Corrugated Containers (Pty) Ltd*[32] the Court said:

> '… Progressive sanctions were designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed. The idea of a progressive sanction is to ensure that an employee can be reintegrated into the embrace of the employer's organization, in circumstances where the employment relationship can be restored to that which pertained prior to the misconduct. …'

[45] In my view, a conspectus of the evidence shows that the individual applicant had a singular lapse of judgment, considering that his conduct on the day was uncharacteristic. He should have known better than to continue to revel the night away when he was already approaching intoxication much earlier in the evening. But there was no evidence or indication that he was a habitual miscreant where it came to these kind of situations. This kind of singular error in judgment cries out for progressive discipline, which would more than likely make the individual applicant a very cautious employee where it comes to possible excessive alcohol consumption in the future. That kind of result is what progressive discipline is all about.

[31] See *Tanker Services (Pty) Ltd v Magudulela* [1997] 12 BLLR 1552 (LAC); *Transnet Freight Rail v Transnet Bargaining Council and Others* (2011) 32 ILJ 1766 (LC); *Exactics-Pet (Pty) Ltd v Patelia NO and Others* (2006) 27 ILJ 1126 (LC).
[32] (2010) 31 *ILJ* 1844 (LAC) at 1850A-C.

[46] A final written warning to the individual applicant for his breach of the Code in respect of his conduct on 31 August and 1 September 2012 would have impressed upon him the error of his ways, and would have made it clear that any such future transgression would result in the loss of his job. In *Gcwensha v Commission for Conciliation, Mediation and Arbitration and Others*[33] the Court held:

> 'I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal.'

[47] The next consideration is the harm caused by the individual applicant's misconduct. It is also in this context that the true reason why the third respondent dismissed the individual applicant becomes apparent. This harm and this reason is inextricably tied to one crucial consideration, being image. The fact that Victoria was found deceased in a bed in the individual applicant's apartment after a night of drinking resulting in paramedics being called, the police being called, and the press reporting on the incident, tarnished and prejudiced the image of the foreign services. I accept that there is merit in such a contention. But once again, one is left with the compelling question – would the situation have had the same impetus if some French reporter published an article that the individual applicant, as a senior diplomat, drank too much and passed out on his bed in his apartment. I doubt such a situation would even make the papers, a view actually shared by the initial investigator, Netshitenshe. And because no misconduct charges were levelled at the individual applicant relating to the death of Victoria, it has to be asked whether the conduct of the third respondent in dismissing the individual applicant was not some knee jerk reaction to the incident making the newspapers and punishing the individual applicant for it, rather than a reaction to the misconduct itself.[34]

[48] It is in the abovementioned context that an important issue pertinently raised by the applicant, and never considered by the second respondent, comes into

[33] (2006) 27 ILJ 927 (LAC) at para 32. See also *Transnet Freight Rail* (supra) at para 43.
[34] Compare *Legobate v Quest Flexible Staffing and Others* (2014) 35 ILJ 738 (LC) at paras 26 – 27.

play. This issue is that even after the incident, the individual applicant continued to work, unabated, for some eight months, within the same foreign services community, interacting with the same diplomats, and fulfilling the exact same functions, without any hint of protest from anyone. There certainly was no evidence of any protest from the French Government about the continued presence of the individual applicant at the Embassy. If anything, the evidence seemed to show sympathy from the individual applicant's peers and colleagues for what had happened to him, with the consensus view being what happened to the individual applicant could happen to anyone. The individual applicant was still described, despite the incident, as being a professional, hard working and dedicated diplomat.

[49] In my view, the contentions of the third respondent's image being tarnished to the extent of necessitating the dismissal of the individual applicant is contrived. Yes, there certainly was harm to the image and reputation of the third respondent, but it was not the kind of harm that an apology, time and progressive discipline could not completely fix. As opposed to this, the individual applicant had just started building a proper career in the foreign services, with Paris being his first foreign deployment, and it seems to me he was good at his job. To deprive him of the opportunity to fulfil this career objective, considering what had actually happened, is unduly harsh.

[50] Where one next takes the individual applicant's personal circumstances into account, he had studied to join the foreign services. He had some five years' service and an unblemished disciplinary record, which works in his favour when deciding whether dismissal is appropriate.[35] It is also not lost on me, as it seemed to have been the case with the second respondent, that during the eight month period following the incident the individual applicant received two favourable performance appraisals and was allocated projects. As touched on above, and save for this one error of judgment, there is no indication of the individual applicant being a troublesome employee. In short, there is nothing in the personal circumstances of the individual applicant which could indicate that progressive discipline would not work.

[35] See *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 36.

[51] In the answering affidavit in the review application, the third respondent tried to make out some or other case of dishonesty against the individual applicant. In my view, the third respondent did so because it must have appreciated the difficulties it was facing in substantiating the dismissal of the individual applicant as being fair. This alleged case of dishonesty related to the individual applicant allegedly lying when he said he called the Acting Ambassador about the incident before he allowed the police into his apartment, that he changed his version about drug use in his apartment when the incident occurred, and did not accept responsibility for the death of Victoria. This case of dishonesty is nothing but an artificial creation. The individual applicant was never charged with any dishonesty offence. The conduct of the individual applicant following the incident is not dishonest. The individual applicant never misled anyone, and always fully embraced what happened. To even label the individual applicant to be dishonest is disingenuous. The matter at hand has nothing to do with dishonesty.

[52] There was no evidence of any disciplinary code or rule in the third respondent necessitating and prescribing dismissal for the misconduct the individual applicant had been found guilty of. This means that dismissal was never a prescribed imperative for the misconduct. In fact, the disciplinary code (clause 2.1) provides that discipline is a corrective measure, and not a punitive one, and should always be applied in a prompt, fair, consistent and progressive manner (clause 2.2).

[53] This brings me to the next consideration, being that of remorse. The fact is that the individual applicant never denied his wrongdoing. He conceded that he violated the Code, and his conduct did harm the image and reputation of the third respondent. He fully admitted all the facts relating to the incident. Even at the arbitration, the individual applicant conceded his guilt on the misconduct, and sought to only challenge dismissal as an appropriate sanction. In short, the individual applicant never disputed what he did, and that it was wrong. All he said in defence is that he should not be dismissed for it. In *Absa Bank Ltd v Naidu and Others*[36] the Court held as follows:

[36] (2015) 36 ILJ 602 (LAC) at para 46.

> ‘Obviously, the fact of a guilty plea per se or mere verbal expression of remorse is not necessarily a demonstration of genuine contrition. It could be nothing more than shedding crocodile tears. Therefore, the crucial question is whether it could be said that Ms Naidu's utterances empirically and objectively translated into real and genuine remorse. In *S v Matyityi*, the Supreme Court of Appeal remarked as follows on this issue:
>
> 'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.’’

Considering the evidence on record, I do not believe the individual applicant was shedding crocodile tears having been caught out transgressing the Code. I accept that he was genuinely sorry for what happened, and the harm it caused to the image of the third respondent. The evidence showed that he was just as embarrassed because of the events as any embarrassment which was caused to the third respondent. The individual applicant played open cards about all that happened and never shied away from his responsibility in this regard. He pleaded for forgiveness. His testimony was that he doubled his efforts to make up for the mistake and to restore any trust lost in him. Following what was fairly gruelling and extensive cross-examination, the individual applicant in fact said ‘Yes, there is no one to blame other than myself’. In line with the dictum in *Naidu* referred to above, this behaviour of the individual applicant is consistent with someone who was genuine remorseful for the wrong he had done.

[54] In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[37] the Court held:

> '… Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken.'

The conduct of the individual applicant, in my view, is consistent with an employee that seeks rehabilitation, and would and did re-commit himself to the values of the third respondent. I am satisfied that he showed genuine remorse.

[55] This then only leaves the issue of the break down in the trust relationship for consideration. It is true that Ambassador Tebogo Seokolo ('Seokolo'), who testified for the third respondent, testified that the employment relationship had been destroyed. Seokolo was the Chief Director: Western Europe, and overall responsible for the Embassy in which the individual applicant was stationed. But his testimony was founded more on general policy considerations, and his own views following him being apprised of the matter and what had happened. As the applicant properly pointed out, the individual applicant did not report to Seokolo, and did not work with him. In *Edcon Ltd v Pillemer NO and Others*[38] the Court held as follows concerning what evidence must be considered, so as to establish whether there was a break down in the employment relationship:

> '… It is to Naidoo's testimony, as Edcon's sole witness in the arbitration, as well as the documentary evidence referred to above, that one must look to see if indeed there was evidence showing that Reddy's conduct had destroyed the trust relationship between her and Edcon. Naidoo's testimony in the arbitration was mainly to recount the investigative history of the matter. He also testified that Edcon was intolerant towards dishonesty and that employees were generally dismissed if they committed dishonest acts. This, he said, was one of Edcon's core values. As already mentioned Naidoo was the investigator of Reddy's misconduct and fielded some of her lies. It was at his recommendation, as investigator, that Reddy was suspended and eventually disciplined. What becomes immediately apparent is that Naidoo's evidence did

[37] (2000) 21 ILJ 1051 (LAC) at para 25.
[38] (2009) 30 ILJ 2642 (SCA) at para 19.

> not, and could not, deal with the impact of Reddy's conduct on the trust relationship. Neither did Naidoo testify that Reddy's conduct had destroyed the trust relationship. This was the domain of those managers to whom Reddy reported. They are the persons who could shed light on the issue. None testified.'

[56] The individual applicant, as First Secretary, reported directly to the Director of the UNESCO desk, being Marthinus Van Schalkwyk ('Van Schalkwyk'). Van Schalkwyk testified that what the individual applicant in this instance did not harm the employment relationship. Van Schalkwyk testified that the misconduct of the individual applicant did not have an effect in respect of his UNESCO duties, and that even after the incident, the individual applicant was directly involved in two major projects. He said there was no problem with the relationship with other diplomats, and he still considered the individual applicant to be trustworthy and reliable. Being the individual applicant's direct superior, and the person with whom the individual applicant actually directly worked, Van Schalkwyk was in the best position to convey how the individual applicant's transgression may have compromised the employment relationship. Also, the evidence was that the Ambassador at the Embassy in Paris had no difficulty with the trust relationship with the individual applicant. In *Edcon*[39], the Court further held:

> '… The gravamen of Edcon's case against Reddy was that her conduct breached the trust relationship. Someone in management and who had dealings with Reddy in the employment setup, as already alluded to, was required to tell Pillemer in what respects Reddy's conduct breached the trust relationship. All we know is that Reddy was employed as a quality control auditor; no evidence was adduced to identify the nature and scope of her duties, her place in the hierarchy, the importance of trust in the position that she held or in the performance of her work, or the adverse effects, either direct or indirect, on Edcon's operations because of her retention, eg because of precedent or example to others.'

[57] The testimony and views of Van Schalkwyk is substantiated by the fact that the individual applicant continued to work for eight months fulfilling the exact

[39] Id at para 20.

same functions and duties, and having the same responsibilities, and was never suspended. I find it inconceivable that it can be legitimately suggested that because the individual applicant drank too much and passed out in his apartment, this had destroyed the trust relationship, especially considering that he thereafter continued to do the same work for eight months without any inkling of a problem. Added to this, the French government never asked that the individual applicant be removed. I cannot accept that there was a complete destruction of the trust relationship in this case of the kind that would compel dismissal.

[58] However, and in any event, even if one should accept the testimony of Seokolo for the third respondent that the trust relationship had been compromised, it does not mean that dismissal follows *per se*. As said in *Woolworths (Pty) Ltd v Mabija and Others*[40]:

> '… Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair.'

[59] In summary, the totality of circumstances, considered in the context of a balanced evaluation so as to be fair to both parties, convinces me that the dismissal as a sanction, in the case of the individual applicant, was unfair. In arriving at this conclusion, I consider that: (1) the gravity of the misconduct was not sufficiently serious to justify dismissal *per se*; (2) the application of progressive discipline is viable to remedy the misconduct and avoid a repetition of it in the future; (3) the personal circumstances and disciplinary record of the individual applicant mitigate against dismissal; (4) the individual applicant has shown the requisite genuine remorse for his misconduct; (5) there exists no regulatory provisions prescribing dismissal; (6) any harm to the third respondent resulting from the misconduct is easily remediable, and pales by comparison to the harm to the individual applicant; (7) the trust relationship cannot be seen to have completely broken down; and (8) the reason why the individual applicant was dismissed was rather in reaction to publicity that a real reaction to the nature of the misconduct the individual applicant committed. In the end, the continued employment of the individual applicant posed no

[40] (2016) 37 ILJ 1380 (LAC) at para 21.

meaningful risk to the third respondent, and dismissing the individual applicant in this case was more of an expression of outrage than real risk management. As said in *De Beers*[41]:

> 'A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. …'

[60] My conclusions as set out above serve to illustrate, in the context of the second part of the review test, that the outcome arrived at by the second respondent cannot be considered to be a reasonable outcome, on any grounds. The proper factual matrix and balanced consideration of the sanction principles can only result in a conclusion that the individual applicant's dismissal was too harsh, inappropriate as a sanction, and thus unfair. The second respondent's determination to the contrary is not a reasonable outcome. In the end, a final written warning issued to the individual applicant for his misconduct would have sufficed, and this could be the only reasonable outcome that could have been arrived at.

Evaluation: the issue of inconsistency

[61] The next issue to be dealt with is the applicant's inconsistency challenge. Again, I must point out that the manner in which the second respondent dealt with this issue left much to be desired. The second respondent records in his award that there is nothing in the pre-arbitration minute that makes 'provision' for an inconsistency challenge, and as such, he would not consider it. In my view, this reasoning is a clear indication that the second respondent simply does not understand the nature of an inconsistency challenge. As said in *Naidu*[42]:

> 'It is trite that the concept of parity, in the juristic sense, denotes a sense of fairness and equality before the law, which are fundamental pillars of the administration of justice …'

[41] Id at para 22.
[42] (*supra*) at para 35.

[62] Where it comes to inconsistency, and should this consideration find application in a particular case, it can serve to contradict the fairness of a dismissal in two different contexts. This is illustrated by the following dictum from the judgment in *Minister of Correctional Services v Mthembu NO and Others*[43]:

> 'The consideration of consistency of equality of treatment (the so-called parity principle) is an element of disciplinary fairness … When an employer has in the past, as a matter of practice, not dismissed employees or imposed a specific sanction for contravention of a specific disciplinary rule, unfairness flows from the employee's state of mind, ie the employees concerned were unaware that they would be dismissed for the offence in question. When two or more employees engaged in the same or similar conduct at more or less the same time but only one or some of them are disciplined or where different penalties are imposed, unfairness flows from the principle that like cases should, in fairness, be treated alike.'

[63] Firstly, inconsistency can serve as a possible defence to the existence of misconduct in itself. In other words, it serves as basis to acquit the employee of the misconduct with which he or she has been charged. This would be the case, for example, where an employee is charged for contravening a rule, but as a result of practice over time in the past, this rule has been consistently not followed and applied by the employer. If an employee in such circumstances is then charged with breaching such a rule, as a basis for a misconduct charge, then inconsistency as a consideration would dictate that the application of the rule itself has been negated, resulting in a conclusion that no valid and binding rule exists that could be considered to have been breached, and thus there is no misconduct. Another example would be where a number of employees commit the same misconduct, but the employer then arbitrarily selects some of them to be disciplined, leaving the other transgressors unaffected.[44] As said in *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Metrofile (Pty) Ltd*[45]:

[43] (2006) 27 *ILJ* 2114 (LC) at para 8.
[44] See *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others* (2010) 31 ILJ 2836 (LAC) at para 20.
[45] (2004) 25 ILJ 231 (LAC) at para 35.

> '… Our law requires that employees who have committed similar misconduct should not be treated differentially. …'

[64] The second context is where inconsistency is raised as a basis to challenge the fairness of the sanction of dismissal.[46] In this instance, there would be no issue that what the employee was charged with indeed validly and properly constitutes misconduct, of which the employee is guilty, but the issue would be that the dismissal of the employee for such misconduct would be inconsistent with the sanction imposed by the employer for similar and related misconduct, in the past, in respect of other employees. In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[47], the Court, in this context, said:

> 'The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant'

[65] Where instances of inconsistency is raised as a defence to dismissal as an appropriate sanction, this would form part of the value judgment that must be exercised in the course of considering all of the sanction principles discussed above, and is not decisive on its own.[48] This has to mean that it is certainly

[46] See Schedule 8 Item 3(6) which reads: 'The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'
[47] (2010) 31 ILJ 452 (LC) at para 10.
[48] *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; *Absa Bank Ltd v Naidu* (*supra*) at paras 36 – 37; *Consani Engineering*

part and parcel of the totality of circumstances when deciding whether dismissal is appropriate, and this was the very issue placed before the second respondent to decide in terms of the pre-arbitration minute.

[66] Therefore, and having regard to the above, the second respondent's conclusion that inconsistency has not been raised by the applicant in the arbitration is patently wrong, and constitutes a gross error of law. The fact is that inconsistency was raised in the context of challenging dismissal as an appropriate sanction. As illustrated above, this is a proper context within which such a challenge could apply.

[67] But further, and to compound matters, the applicant, at the outset of the arbitration, made it clear that it would raise inconsistency. The representative of the applicant in the arbitration, in the course of the opening address, said: 'With the harshness of the sanction, it will definitely also refer to consistency.' This statement was never contradicted by the third respondent's representative. This meant that the applicant was entitled to accept that inconsistency was properly in issue as part and parcel of the sanction of dismissal being inappropriate.[49] The conduct of raising this at the start of the arbitration was fully in line with the following *dictum* in National Union of Mineworkers on behalf of *Botsane v Anglo Platinum Mine (Rustenburg Section)*[50] where the Court held:

> 'Moreover, as a matter of practice, a party, usually the aggrieved employee, who believes that a case for inconsistency can be argued, ought, at the outset of proceedings, to aver such an issue openly and unequivocally so that the employer is put on proper and fair terms to address it. …'

[68] By refusing to consider the applicant's inconsistency challenge, the second respondent in effect negated a critical consideration he was obliged to consider, and this in my view would certainly have a direct and material impact

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(Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2004) 25 ILJ 1707 (LC) at para 19.

[49] *Fidelity Cash Management Services* (*supra*) at paras 20 – 23; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* (2013) 34 ILJ 2347 (LC) at paras 61 – 62 and 67.

[50] (2014) 35 ILJ 2406 (LAC) at para 39.

on the outcome of this matter, rendering it unreasonable. In *Network Field Marketing (Pty) Ltd v Mngezana No and Others*[51] the Court said:

> '…. By excluding the applicant's evidence from serious consideration on this unwarranted basis, the arbitrator effectively denied the applicant a fair hearing which amounts to misconduct by the arbitrator in relation to his duties ….'

[69] It is now settled that in the case of an inconsistency challenge, the burden is on the employee party to produce sufficient evidence before the arbitrator to substantiate such a challenge. This evidence must be sufficient to the extent that the employer is able to identify the elements of the challenge, in particular to which other employees it may relate and what the facts are that substantiate the challenge. The employer must be placed in a position so as to competently be able to present a defence thereto. In *Comed Health CC v National Bargaining Council for the Chemical Industry and Others*[52] the Court said:

> 'It is trite that the employee who seeks to rely on the parity principle as an aspect of challenging the fairness of his or her dismissal has the duty to put sufficient information before the employer to afford it (the employer) the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner. One of the essential pieces of information which the employee who alleges inconsistency has to put forward concerns the details of the employees who he or she alleges have received preferential treatment in relation to the discipline that the employer may have meted out.'

[70] The point in the end therefore is that the second respondent's approach to the inconsistency challenge of the applicant, as reflected in his award, is unsustainable. The second respondent needed to consider the inconsistency challenge, and in not doing so, committed a gross and reviewable irregularity. The second respondent, in refusing to allow the applicant an opportunity to present this challenge and present the requisite evidence in this regard, as it was required to do, deprived the applicant a fair ventilation of the issue. The

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[51] (2011) 32 ILJ 1705 (LC) at para 16.

[52] (2012) 33 ILJ 623 (LC) at para 10. See also *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (*supra*) at para 39; *Banda v General Public Service Sectoral Bargaining Council and Others* [2014] JOL 31486 (LC) at para 49; *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others* (2011) 32 ILJ 3018 (LC) para 50.

failure of the second respondent to even consider inconsistency means that this Court is now required to consider it, to establish whether there was actual merit in that challenge.[53]

[71] Turning next to the substance of the inconsistency challenge of the applicant, it is in essence founded on a complaint that other diplomats committed misconduct that featured in the press and similarly caused harm and prejudice to the good name and reputation of the foreign services, but these diplomats were not dismissed. The inconsistency challenge is thus not raised as a defence to the misconduct or breach of the Code committed by the individual applicant, but aimed at the issue of the reaction of the third respondent to reputational damage caused by the publication of the misconduct of diplomats in the press. The fact is that it was an important part of the third respondent's case where it came to justifying the dismissal of the individual applicant that his misconduct was indeed published in the press.

[72] What the applicant sought to introduce into evidence was a number of newspaper articles, reporting on misconduct by diplomats, in instances where these diplomats were not dismissed despite these articles. I will shortly set out these instances, in respect of which the press articles were sought to the discovered by the applicant. In the case of one Bruce Koloane, he was the Chief of State Protocol, who authorized the landing of the private jet of the Gupta family at the Waterkloof Airforce base. This was widely publicized, and Koloane also pleaded guilty to the misconduct, but was not dismissed. Next, there was the case of the Consul General to Shanghai, Lassy Chiwayo ('Chiwayo') who was found walking naked in the street in Shanghai, which was again widely reported. Chiwayo was recalled, but was not dismissed. The second in charge of the Embassy in Harare, Zimbabwe, Mlulami Singapi ('Singapi'), assaulted a female staffer in the Embassy. This was also reported in some detail in the press, but Singapi was not dismissed. Jerome Barnes, a senior foreign diplomat in London, was found guilty of indecent assault of an SAA cabin attendant, which incident was reported in the press, but he retained his position. Mpendulo Khumalo ('Khumalo'), a senior consulate official in Los Angeles, United States, assaulted his wife, was questioned by police and

[53] *Banda* (*supra*) at para 48.

investigated, and this was reported in the Los Angeles Times. Khumalo was not dismissed. The comparisons to the case sought to be made out by the third respondent, in justifying the dismissal of individual applicant, are clear.

[73] The Court in *Irvin and Johnson Ltd,*[54] aptly determined the principles applicable to inconsistency, as follows:

> '… Consistency is simply an element of disciplinary fairness …. Every employee must be measured by the same standards …. Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercses his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.... Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. …'

[74] In my view, the *ratio* in the judgment in *Irvin and Johnson* indicates that the following considerations apply to the determination of the issue of inconsistency: (1) Employees must be measured against the same standards (like for like comparison); (2) Did the chairperson of the disciplinary enquiry conscientiously and honestly determine the misconduct; (3) The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating

[54] (*supra*) at para 29. See also *Consani Engineering* (*supra*) at para 19.

management policy (in other words this conduct must be bona fide)[55]; and (4) A value judgment must always be exercised[56].

[75] In general, inconsistency as a consideration is intended to protect employees against arbitrary conduct by the employer. Objective difference in circumstances is thus an important consideration. In *Southern Sun*[57] it was said:

> '… An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors …'

[76] Considering the facts *in casu*, the individual applicant has a legitimate cause of complaint where it comes to inconsistency. Applying the principles relating to inconsistency to the facts, I am satisfied that the chairperson of the disciplinary hearing, as well as the appeal chairperson, properly determined the misconduct of the individual applicant, and there is thus no problem in this respect. But that being said, a like for like comparison leaves the third respondent exposed. In this case, it is not about comparing the content of nature of the act of misconduct on a like for like basis. It is about what was reported in the press about the misconduct of employees in the past, and then how the third respondent reacted to this. In short, the applicable like for like comparison is about whether the content of the reported article, as it stands, would cause embarrassment to the third respondent and bring its good name into disrepute, and what the third respondent then did about it vis-à-vis the errant employee.

[77] Comparing the articles published about the transgression of the individual applicant to all the other articles referred to above as contained in the bundle of documents, there is little basis for distinction where it comes to the possible embarrassment and the harm to the reputation of the third respondent, all these articles would or could cause. It can hardly be said that an article about

[55] See *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others (supra)* at para 21.
[56] See *SRV Mill Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 135 (LC) at para 23.
[57] (*supra*) at para 10.

the consulate general being caught walking naked down in the street in Singapore would be less embarrassing and cause less harm to the third respondent's reputation, than an article about the individual applicant having a party in his own apartment, with one of his guests turning up deceased due to no fault of his own. Similarly, articles about senior diplomats assaulting fellow staff or family members, and indecently assaulting a cabin attendant on an aircraft, would certainly not be less embarrassing and cause lesser reputational harm, than the articles about the individual applicant. Finally, not much need to be said about the reputational damage caused by the articles relating to the Gupta plane landing at Waterkloof air force base. Despite the above clear similarities, the individual applicant was the only one dismissed. Thus, measuring employees against the same standards, *in casu*, would bring inconsistency into play.

[78] Next, is the decision to dismiss the individual applicant and not others, tantamount to arbitrary behaviour on the part of the third respondent? It does seem to be so. There is no evidence as to what necessitated dismissal in the case of the individual applicant, as compared to the other instances of published transgressions by other senior diplomats where those miscreants escaped dismissal. It is my view that in the case of the individual applicant, an attitude of overreaction and retribution prevailed on the part of the third respondent that principally motivated dismissing the individual applicant. This would be seen as discipline driven by improper motive. Considering the completely insufficient and sparse manner in which both the disciplinary and appeal chairpersons reasoned the issue of dismissal as an appropriate sanction, it cannot even be said that there was a bona fide decision taken which was simply wrong and to an extent excusable where it comes to inconsistency.

[79] Finally, and even excluding all else, this is not a case where the exercise of a value judgment would justify the individual applicant being treated differently. *In casu*, this value judgment must be exercised as part and parcel of the sanction considerations, fully discussed above. This value judgment would make dismissal inappropriate. The value judgment in this instance supports the application of corrective discipline instead, and is not a situation where it can be argued that despite differentiating the individual applicant from other

comparable misconduct by other employees, he nonetheless deserved dismissal.

[80] In summary, and where it comes to inconsistency, the dismissal of the individual applicant would equally be rendered to be unfair. The second respondent's failure to even consider this is therefore not only grossly irregular, but is fatal to his award being considered to be a reasonable outcome, and the award should therefore be reviewed and set aside on this basis as well.

Conclusion

[81] For all the reasons as set out above, it is my view that the second respondent's determination in his award that the dismissal of the individual applicant was an appropriate sanction is grossly irregular, and resorts well outside the bands of what may be considered to be a reasonable outcome.[58] As such, the award of the second respondent falls to be reviewed and set aside.

[82] Having reviewed and set aside the award of the second respondent, I see no reason to remit this matter back to the first respondent again for determination *de novo* before another arbitrator. All the required evidence has been led and is on record. The transcript is complete and all the documentary evidence presented is part of the record. I thus have sufficient evidentiary material before me to finally determine this matter.[59] Because it is clear from the evidence, and the applicable principles *in casu*, that the dismissal of the individual applicant by the third respondent is too harsh, inappropriate, and thus unfair, the dismissal of the individual applicant must be held to be substantively unfair. I shall therefore substitute the award of the second respondent with an award that the dismissal of the individual applicant by the

[58] See *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at para 30.
[59] Section 145(4) of the LRA gives this Court the power to finally determine the matter. See *Woolworths (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* (2016) 37 ILJ 2831 (LAC) at paras 28 – 29; *SA Custodial Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 1255 (LC) at para 28; *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 33126 (LC) at para 77; *Member of the Executive Council, Department of Health, Eastern Cape v Public Health and Social Development Sectoral Bargaining Council and Others* (2016) 37 ILJ 1429 (LC) at paras 54 – 55.

third respondent was substantively unfair, on the basis that the sanction of dismissal was unfair.

[83] This then only leaves the issue of the appropriate consequential relief to be afforded to the individual applicant, consequent upon this conclusion. I will next turn to deciding this.

The issue of the relief

[84] The relief to be afforded to an employee whose dismissal is found to be unfair flows from Section 193(1) of the LRA, which provides as follows:

> 'If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may - (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or (c) order the employer to pay compensation to the employee.'

[85] In terms of Section 193(2), an employee found to have been unfairly dismissed must be reinstated or re-employed by the Labour Court or an arbitrator, as the case may be, unless one or more of the following specified exceptions are shown to exist:

> '(a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[86] In applying Sections 193(1) and (2), the Court in *Equity Aviation Services Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[60] said:

> 'The legislative structure for the resolution of unfair dismissal disputes is clear and coherently crafted. The LRA allows for any of the three remedies set out

[60] (2008) 29 ILJ 2507 (CC) at para 44.

> in s 193(1) to be granted to an unfairly dismissed employee. Reinstatement or re-employment remains the legislatively preferred remedy so as to restore the employee to the employment relationship. They safeguard the employee's security of employment. Either of the two remedies may be granted except in the specified circumstances set out in s 193(2) in which case compensation in terms of s 193(1)*(c)* may be ordered, the amount of which depends on the nature of the dismissal.'

[87] This exact sentiment was very recently echoed *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[61] where it was held:

> 'The correct approach to adopt when the dismissal has been found to be unfair, is first to consider the provisions of s 193(1) and then s 193(2) to determine which of the three remedies — reinstatement, re-employment or compensation — may be granted. This is buttressed by these remarks by Zondo J[62]:
>
> Once the Labour Court or an arbitrator has found a dismissal unfair, it or he is obliged to consider which one of the remedies listed in s 193(1) is appropriate, having regard to the meaning of s 193(2). Considering both the provisions of s 193(1) and s 193(2) is important because one cannot adopt the attitude that dismissal is unfair, therefore, reinstatement must be ordered. The Labour Court or an arbitrator should carefully consider the options of remedies in s 193(1) as well as the effect of the provisions of s 193(2) before deciding on an appropriate remedy. A failure to have regard to the provisions of s 193(1) and (2) may lead to the court or arbitrator granting an award of reinstatement in a case in which that remedy is precluded by s 193(2).'

[88] It is clear from the ratios in *Equity Aviation Services* and *SA Revenue Service* that reinstatement is the primary remedy for a substantively unfair dismissal, and must follow a finding of unfair dismissal, unless it can be shown by the employer or be apparent from the evidence that one of the special circumstances in Section 193(2) exist. This approach has also been

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[61] (2017) 38 ILJ 97 (CC) at para 38.
[62] The Court was referring to the minority judgment of Zondo J in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 313 (CC) at para 135.

consistently applied by the Labour Appeal Court.[63] As said in *Boxer Superstores (Pty) Ltd v Zuma and Others*[64]:

> '… Reinstatement is in effect, the default position. …'

[89] Considering whether any of the special circumstances in Section 193(2) apply, it was clear that throughout the proceedings, the individual applicant sought reinstatement, meaning that Section 193(2)(a) did not apply. Also, procedural fairness was never in issue, disqualifying consideration of Section 193(2)(d). This then only leaves Section 193(2)(b) – employment relationship intolerability, and Section 193(2)(c) – reasonable practicability. In *Mediterranean Textile Mills*[65] the Court said the following where it comes to considering these conditions:

> '… at the conclusion of each case it remains the responsibility of the court or the arbitrator to determine whether or not, on the evidentiary material properly presented and in the light of the *Equity Aviation* principle, it can be said that the reinstatement order is justified. In other words, even in a situation such as the present, where no specific evidence was canvassed or submissions made during the trial on the issue of the non-reinstatable conditions, the court or the arbitrator is not only entitled but, in my view, is obliged to take into account any factor which in the opinion of the court or the arbitrator is relevant in the determination of whether or not such conditions exist.

In *Xstrata*[66] the Court added the following:

> 'An employer wishing to avoid reinstatement must satisfy the arbitrator that one of the exceptions to reinstatement applies, in this case to show that it would not be practicable. The employer should lead evidence concerning relief in anticipation of a finding that a dismissal might be ruled unfair.'

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[63] *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others* (2012) 33 ILJ 160 (LAC) at para 28; *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and Others* 2012) 33 ILJ 1081 (LAC) at para 30; *Elliot International (Pty) Ltd v Veloo and Another* (2015) 36 ILJ 422 (LAC) at para 53; *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) at paras 6 and 8.

[64] (2008) 29 ILJ 2680 (LAC) at para 9.

[65] (*supra*) at para 30.

[66] (*supra*) at para 8.

And finally in this respect, the Court in *Eskom Holdings Ltd v Fipaza and Others*[67] said:

> 'The enquiry that determines the issue of whether or not reinstatement should be ordered has as its focal point the underlying notion of fairness between both the employer and the employee which 'ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment''

[90] Considering then what is contemplated by Sections 193(2)(b) and (c), the Court in *Xstrata*[68] gave examples as to what could constitute 'reasonably practicable' as contemplated by Section 193(2)(c), as follows:

> 'The object of s 193(2)*(c)* of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term 'not reasonably practicable' in s 193(2)*(c)* does not equate with 'practical', as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile. An employee's length of service, the delay in the arbitration and alleged untested shortcomings in capacity are not normally relevant to the question of practicability. …'

[91] Despite what was said in *Xstrata*, the Court in *Witzenberg Municipality*[69] did consider the fact that the employee had not worked for the employer for a considerable period of time as a relevant factor in coming to the conclusion that reinstatement was not reasonably practicable. This was also an important consideration to the Court in *Republican Press (Pty) Ltd v CEPPWAWU and Others*[70], where it has held:

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[67] (2013) 34 ILJ 549 (LAC) at para 66.
[68] Id at para 11.
[69] (*supra*) at paras 31 – 34. See also *National Union of Metalworkers of SA on behalf of Maifo and Others v Ulrich Seats (Pty) Ltd* (2012) 33 ILJ 2918 (LC) at para 48.
[70] (2007) 28 ILJ 2503 (SCA) at para 20 and 22.

> '... While the Act requires an order for reinstatement or re-employment generally to be made a court or an arbitrator may decline to make such an order where it is "not reasonably practicable" for the employer to take the worker back in employment. Whether that will be so will naturally depend on the particular circumstances, but in many cases the impracticability of resuming the relationship of employment will increase with the passage of time …'

[92] In dealing with Section 193(2)(b), the Court in *Boxer Superstores*[71] said that an important consideration would be the evidence as to the nature of the relationship between the parties, as well as the gravity and nature of the misconduct the employee had been found guilty of. The Court aptly described the consideration as being whether: 'the relationship between the two parties is at the level where they can no longer work together'. The gravity and nature of the misconduct was also the deciding consideration in *SA Revenue Service*[72], as well as the lack of remorse by the employee. In *Eskom Holdings*[73] it was said:

> '… there should be a properly conducted enquiry at the arbitration hearing which seeks to determine whether or not the trust relationship between the parties has, indeed, been destroyed beyond repair …'

[93] In *Potgieter v Tubatse Ferrochrome and Others*[74] the Court added:

> '… the focal point and overriding consideration in an enquiry concerning the appropriateness of reinstatement is the notion of fairness between the parties. In *Equity Aviation Services (Pty) Ltd v CCMA & others*, the court held that fairness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment …'

[94] In this instance, this is not a situation where reinstatement would be not reasonably practicable. There is simply no evidence of anything, at an organizational level and considerations of integration, standing in the way of

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[71] (*supra*) at paras 9 and 11.
[72] (*supra*) at paras 45 – 46
[73] (*supra*) at para 66. Compare *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 ILJ 2662 (LC) at para 52, where it comes to the kind of factual considerations that would exist, when it can legitimately be said the employment relationship has been destroyed.
[74] (2014) 35 ILJ 2419 (LAC) at para 39.

the individual applicant being reinstated. He remains properly trained for his position, and as the evidence showed, his security clearance remained intact. He can readily be redeployed back to his posting in France, where everyone is happy to work with him. There is no reason why the individual applicant cannot resume what had started out as a promising career in the foreign services, other than this one blemish. Even if the time period between when the individual applicant was dismissed in May 2013 and whether this matter finally came before me in September 2016 is considered as a factor in this respect, I do not believe it to be excessive to the extent of becoming impracticable. The delay in *Republican Press*, for example, was more than six years. I conclude that the exception in Section 193(2)(c) of the LRA does not apply.

[95] Turning then to Section 193(2)(b), this is the consideration principally relied on by the third respondent. But the problem is that the evidence presented by the third respondent to sustain the application of this exception is severely lacking. The third respondent needed lead testimony of persons with whom the individual applicant would directly work with, to show that any working relationship would not be possible. As already dealt with above, the actual evidence showed that there exists a real possibility that the working relationship between the individual applicant, his superiors, peers and fellow diplomats in France could be easily restored and continue without much fuss. The gravity of the misconduct is also not such so as to itself, by way or its mere existence, destroy the employment relationship, such as for example the racist conduct of the employee in *SA Revenue Service*. Therefore, it my view that the exception in Section 193(2)(b) equally finds no application.

[96] I therefore conclude that none of the non reinstateable considerations as contemplated by Sections 193(2)(b) and (c) apply in this case. This means that the default position applies, and the individual applicant is entitled to reinstatement. This reinstatement must however be subject to a final written warning, for the reasons I have set out above. In *Xstrata*[75] the Court said that:

[75] (*supra*) at para 8. See also *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 26.

> 'If the exceptions to the remedy of reinstatement do not apply, the Labour Court and arbitrators only have a discretion with regard to the extent to which reinstatement should be made retrospective.'

[97] As to how this discretion must be exercised, the Court in *Equity Aviation Services*[76] held:

> '… In exercising the discretion a court or an arbitrator may address, among other things, the period between the dismissal and the trial as well as the fact that the dismissed employee was without income during the period of dismissal, ensuring however, that an employer is not unjustly financially burdened if retrospective reinstatement is ordered or awarded.'

In *Mediterranean Textile Mills*[77] the Court referred with approval to the aforesaid *dictum* in *Equity Aviation Services*, and added the following:[78]

> 'I am accordingly inclined to agree with the appellant's counsel that the retrospective reinstatement order issued by the Labour Court entitling the employees to full backpay had the effect of 'unjustly financially burdening' the appellant and was not objectively fair on the facts of this case. The order did not take cognizance of the employees' conduct which deserved some form of censure as a mark of this court's disapproval thereof. In my view, an order granting the employees 12 months' backpay would be just and equitable in the circumstances.'

[98] In deciding the appropriate back pay to be awarded, I do consider that the individual applicant did commit misconduct and that there was harm caused to the image and reputation of the third respondent. Even though these considerations were not enough to work against reinstatement, they remain valid considerations when deciding the *quantum* of back pay. I also consider that it was the failure of the second respondent that resulted in this Court having to be approached, and the resulting further delay that took place as a result thereof. One must also bear in mind what would be considered to be just and equitable to both parties, an important consideration where it comes to

[76] (*supra*) at para 43.
[77] (*supra*) at para 31.
[78] Id at para 45.

monetary awards.[79] Taking a leaf out of the book of the judgment in *Mediterranean Textile Mills*, I decide that back pay should be limited to 12(twelve) months' salary.

[99] This then only leaves the question of costs. In terms of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. The third respondent did oppose the matter, but I do not think the opposition was unreasonable. I am also mindful of the fact that as a result of the relief afforded in this judgment, an employment relationship would be restored between the parties and I am not inclined to burden the restoration of this relationship with a costs order. The third respondent and the PSA also have a continuing relationship. I also consider that the individual applicant indeed did transgress, which was the catalyst for all that followed. In all these circumstances, the appropriate order where it comes to costs, is to make no order as to costs, and I exercise my discretion accordingly.

[100] In conclusion the arbitration award of the second respondent in terms of which it was found that the dismissal of the individual applicant by the third respondent was an appropriate and fair sanction is irregular, unsustainable and not a reasonable outcome, and falls to be reviewed and set aside. The award of the second respondent must be substituted with an award that the dismissal of the individual applicant by the third respondent is substantively unfair on the basis that the sanction of dismissal in this instance was unfair. The individual applicant is entitled to consequential relief, as a result of his substantively unfair dismissal, of reinstatement retrospective to the date of his dismissal on 6 May 2013 on his same terms and conditions that prevailed at the date of his dismissal, but with back pay limited to 12(twelve) months' salary.

Order

[101] In the premises, I make the following order:

[79] In dealing with an award of back pay, Zondo JP (as he then was) in *Kemp t/a Centralmed v Rawlins* (2009) 30 *ILJ* 2677 (LAC) at para 27 said: ''…. The court has to consider all the relevant circumstances and make such order as it deems fair to both parties in the light of everything ...'. The SCA in *Rawlins v Kemp t/a Centralmed* (2010) 31 *ILJ* 2325 (SCA) upheld the findings of the LAC with regard to the principles set out in the LAC judgment.

1. The applicant's review application is granted.

2. The arbitration award of the second respondent dated 24 February 2014 and issued under case number GPBC 1254/2013 is reviewed and set aside.

3. The arbitration award of the second respondent dated 24 February 2014 and issued under case number GPBC 1254/2013, is substituted with an award that the dismissal of the individual applicant by the third respondent is substantively unfair.

4. The individual applicant, Andrew Rae, is reinstated with retrospective effect to the date of his dismissal on 6 May 2013, on the same terms and conditions of employment that prevailed at the time of dismissal, but subject to a final written warning that will apply from date of this order for a period of 12(twelve) months.

5. The back pay payable to the individual applicant as a result of the reinstatement awarded in terms of paragraph 4 of this order shall be limited to an amount equivalent to 12(twelve) months' salary of the individual applicant.

6. There is no order as to costs.

S.Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Ms J Rheeder of Johanette Rheeder Attorneys
For the Third Respondent:	Adv L Pillay
Instructed by:	The State Attorney, Pretoria