**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

Case No: JR1894/2011

In the matter between:

**MIRANDA NANGAMSO MGIJIMA** **Applicant**

**And**

**MEMBER OF THE EXECUTIVE COUNCIL,** **First Respondent**

**GAUTENG DEPARTMENT OF EDUCATION**

**ZARINA WALELE N.O** **Second Respondent**

**THE GENERAL PUBLIC SERVICE SECTORAL**

**BARGAINING COUNCIL** **Third Respondent**

**Heard: 07 April 2014**

**Delivered: 27 October 2014**

**Summary: Dismissal of senior manager on the grounds of incompatibility. The employer convening a meeting where the issues causing disharmony were ventilated. The meeting resolving that an organisational psychologist should be appointed to investigate the cause of the disharmony. The employer dismissing the employee a year later- having failed to appoint the psychologist. Incompatibility regarded as a species of incapacity.**

---

**JUDGMENT**

---

MOLAHLEHI, J

Introduction

[1] This is an application to review and set aside the arbitration award made by the second respondent (the arbitrator) on 01 August 2011, in terms of which she found the dismissal of the applicant for the incompatibility to have been fair.

[2] Subsequent to the filing of the review application, the first respondent (the department) raised several preliminary issues which were considered and determined by Bhoola J on 14 February 2013. In determining those issues, the Learned Judge made the following order:

> '1. The Application to strike out the document "J" from the record is granted as unopposed with no order as to costs.
>
> 2. The Application for condonation of the late filing of the replying affidavit, the late filing of the heads of argument and the late filing of the application for condonation is dismissed with costs on a scale *de bonis propriis* payable by A N Msindwana.
>
> 3. The conduct of the applicant's attorneys of record and their failure to deliver a complete record renders the review defective and unless this defect is remedied within (10) ten days of this order the review application will be deemed to be dismissed with costs on a scale *de bonis propriis* payable by A N Msindwana.'

[3] The matter then came before this Court on 31January 2014 but had to be postponed as the applicant needed legal representation; her attorneys having withdrawn shortly before the day of the hearing.

Background Facts

[4] The applicant who prior to her dismissal was employed as Deputy Director General District and Institutional Governance (the DDG) was dismissed for incompatalibility and breakdown in the trust relationship. The applicant was employed by the first respondent, the Gauteng Department of Education (the department) on a 5 year fixed term contract which commenced on 01 December 2007 and would have expired on 31 October 2012.

[5] In terms of the responsibility in the department, the applicant was the second in charge, the first being the head of department (the HOD) whose position was equivalent to that of the director general (the DG) in other departments of government. The applicant was responsible for managing the implementation of the school's curriculum in the Gauteng Province.

[6] The Gauteng Province has 15 districts with about 2 million learners and 16 000 educators. In managing the 15 district directors, the applicant was assisted by 2 chief directors.

[7] As a senior manager, the applicant's contract of employment made provision for a performance management contract. The performance management contract was concluded on 01 April 2008 and was effective until 31 March 2009. In addition to agreeing with the statutory obligation of the position, she occupied the applicant agreed to observe utmost good faith and undertook that in her dealings with the department she would not do anything that might amongst other things prejudice or detract from protecting the interest of the department. Her responsibilities included also ensuring effective service delivery coordination of all the activities of the 15 education districts and strengthing the interface between the district and the head office.

[8] On 16 October 2009, the department instituted disciplinary proceeding against the applicant for incompatibility. The disciplinary hearing, which was chaired by a senior counsel from the Johannesburg Bar, found the applicant guilty of incompatibility and recommended that she be dismissed for that reason.

[9] The applicant, being unhappy with the outcome of the disciplinary hearing, referred a dispute concerning the alleged unfair dismissal to the third respondent for conciliation. The attempt at conciliation having failed, the matter was arbitrated upon by the arbitrator who as indicated earlier found the dismissal to have been for a fair reason.

[10] In support of its claim that the dismissal was for a fair reason, the respondent presented its version through the testimony of eight witnesses.

The first witness:

[11] The first witness of the department was Ms Moiloa, one of the Chief Directors who reported to the applicant and was responsible for institutional development. Her key responsibilities were to ensure effectiveness and efficiency of the running of schools at the various levels through funding, resourcing and governance. She reported and accounted on the operational plans developed for the department.

[12] Ms Moiloa testified that soon after the introduction of the applicant as her senior who she was supposed to report to, she developed fear which was due to the confrontational style of management of the applicant. She experienced the confrontational style of the applicant at the meeting which was to take place at the applicant's office. She had failed to attend that meeting in time because at that time she had a meeting with the external stakeholders. She had sent a message of apology to the applicant's office indicating that she would report to the applicant's office as soon as she was done with the other meeting.

[13] It would appear on receipt of the message, that Ms Moiloa was not able to immediately attend the meeting, the applicant went to her office, 'stormed into the office and called her outside the office'. Outside the office and in the foyer, the applicant chastised Ms Moiloa for not listening to her instructions. The office door was open as Ms Moiloa was being chastised and six of her subordinates sitting in that meeting could hear.

[14] The other incident which Ms Moiloa referred to as evidence of the confrontational and intolerant nature of the applicant relates to the request that she made to report after 08h30 am because she had to drop her grandson at school before reporting for work. The applicant acceded to the request on condition that she signed an attendance register. Ms Moiloa complied with the condition for three months and thereafter stopped because she had found the condition embarrassing and more particularly that the applicant's PA had to check on the register regularly. Ms Moiloa further testified that the applicant regularly left the office at 15h00 and would then phone the office on the landline just before 16h00 pm, which according to her seemed to have been a way of checking whether they were still in their offices. This practice included sending secretaries and other junior staff members to check at 16h00 pm whether the directors were still in the office.

[15] Ms Moiloa testified also about the tension that existed between the applicant and Mr Nkonyane. The tension manifested itself in meetings where there would be challenges and exchanges between the two of them. Mr Nkonyane unlike Miss Kgare would always respond when the applicant criticised him or harassed him. The arguments and the exchanges between Mr Nkonyane and the applicant would at times take place in front of the district directors who were Mr Nkonyane's subordinates.

[16] She testified also about the tension between the applicant and Mr Tau who was at the time responsible for intervention and governance.

[17] During cross examination, Ms Moiloa conceded that part of the problem that existed may have been due to the changes introduced by the applicant, which according her did not have to make people fearful, uncomfortable, scared and depressed.

<u>The second witness;</u>

[18] The second witness of the department was Mr Tau, who at the time was employed as the district director, Ekurhuleni North. He was in charge of 14 staff members. In terms of the organogram, he was supposed to report to the

Chief Director but upon commencement with his duties the applicant informed him that he would report to her directly.

[19] According to Mr Tau, his first challenge on assuming his duties was to deal with the issue of staff members in his unit who had been grounded by the applicant. The staff members could not provide him with reasons for their grounding but referred him to Mr Nkonyane. On enquiring about the issue, Mr Nkonyane advised that he had been instructed by the applicant to ground the staff members; the reason for that was, however, was not provided. He then approached the applicant to enquire as to the reason for the grounding of the staff. The applicant denied having given the instructions to have the staff members grounded. It is for this reason that Mr Tau went back to the staff and informed them to continue working on their programmes. A week later Mr Tau, received a letter from the applicant enquiring as to who released the staff to perform their duties. He informed her that he had released the staff because no one could take responsibility for the grounding.

[20] Mr Tau testified about an incidence where there was an altercation between the applicant and Mr Nkonyane just before the provincial meeting of management could start. The altercation between the two delayed the starting of the meeting which was to be chaired by the applicant.

[21] The other example given by Mr Tau to indicate the negative management style of the applicant relates to the instruction given to him to take over the running of the DDG's office, by having the office manager Ms Pullen reporting to him.

[22] A week later after giving the instruction about the supervision of Ms Pullen, the applicant addressed a letter to Mr Tau enquiring as to who said he should be in charge of Miss Pullen. He responded to the letter by indicating how it came about that he was in charge of Ms Pullen but never received any response from the applicant.

[23] The other example for the poor management style of the applicant stated by Mr Tau relates to the invitation from the national office to attend the meeting in Polokwane. According to him, he had approached the applicant with regard to

this invitation for guidance as the invitation arrived very late. After completing the logistical arrangement, he reported to the applicant. Instead of giving guidance, the applicant told him that if she wished, she could cancel the trip.

[24] The other incident which Mr Tau used to illustrate the negative attitude of the applicant took place when he was required to make a presentation to the MEC. It happened that he had already started working on the presentation. At the meeting the applicant presented a draft different to that which he prepared.

[25] He also testified that the environment created by the applicant was so hostile that he addressed a letter to the MEC requesting to be transferred back to his position as a principal of the school.

The third Witness

[26] Mr Nkonyane, the Chief Director for districts and previously Chief Director of Ekurhuleni South, was the third witness of the department. He was responsible for co-ordinating the 15 districts. The district directors in those districts reported to him.

[27] The first interaction that Mr Nkonyane had with the applicant was on 25 January 2008, when he was required to report at the office of the applicant. On arrival at the office the applicant accused him in the presence of other people for failing to submit the school readiness plan which he had already done. The applicant would not afford him the opportunity to explain why it was not submitted. The relationship between the two deteriorated since that day. Furthermore on the 14 February 2008, when the applicant is alleged to have repeatedly interrupted Mr Nkonyane during his presentation at a meeting.

[28] The other incidence which Mr Nkonyane cited as example of the negative management style of the applicant relates to when she arranged a meeting for 07h00 am on 15 February 2008, with herself, Ms Moiloa and Miss Kgare. He reported at the applicant's office 15 minutes before the time set for the meeting but there was no response when he knocked at the office door of the applicant. This happened also again the second time when he reported for the

meeting. On both occasions, he would go back to his office when there was nobody responding when he knocked on the applicant's door. At about 08h00 am, he was called to the applicant's office, where he was required to produce the institutional development support officers' job description. According to him, the applicant would not listen and was aggressive towards him when he explained that he has submitted his part of the report and the rest was a team work effort.

[29] The other incident which Mr Nkonyane used to illustrate the negative management style of the applicant relates to an instruction given to him on 29 February 2008. He was instructed to produce a document relating to the rules and responsibilities of the districts. According to him, an arrangement had been made to discuss the rules and function of the districts at a workshop which was to be held on the 04 and 05 March 2008.

[30] The other example given by Mr Nkonyane concerns the instruction given by the applicant that all government vehicles, used by the directorate should be grounded because she did not know what the people in that directorate were doing. After having given that instruction, she later communicated to the staff who were supposed to use the cars, to say she did not understand why the cars were grounded.

[31] The incidence at Norwood Primary School is another example given by Mr Nkonyane to illustrate the negative management style and the attitude of the applicant towards him. The meeting was convened at the school to address numerous issues. It was alleged that during the meeting, the applicant ignored Mr Nkonyane every time he raised his hand and when she finally recognised him she would not listen to his explanation as to why the previous meeting at the school failed. She attacked him saying that she did not know about the other activities which prevented him from attending the meeting.

[32] On 08 May 2008, a branch meeting was held at Matthew Goniwe School of Leadership where Mr Nkonyane had to make a presentation. It is alleged that the applicant interrupted him as he was making his presentation and told him that he was out of order. Whilst trying to explain a particular point, the

applicant stormed out of the meeting without any apology and failed to do so even when she came back.

The Fourth Witness:

[33] The fourth witness of the Department was Ms Pullen, the Chief Education Specialist in the office of the DDG – the applicant at the time. Her testimony concerned mainly the manner in which she had been treated by the applicant both on the trip they undertook to Cape Town and access to transport for her to visit districts.

[34] In relation to the Cape Town trip, Ms Pullen testified that the applicant was firstly unhappy about being booked on an economic class. Although she did not do the booking and was new in the department, the applicant was angry with her and demanded that she sought the issue without giving her any guidance. The applicant simply told her that she would not fly to Cape Town unless the ticket was changed to business class.

[35] As a newly appointed person Ms Pullen enquired from the applicant as to what she should do because the booking was done by someone else. The answer from the applicant was that she would not fly on the economic flight and that she (Ms Pullen) had to see to it that the ticket was changed to business class.

[36] Ms Pullen contacted the office on a number of occasions to seek advice as to what she could do to address the problem that had arisen with the flight booking. The applicant did not only fail to provide guidance to Ms Pullen, her subordinate, but was angry because every time she reported to her what people in the office were saying about the booking she would tell her that she did not like being interrupted during her meetings. Her attitude was that she did not care and whatever other people were saying in the office about the ticket, it was for Ms Pullen to sort out.

[37] The problem of the flight booking was sorted out when one of the staff members who was also travelling to Cape Town offered to pay R800.00 for the upgrade of the ticket.

[38] On arrival at the airport in Cape Town another problem arose which angered the applicant and caused her to shout at Ms Pullen and her colleague relates to the car which was booked for travelling to the hotel. They were booked a 1400 litre Corsa which did not have an air conditioner.

[39] Ms Pullen also alleges that on arrival at the hotel, the applicant required her to carry her bags despite the fact that she had her bags to carry.

[40] The other problem that arose for Ms Pullen, new as she was in the department, had to do with the transportation to the various districtswhich she had to undertake across the province as part of her duties. In this respect, she would request a vehicle from the government fleet which entails completing certain forms and having them signed by the applicant for authorisation. The applicant would fail to sign the forms on time or at all resulting in Ms Pullen not being able to utilise the vehicle as requested. She resorted to utilising her own vehicle as a way of addressing the problem. She, however, encounted another problem which was that the applicant would never authorise her travelling claims.

[41] At some point in this tense relationship, the applicant required Ms Pullen to make an appointment with her PA if she needed to see her. This was despite the fact that she was the office manager.

The fifth witness

[42] The fifth witness of the Department was Mr Matabane, the district director Johannesburg East, who in terms of his line function reported to the chief director, Mr Nkonyane. He confirmed the allegation concerning the meeting held at Matthew Goniwe Leadership School, where it was alleged that the applicant left the meeting to answer a cell phone call without apologising. He also testified about what happen at the Norwood School.

The sixth witness:

[43] The sixth witness was Mr Chanee who was the DDG for corporate services and responsible specifically for human resource development. His

engagement with the applicant concern addressing issues relating to capacity and operational matters related to the D grade R practitioners and A grade practitioners. He testified that his interaction with the applicant was not frequent but the one incident he had to engage with her was when the MEC had requested an intervention arising from the public outcry amongst other things related to Grade R and specifically the non payment of the practitioners in that grade. According to him, he developed a perception from what he had heard from a number of individuals in that process that the applicant was a difficult person to work with.

[44] Mr Chanee was also part of the meeting of 14 July 2008 and served as a scriber of the minutes during deliberations. According to him, the meeting was convened to discuss a number of complaints raised about the relationship and management style of the applicant.

[45] There are three main conclusions that came out of the meeting according to Mr Chanee and they are:

a. That according to the DDG the common denominator in the problem that existed at the time was the applicant.

b. That the applicant would review districts performances, implement remedies and submit a report

c. That he (Mr Chanee) was to facilitate the appointment of organisational psychologist to assist in identifying the causes of the breakdown in the relationship and suggest a solution.

<u>The seventh witness</u>

[46] The seventh witness of the department was Mr Davids, Deputy Director General responsible for curriculum management and delivery and at some point he acted as HOD for the department. He testified that the relationship between him and the applicant broke down on 15 July 2009. The problem arose from the issue of the non payment of Grade R practitioners. The Grade R practitioners had marched to the department and demanded to see the

MEC. There is also an issue about management problem at one of the high schools in Soweto and a seat-in at one of the district offices.

[47] The other problem between the applicant and Mr Davids arose from the performance review. The issue concerned the arrangement of the meeting to conduct the performance review of the applicant. The meeting between the two took place on 15 July 2009. Mr Davids testified during the arbitration hearing that the applicant was very aggressive towards him, would not allow him the opportunity of speaking and pointed a finger at him.

[48] As concerning the interaction between the applicant and other staff members, Mr Davids said he heard observed the applicant in more than one occasion distancing herself from the presentation made by her subordinates. He also testified about the breakdown in the relationship between the applicant and Mr Nkonyane.

The eighth witness:

[49] The eighth witness of the department was Mr Ngobeni the HOD of the department. He testified that he was baffled by the behaviour and interaction of the application in several high level meetings. He described her as a person who would not take responsibility, created conflict easily, was not a team player and her interpersonal skills were very poor.

[50] As an example of the poor interpersonal skills and attitude of the applicant, Mr Ngobeni referred to what happened at a senior management meeting held at Gold Reef City which he attended. The applicant raised her hand after the presentation of one of her managers and after being recognised gave a parallel presentation to the one presented by one of the managers. She according to him disowned the other presentation.

[51] The other negative experience which Mr Ngubeni had with the applicant relates to an instance when his PA had to collect something from the applicant. The applicant took exception to the PA referring to her as Mrs Mgijima and not as doctor.

The case of the Applicant

[52] In her defence, the applicant denied most to the allegations made against her by the various witnesses that testified in favour of the department. In relation to Ms Moiloa, she testified that they had a good relationship and working with her, they managed to develop a number of policies for the department. She denied ever making her sign an attendance register. The version that she required Miss Moiloa to fill in the register was, however, never put to Ms Moiloa during her cross examination.

[53] The relationship with Mr Nkonyane was initially cordial and harmonious until after the meeting where the strategic document of the MEC with priorities were discussed. Mr Nkonyane was according to her uncooperative. This version was never put to Mr Nkonyane.

[54] She further confirmed the meeting of the 14 July 2009, where the HOD opened it by indicating that he had received complaints against her. Amongst the list of complaints was that she failed to manage the people which resulted in the acrimonious relationship with managers and subordinate staff members.

[55] The applicant stated that she did not respond to each of the complaints raised by the staff members but stated in broad terms that she was surprised by the issues raised. She, however, responded to the allegation concerning the grounding of the cars by stating that Mr Tau did apologise about that issue. This was, however, never put to Mr Tau. The letter of apology which she says Mr Tau wrote to her regarding this matter was also not placed before the arbitrator.

[56] The applicant did not dispute having left the meeting as alleged to answer a telephone call. She also did not dispute having left without an apology but stated that she had to answer an urgent call from the HOD. This version was not put to the witnesses of the department.

[57] As concerning the allegation about the flight ticket and the car booked for her, the applicant largely conceded to those allegations.

The grounds for review.

[58] The applicant has raised several grounds of review which can broadly be summarised, as relating to failure to meet the reasonable standard of a reasonable Commissioner and gross-irregularity committed in the conduct of the arbitration proceedings. The aspect of unreasonableness relate to the allegations that the Commissioner failed to apply her mind to the facts before her, disregarded the relevant evidence, misconstrued the evidence and adopted a definition of incompatibility that is too wide.

[59] As concerning the issue of irregularity the complaints of the applicant are essentially that the Commissioner refused to direct the department to discover certain documents, she was compelled to confine to lead her only witness to a letter that she had written and that the Commissioner was biased. The complaint of biased includes the fact that the Commissioner had at an earlier period and before the applicant joined the department chaired a disciplinary hearing involving the applicant. The applicant complaint also about the ruling on the change of venue by the Commissioner.

[60] I do not deem necessary to deal with the allegations that the Commissioner committed irregularities in the conduct of the arbitration proceedings, save to say none of them bears merit. I do not deal with those complaints for the simple reason, as will appear later in this judgment, I am of the view that matters turns on the finding that the sanction of dismissal was fair in the circumstances.

[61] The complaint of the applicant in as far as gross irregularity is concerned that needs some attention concern the refusal of the arbitrator to recuse herself. The complaint of the applicant in this respect is that the arbitrator ought to have recused herself from hearing the matter because she chaired a disciplinary hearing of the applicant when she was an employee of the Department of Arts and Culture. The arbitrator dismissed the application for her recusal on the grounds that she never determined the merits of the charges which were proffered against the applicant because the matter was settled by agreement between the parties. It is important to note that the

arbitrator served in that process in her capacity as an independent third party. In my view, on these facts, the arbitrator cannot be faulted for refusing to recuse herself. The complaint is thus unsustainable.

The arbitration award

[62] The Commissioner in her analysis of the evidence before her found that the version of the department as presented through various witnesses was not challenged by the applicant. The failure according to the Commissioner meant that the events and incidents set out in the testimony of the various witnesses could not be said to be "the figment of their imagination".

[63] The Commissioner rejected the suggestion of the applicant in her defence that the conflict between her and her colleagues was due to the high standards she had set for the department. In arriving at the conclusion that the employment relationship had irretrievably broken down, the Commissioner found that the cause of the breakdown and the disharmony in the department was caused by applicant's conduct. The Commissioner found that although the department had failed to follow up the decision to appoint a psychologist, "the Applicant at her level was duty bound in terms of contract of employment; duty of good faith and position in the Department to do something about what was said at the meeting about her management style and the problems that her subordinates were experiencing. She simply transferred the blame to the Respondents' lack of appointing the psychologist and did nothing about it."

The test of review

[64] It is now well established that the test to apply in review matters is that of a reasonable decision maker which has been explained in by the Labour Appeal Court (LAC) in *Fidelity Guard Cash Management Services v CCMA and Others*,[1] in the following terms:

> 'If it is award or decision that a reasonable decision-maker could not reach, then the decision or the award of the CCMA is unreasonable and, therefore reviewable and could be set aside. If it is a decision that a reasonable

[1] [2008] 3 BLLR 197 (LAC) at para 97.

> decision-maker could reach, the decision or the award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration or decision of the commissioner is one that a reasonable decision would not reach but one that a reasonable decision maker could not reach.'

[65] After arriving at the conclusion that the disharmony in the department was caused by the attitude and conduct of applicant, the Commissioner proceeded to determine whether the sanction of dismissal imposed by the department was fair. It is apparent from the reading of the arbitration award that the Commissioner applied her mind to the facts and the circumstances of the matter before arriving at the conclusion regarding the cause of the disharmony in the department. In my view, the Commissioner cannot be criticised for unreasonableness in arriving at the conclusion that the applicant caused disharmony in the branch. The same cannot, however, be said of the conclusion that the sanction of dismissal was in the circumstances of this case fair for the reason set out below.

[66] Having concluded that the main cause of the disharmony in the branch was the conduct of the applicant, the Commissioner was then enjoined to determine whether the sanction of dismissal was in the circumstances of the case fair. The responsibility of determining whether the decision to dismiss an employee was fair rests with the Commissioner. The Commissioner has to determine the fairness of the dismissal based on the evidence and the circumstances determined by the facts or material placed before him of her during the arbitration proceedings.[2] The test to apply in determining whether dismissal was an appropriate sanction is whether the misconduct renders the relationship intolerable.[3] In *Sidumo and Another v Rustenburg Platinum Mine Limited and Others*,[4] the Court held that:

> 'In determining whether the sanction of dismissal is fair, therefore the commissioner must take into account the totality of the circumstances,

---

[2] See *Sidumo and Another v Rustenburg Platinum Mine Limited and Others* [2007] 12 BLLR 1097 (CC).at para 79.See also *Wasteman Group v SAMWU and Others* (2012) 33 *ILJ* 2054 (LAC).
[3] See *Woolworths (Pty) Ltd v CCMA and Others* [2011] 10 BLLR 963 (LAC), *Rainbow Farms (Pty) Ltd v CCMA and Others* [2011] 5 BLLR 451 (LAC) and *Edcon Ltd v Pillemer N.O and Others* [2010] 1 BLLR 1 (SCA).
[4] *Sidumo* at para 78.

including the importance of the of the rule that had been breached, the reason the employer imposed the sanction of dismissal, 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 the dismissal on the employee and the employee's record.'

[67] It was further stated in *Sidumo* that the Commissioner's sense of fairness is what must prevail and not the employer's view.[5]

The principles re: incompatibility.

[68] It is trite law that there are certain grounds upon which an employer can be justified in terminating the employment contract of an employee. In terms of section 188 of the Labour Relations Act of 1995 (the LRA), the dismissal of an employee is unfair unless the employer can show that the reason for such a dismissal was related to conduct, incapacity or operational consideration.[6]

[69] Although the LRA makes no reference to incompatibility as ground for dismissal, the Court and other dispute resolution tribunals recognise it as part of the incapacity and as a ground for terminating employment relationship.

[70] As indicated earlier incompatibility is generally treated as aspect of incapacity and essentially involves the inability or failure by an employee to maintain harmonious relationship with his or her colleagues. Some of the factors that may cause incompatibility may be related to the 'personality conflicts, management style, inability to integrate into culture and the environment of the workplace and simple lack of confidence in the ability or willingness of the manager to do the job in the way the owner or senior colleagues desire could justify dismissal.'[7]

[71] The onus is on the employer to show that the employee charged with incompatibility is responsible substantially for the disharmony at the

---

[5] See *Sidumo* para 75.

[6] Section 188 of the LRA reads: "(1) A *dismissal* that is not automatically unfair, is unfair if the employer fails to prove -

(a) that the reason for *dismissal* is a fair reason -
(i) related to the *employee*'s conduct or capacity; or
(ii) based on the employer's *operational requirements*; and

[7] *Jabari v Telkom SA (Pty) Ltd* [2006] 10 BLLR 924 (LC).

workplace. Furthermore, the employer must show that incompatibility as proven constitute a fair reason for the dismissal in the circumstances of a given case. The fairness of the dismissal in incompatibility cases, general turns around the question of:

a. the nature and the seriousness of the conduct of the employee in causing disharmony with the others.

b. the assistance given to the employee to address his or her problem. This may include counseling and facilitating a relationship building by objective exercise.

c. placing the employee in another alternative position if the remedial action has failed.

[72] In dealing with the approach to adopt when confronted with incompatibility the Court in *Wright v St Mary's Hospital,*[8] held that:

> 'The employee must be advised what conduct allegedly causes disharmony; who has been upset by the conduct; what remedial action is suggested to remove the incompatibility; that the employee be given a fair opportunity to consider the allegations and prepare his reply thereto; that he be given a proper opportunity of putting his version; and where it is found that he was responsible for the disharmony, he must be given a fair opportunity to remove the cause for disharmony.'

Evaluation

[73] It is common cause that the applicant was the second in charge in the department reporting to the HOD. In this respect, it is generally accepted that when dealing with the fairness of the dismissal of senior employees in cases involving incompatibility, the Court should adopt a more flexible approach.[9] The procedure to follow prior to dismissal in cases involving senior managers is also approached with much flexibility. This does not, however, detract from

[8] (1992) 13 *ILJ* (IC) at 1004H-J.
[9] *Brereton v Bateman Industrial Corporation Ltd and Others* (2000) 21 *ILJ* 442 (IC).

the basic principle enshrined in section 185 of the LRA[10] which protects employees from unfair dismissal by their employers.

[74] It is significant to note, in the present matter, that the disciplinary enquiry was instituted at the end of October 2009, which is about a year since the meeting of 14 July 2008 where the previous HOD, intervened to deal with the complaints which had been raised against the applicant. The meeting identified the causes of the disharmony in the branch and thereafter adopted a resolution on the approach to adopt to deal with it.

[75] There appears to have been no other complaints against the applicant since that meeting. Mr Nkonyane seems to attribute the harmony in the branch since the meeting to the fact that he avoided dealing with the applicant. Ms Pullen had taken a transfer to another district. There is no evidence that she took the transfer because she had further fallout with the applicant after the meeting of the 14 June 2008.

[76] The arbitrator, in her finding, accepted that the department had failed to implement the above resolution relating to the appointment of the psychologist. She, however, blames the applicant as a senior manager for failing to see to it that the resolution was implemented. Mr Chanee was appointed by the HOD to facilitate the appointment of the psychologist. There is no evidence that the applicant obstructed or influenced Mr Chanee otherwise in performing his mandate given in terms of the resolution of the meeting of 14 June 2008.

[77] In the circumstances of this case, I am of the view, that the finding of the arbitrator in relation to the fairness of the sanction is unreasonable. In this respect, the Commissioner failed to apply her mind to the totality and the circumstances of the matter. She applied an irrelevant consideration to the non-appointment of the psychologist. Although the applicant was second in charge in the department, she was, however, accountable to the HOD who

---

[10] Section 185 of the LRA reads as follows: "Right not to be unfairly dismissed or subjected to unfair labour practice" Every *employee* has the right not to be –

(a) unfairly dismissed; and

(b) that the *dismissal* was effected in accordance with a fair procedure.

had been part of the consensus that a third party should be appointed to assist in investigating the causes of the problem. Accepting that the applicant was a senior manager, she was, however, the one accused of causing the disharmony. It would therefore, have been inappropriate and probably compounded the conflict further had she taken the responsibility of arranging the appointment of the psychologist when she was not mandated by the resolution of the meeting to do that. In fact, had she done that the process of investigating the matter by the psychologist was likely to have been undermined.

[78] In the absence of evidence as to why the department took so long to institute the disciplinary hearing against the applicant and also evidence of further conflict after the meeting of 14 June 2008, the inevitable and reasonable conclusion ought to have been that the department did not regard the incidents as described by the various witnesses as being serious enough to warrant a dismissal. In other words and on the authority of *Edcon v Pillemer,*[11] the Commissioner ought to have found that objectively speaking there was insufficient evidence to conclude that the relationship between the parties had irretrievably broken-down. Another factor which the Commissioner ought to have taken into account is that in terms of the outcome of the meeting, the HOD seems to have been of the view that the issues that had caused disharmony had been ventilated and that the possibility of repeat would be addressed with the recommendation of the psychologist. If the erstwhile HOD had been of the view that the issues had not been properly and fully ventilated and there were no prospects of harmonious relationship, he would have instituted the disciplinary hearing soon thereafter.

[79] In light of the above, I find the conclusion reached by the arbitrator that the dismissal of the applicant was fair to be one which no reasonable decision maker could have reached. The issue that then remains is whether I should remit the matter to the First Respondent for consideration afresh or should substitute that decision.

[11] (2010) 1 BLLR 1 (SCA).

[80] In the circumstances, where there has been such a significant delay in the finalisation of the review application and considering the time it would take to finalise this matter if it was to be remitted to the First Respondent, I am of the view, in light of all the materials before this Court, that the appropriate approach to adopt is to substitute the decision of the Commissioner.

[81] It should be apparent from my earlier analysis that the dismissal of the applicant was in the circumstances of this matter unfair. It follows that the next issue for consideration is the remedy to be made.

[82] It is trite that the primary remedy in a case where the dismissal has been found to be unfair is reinstatement or re-employment, unless the provisions of section 193 of the LRA[12] apply. In terms of section 193 (2) of the LRA, the Court has a discretion not to order reinstatement where amongst others the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

[83] It is apparent from the circumstances and the facts of this case that reinstatement would be inappropriate. In the first instance the applicant has not as indicated earlier disputed most of the complaints made against her and secondly there was no indication in her response as what she would to address her conduct. The decision of this Court in *MEC for Education, Gauteng v Mgijima and others*,[13] involving the same parties, is also a significant factor to take into account in considering reinstatement as a remedy. In that case the applicant was accused of having failed prior to her appoint by the department that at the time of her interview she was facing a disciplinary hearing at the Department of Arts and Culture. In that case Van Niekerk J in reviewing the arbitration award which had been made in favour of the applicant observed:

---

[12] Section 193 reads: "(1) 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;

(b) 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.

[13] [2011] 3 BLLR 253 (LC).

> “[8] In short: the crucial issue before the arbitrator was not whether Mgijima was guilty of the charges brought against her by the DAC or the materiality of those charges, but her non-disclosure at the time of the interview, (and engaged during the subsequent period leading to the signing of the contract) of the fact that she was on suspension and facing serious disciplinary charges. The post for which Mgijima applied was a senior post, one that she required unimpeachable honesty and integrity on the part of its incumbent. Quite what effect Mgijima's conduct during the period of her employment at the DAC may have had on her suitability for appointment to the GED was a matter for the GED to determine. Mgijima's failure to disclose material information in response to an express invitation to do so deprived the GED of the opportunity to make an informed decision as to the effect, if any, of the suspension and pending charges of the contemplated employment relationship."

[84] In considering the amount of compensation to be made, account should be taken that the applicant with her qualification, it is expected that she possessed all the analytical tools which she could have used to deal with the conflict that was developing between her and her colleagues. She presented no evidence as to what prevented her from dealing with the conflict as would have been expected of a person at her level and qualification. She also ought to have realised, with a simple sense of respect of the dignity of others that her management style and the way she spoke to and treated others would create conflict which would lead to instability in the department. It is thus my view that the most equitable and just compensation for the unfairness of the dismissal of the applicant is 3 (three) months.

[85] As concerning the issue of costs, whilst the applicant has been successful in her unfair dismissal claim I am of the view, having regard to the facts and

circumstances of this case, that it would not be fair to allow costs to follow the results.

Order

[86] In the premises, the following order is made:

1. The arbitration award made by the Second Respondent on 01 August 2011 is reviewed and set aside.

2. The arbitration award is substituted with the following award:

   "a. The dismissal of the Applicant was substantively unfair.

   b. The Respondent is to pay the applicant compensation equivalent to 3 (three) months, calculated on the salary which the Applicant earned at the time of her dismissal."

3. The parties are each to pay their own costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In Person

For the Respondent: Mr Henry Ngcobo of Bowman Gilfillan Inc.