REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JA52/2013

In the matter between:

RUAN KUKARD **Appellant**

and

GKD DELKOR (PTY) LTD **Respondent**

Heard: **12 September 2014**

Delivered: **07 October 2014**

Summary: Proof of dismissal- parties entering into a settlement agreement to re-employ employee on same terms and conditions prior to employee's resignation- employer re-employing employee on different terms- employee refusing new terms of employment. Employee referring unfair dismissal- employer contending the existence of an employment relationship and that no dismissal took place. Commissioner finding dismissal procedurally unfair. Labour Court finding that no dismissal took place and CCMA not having jurisdiction. Arbitration award set aside- Appeal- evidence showing existence of employment relationship and that employer re-employing employee on different terms contrary to the settlement agreement. Commissioner's decision reasonable – Compensation *Kemp* judgment distinguished- reviewing an order for compensation- evaluation of the facts before the commissioner based on fairness to both parties- evidence showing that reinstatement impractical- commissioner's compensation order correct- Labour Court's judgment set

aside- review application dismissed with costs Coram: Musi JA, Murphy and Kathree-Setiloane AJJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal, with leave of this Court, against the judgment of the Labour Court (Vatalides AJ) in which it reviewed and set aside an arbitration award of the Commission for Conciliation, Mediation and Arbitration ("the CCMA") and substituted it with an award that the appellant had failed to prove a dismissal, and consequently the CCMA lacked jurisdiction to determine the appellant's unfair dismissal dispute. The Labour Court ordered the appellant to pay the costs.

[2] The factual matrix from which this appeal arises is largely common cause between the parties. The appellant, Ruan Kukard ("the appellant"), was employed by the respondent GKD Delkor (Pty) Ltd ("Delkor") during May 2005 as Technical Sales Representative (Specialised Solid Weave Products). His contract of employment included a restraint of trade *inter alia* preventing him from entering into any form of consultation, contract or discussions with direct competitors of Delkor, including those companies specifically listed in the annexures to the contract, for a period of 12 months from the date of resignation.

[3] On 29 September 2008, the appellant resigned from Delkor in order to take up a position with Larox (Pty) Ltd ("Larox"). Gary Whitford ("Whitford"), Delkor's General Manager, regarded Larox to be a competitor, and advised the appellant that Delkor would enforce the terms of the restraint of trade agreement should he take up the position with Larox. The appellant disputed that Larox was a competitor of Delkor, and a flurry of correspondence was exchanged between his attorneys (Van Gaalen Attorneys) and Delkor's attorneys (McClaren and Associates) in relation to this issue.

[4] On 23 October 2008, Delkor's attorneys wrote a letter to the appellant's attorneys confirming that Delkor would take back the appellant, and that

Whitford and the appellant were meeting the next day to formalise the arrangement. On the same day, Delkor's attorneys wrote a further letter to the appellant's attorneys stating *inter alia* that:

> 'this matter is capable of resolution on the following basis:
>
> 1. Larox SA (Pty) Limited or its associates will not employ Ruan Kukard.
>
> 2. GKD Delkor will re-employ Kukard with effect 1 November 2008.
>
> 3. Larox SA (Pty) Limited will not employ any GKD-Delkor employee who is subject to a GKD restraint.'

[5] On 24 October 2008, the appellant's attorneys wrote a letter to Delkor's attorneys stating that:

> 'GKD Delkor will re-employ Ruan Kukard on the same conditions, with the same benefits he was entitled to prior to resigning, with effect 1 November 2008.'

In a letter dated, 27 October 2008, Delkor's attorneys confirmed the abovementioned agreement by stating that:

> 'We refer to your letter dated 24 October 2008.
>
> The matter is resolved on the basis set out in your letter. We kindly request your client to report for duty on 1 November 2008.'

On Friday, 24 October 2008, Whitford met with the appellant at the Dros. Other than that the appellant had asked Whitford to provide him with a detailed job description, which Whitford undertook to do, the details of this discussion are in dispute.

[6] The appellant reported for duty at Delkor on 3 November 2008, as 1 November fell on a Saturday. Upon reporting for duty, the appellant was instructed to wait in the reception area whilst certain documents were being prepared for him. The document that was handed to the appellant on that day was a letter of appointment indicating that he would be appointed in the position of Proposal Engineer from 30 November 2008 until 30 January 2009,

whereas prior to his resignation he was employed on a permanent basis as a Technical Sales Representative. The appellant requested use of the laptop and cell phone which he used prior to his resignation, but these items were not handed to him. The appellant once again asked to be provided with a formal "job description", but it was not provided to him.

[7] On 4 November 2008, a discussion took place between the appellant and Whitford, Although the details of this discussion remain in dispute between the parties, it is common cause that Whitford raised the issue of the appellant's refusal to sign the fixed term contract for the position of Proposal Engineer with the respondent, and instructed him to hand back the company cell phone which was given to him the day before. Whitford also handed the appellant a letter, of the same date, stating that:

> 'This letter confirms that the offer of employment issued Monday 3 November is withdrawn in its entirety.'

The appellant, thereafter, left Delkor's premises. Later that day his attorneys wrote a letter, to Delkor's attorneys *inter alia* stating as follows:

> 'We confirm that our client Ruan Kukard did report for duty on 3 November 2008, 1 November 2008 was a Saturday. He was handed a Letter of Appointment, valid only for three months, and confirming his appointment as Proposal Engineer. We confirm he was not employed on the same conditions and benefit as agreed.
>
> Our client, Ruan Kukard approached your Gary Whitford from your client's offices this morning about the issue that he is not employed on the same conditions and benefits as agreed. Gary informed him that there is no agreement and that he must go home. A letter was even handed to him that confirms that the Letter of Appointment issued on 3 November 2008 is withdrawn in its entirety.
>
> We confirm that your client is in breach of the settlement agreement and further unfairly dismissed Ruan Kukard this morning. Our client accepts your client's repudiation of the settlement agreement and confirms therefore that the settlement agreement is null and void. We are in the process of referring the matter to the CCMA.'

[8] Later that day, Delkor's attorneys replied stating that:

> '1. Notwithstanding the settlement your client has been hell-bent on derailing the process of his re-integration into the company.
>
> 2. As such he has been obtuse and obstructive and difficult to deal with.
>
> 3. There is no question of repudiation or dismissal.
>
> 4. The correspondence and proposed letters of appointment were put forward for discussion purposes only.
>
> 5. You will note from the last paragraph of the proposed agreement that if your client had any queries, he was invited to take up same with the writer.
>
> 6. …
>
> 7. …
>
> 8. There is accordingly no question that your client was dismissed and both you and your client are invited to meet with the writer to discuss the matter.'

[9] On 4 November 2008, the appellant referred an unfair dismissal dispute to the CCMA. The dispute was arbitrated by the Commissioner on 17 February 2009, and on 23 February 2009 she issued the arbitration award ("the award") in which she found that the appellant was dismissed by Delkor on 4 November 2008, and that his dismissal was substantively and procedurally unfair. The Commissioner found that the so called extension of the settlement, dated 11 February 2009, the repeated statements that the appellant had in fact not been dismissed, and the offers to re-employ him, including the one made at the arbitration were of no consequence to the consideration of proper compensation due to the appellant. The Commissioner held, in this regard, that the relationship between the appellant and Delkor "cannot be salvaged" based on: (a) the length of service of the appellant; (b) the way in which the appellant was treated; and (c) the fact that the appellant had been unable to secure employment. The Commissioner accordingly ordered Delkor to pay the appellant the amount of R420 000, 00, in compensation, equivalent

to seven months' pay, within seven working days of the award. No order as to costs was made.

[10] Aggrieved by the outcome of the arbitration, Delkor launched an application for the review and setting aside of the award on the grounds that: (a) the CCMA lacked the requisite jurisdiction to entertain the dispute as there was no "dismissal" as defined in section 186[1] of the Labour Relations Act, 66 of 1995 ("the LRA"); (b) the appellant failed to discharge the *onus* of proving the existence of an employment relationship between the appellant and Delkor, and that it was terminated at the instance of Delkor; and (c) no reasonable Commissioner could have awarded the appellant compensation equivalent to seven months' pay.

[11] The Labour Court found in relation to the contention that an employment relationship did not come into existence "as a consequence of the parties being unable to reach consensus on the material aspects of the employment relationship", that an employment relationship did in fact come into existence between the appellant and Delkor. On the jurisdictional question, the Labour Court found that the withdrawal of the offer of 3 November 2008 by Whitford, in the letter of 4 November 2008, cannot in and of itself constitute a dismissal as the offer had never been accepted by the appellant. The Labour Court was furthermore not persuaded by the appellant's argument that the "only inference" that can be drawn from Whitford's conduct on 4 November 2008 is that Whitford dismissed the appellant on that day. The Labour Court found the appellant's contention that he was dismissed on 4 November 2008 to be in conflict with Delkor's letter of 4 November 2008, which states that the appellant had not been dismissed. The Labour Court consequently found that because the appellant had failed to discharge the *onus* resting on him to prove that he was dismissed by Delkor, the CCMA lacked the jurisdiction to entertain the appellant's dismissal dispute.

[1] Section 186(1)(a) of the LRA provides:
''Dismissal' means that−
(a) an employer has terminated a contract of employment with or without notice '.

[12] I now turn to question of whether the CCMA had jurisdiction to deal with this dispute. Since the jurisdiction of the CCMA is intrinsic to the purported dismissal of the appellant as defined in s186 of the LRA, this Court must first determine whether, on an objective assessment of the evidence, the Labour Court was correct in setting aside the Commissioner's finding that the appellant was dismissed by Delkor within the meaning of s186(1)(a) of the LRA. In determining whether the CCMA has jurisdiction to deal with a dispute, the Labour Court is not limited to the *Sidumo* (reasonableness) test of review, but may determine the issue de *novo*.[2]

[13] Relying on *Ouwehoud v Hout Bay Fishing Industries,*[3] Delkor contended that the appellant has failed to prove that "an overt act" of Delkor "comprising the proximate cause of the dismissal, took place". The contention thus advanced is that the proximate cause of termination was in fact the appellant's refusal to attend work or to attend a meeting to negotiate and finalise the terms of the job description which he had demanded, and to discuss and resolve any minor teething issues such as parking, cell phone etc. Accordingly, Delkor contended that the Labour Court was correct in finding that the appellant was not dismissed.

[14] Fundamental to the determination of whether the appellant was dismissed is the question of the existence of an employment relationship between the appellant and Delkor. As correctly found by the Labour Court, an employment relationship between appellant and Delkor came into existence as a result of, the appellant's tender of services to Delkor, on 3 November 2008, pursuant to the conclusion of the settlement agreement and, being assigned work.

[15] Significantly, in this regard, Whitford acknowledged in his testimony, at the arbitration hearing, that he was aware that in terms of the settlement agreement, Delkor was required to re-employ the appellant on the same terms and conditions as prior to his resignation. As indicated, it is common cause between the parties that the appellant was previously employed by

[2] *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) para 101, *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 ILJ 2662 (LC) para 21.
[3] (2004) 25 ILJ 731 (LC).

Delkor for an indefinite period, in the capacity of Technical Sales Representative (Specialised Weave Products). An aspect of his previous job function was to "visit" clients, and he was furnished with a laptop and blackberry cell phone (Talk500) in order to perform his functions. This notwithstanding, Whitford failed and/or refused to comply with the terms of the settlement agreement by *inter alia* presenting the appellant on the morning of 3 November 2008, with a fixed term (three month) contract in terms of which his job profile was stated to be that of a Proposal Engineer. In addition, despite repeated requests to be issued with the laptop and cell phone which he used prior to his resignation, Delkor failed and/or refused to provide the appellant with these items. Delkor did, however, give the appellant a different cell phone to use.

[16] It is manifestly clear from the evidence led at the arbitration hearing, that Whitford had no intention of giving effect to the settlement agreement by permitting the appellant to resume his duties on the same terms and conditions, which he enjoyed prior to his resignation. When asked under cross-examination why a job description was not timeously prepared for the appellant, Whitford replied: "because it would have been under different conditions to how he was employed previously" Whitford's conduct in my view clearly justifies the inference that he, acting on behalf of Delkor, did not intend to comply with the terms of the settlement agreement.

[17] Even as early as 24 October 2008 at the meeting between the appellant and Whitford at the Dros, to finalise the terms of the settlement, Whitford indicated to the appellant that things would be different when he returned to work as the appellant would no longer be seeing clients, and he would be at the beck and call of Whitford, even if that meant making coffee. The conversation became very heated, and the appellant considered it reasonable to request a job description from Whitford in order to protect himself going forward. Although Whitford denied saying this to the appellant during their meeting at the Dros, he testified that it became necessary for Delkor to change the appellant's job title and functions, because Delkor had undergone a restructuring after the appellant had resigned. A survey of the evidence led at the arbitration

proceedings, however, reveals this to be an afterthought. Even on Whitford's own version of the discussion which he had with the appellant at the Dros on 24 October 2008, this issue was starkly absent. In addition, the letter of 27 October 2008 from Delkor's attorneys, confirming the settlement agreement as recorded by the appellant's attorneys, in the letter of 24 October 2008, also makes no reference to "a restructuring". Whitford raised this issue for the first time in his evidence in chief at the arbitration proceedings but, predictably, it was not put to the appellant during cross-examination. For these reasons, the Labour Court should have rejected the evidence of Whitford in relation to this issue as a recent fabrication.

[18] Having due regard to Whitford's conduct on 3 November 2008 in, presenting the appellant with a three month fixed term contract; changing his job profile from Technical Sales Representative to Proposal Engineer, and refusing to provide the appellant with the laptop, and cell phone which he used prior to his resignation, I consider the Commissioner's finding that Delkor did not intend to comply with the settlement agreement, to be correct. Whitford's conduct on 4 November 2008 gives credence to this finding. It is common cause, in this regard, that on the morning of 4 November 2008, the appellant arrived at work and Whitford asked him why he had not yet departed for Botswana. The appellant responded that he was there to collect a cash advance for his trip to Botswana, as he was not given a company credit card. The discussion then turned to the draft contract, which the appellant had still not signed. This much appears to be common cause. From that point on, however, the respective versions of the appellant and Whitford diverge. The appellant's version is that on the advice of his lawyers, he informed Whitford that Delkor was in breach of the settlement agreement, and that he was not prepared to sign the draft agreement. Whitford responded by informing the appellant that he had two options: to remain unemployed, or work for Larox (the company that hired the appellant in September 2008) and face restraint of trade proceedings. The appellant testified that Whitford then dismissed him by handing him the letter of 4 November 2008 withdrawing the offer of employment of 3 November 2008, and by instructing him to return the company cell phone and leave the company premises.

[19] Whitford admitted handing the appellant the letter of 4 November 2008, withdrawing the offer of employment of 3 November 2008. He also admitted instructing the appellant to return the cell phone, but denied dismissing the appellant by instructing him to leave the premises. He testified, in this regard, that he had instructed the appellant to go to his attorney with the intention of speeding up negotiations to finalise his employment contract. Whitford's testimony on this crucial aspect of the dispute is, in my view, completely implausible and contrary to the contents of the letter of 4 November 2008 withdrawing the offer of employment of 3 November 2008, since that letter does not suggest that the offer of employment is withdrawn until such time that the parties can reach a different and further agreement.

[20] After handing the appellant the 4 November 2008 letter withdrawing the offer of employment of 3 November 2008, Whitford instructed the appellant to hand his cell phone back, and leave the premises. Whitford's conduct, in my view, leaves no doubt in the mind of a reasonable person that he was terminating Delkor's employment relationship with the appellant such as to constitute a dismissal as defined in s186(1)(a) of the LRA. Although Whitford disputed in his testimony at the arbitration hearing, that he instructed the appellant to leave the company premises, he failed to provide an explanation for why he instructed the appellant to hand back his cell phone if, as explained by him, the purpose of the letter of the 4th, and his discussion with the appellant was for the appellant to discuss the terms of the offer with his lawyers and revert with a proposal. The absence of an explanation by Whitford on this crucial aspect which counsel for Delkor conceded during argument, called for explanation, compels me to the conclusion that Whitford instructed the appellant to return the company cell phone because he was terminating the employment relationship with the appellant. In the circumstances, I consider the appellant's version that Whitford instructed him to return the company cell phone and leave the premises to be plausible. If as explained by Whitford, the purpose of the letter of the 4th,and his discussion with the appellant, was for the appellant to discuss the terms of the offer with his lawyer and revert with a proposal, then there would have been no reason, on the probabilities, to instruct the appellant to return the company cell phone.

[21] A central factor in assessing the credibility of the appellant's version as to the conduct of Whitford, on 4 November 2008, is his testimony at the arbitration hearing that, when on the advice of his lawyers, he informed Whitford that Delkor was in breach of the settlement agreement for failing to employ him on the same terms and conditions as previously, Whitford repeatedly told him that Delkor did not have a contract with him and that, as a result, he would not be paid until it does. This was prudently not disputed by Whitford as his testimony as to what he told the appellant on 4 November 2008 is, remarkably, consistent with the appellant's version:

> 'But now I have a situation that you do not have a contract, we have not agreed on this thing, we are waiting for this letter from your lawyer and I have client who was expecting you at midday… At that point I said because there is no agreement here so there cannot be a contract.'

On Whitford's own version, therefore, he did not consider the appellant to be an employee, until the appellant signed a new and different agreement to what was agreed in terms of the settlement agreement. The conduct of Whitford on the evidence presented at the arbitration hearing, and the probabilities, justify the conclusion that Delkor had dismissed the appellant on 4 November 2008 as defined in s186(1)(a) of the LRA.

[21] I consider the letter of 4 November 2008, which withdrew the offer of employment of 3 November 2008 in its entirety, to be relevant only to the extent that it confirmed Delkor's intention not to comply with the terms of the settlement agreement to re-employ the appellant on the same terms and conditions as prior to his resignation. It does not in itself constitute the dismissal of the appellant. Nor can it form the basis of the finding by the Labour Court that because the appellant failed to accept the offer of the fixed term agreement, no agreement came into being and therefore no dismissal could have taken place. To my mind, the emphasis placed by the Labour Court on the withdrawal of the "offer" on 4 November 2008, by Delkor, is entirely misplaced, and clearly wrong.

[22] At best for Delkor, the offer to employ the appellant on a three month fixed term contract in the position of a Proposal Engineer, constituted an attempt to

enter into a new contract of employment. Any attempt to have done so, however, does not detract from the fact that by 3 November 2008, the appellant was already re-employed on the same terms and conditions than prior to his resignation. Thus, the question as to what transpired in the relation to the new and further offer of a fixed term contract in the new position is of little consequence in the context of this dispute. What matters though, and what should rightly have occupied the attention of the Labour Court is what transpired in relation to the re-employment of the appellant on the same terms and conditions that he enjoyed previously.

[23] The Labour Court also placed much emphasis on the letter of response from Delkor's attorneys to the appellant's attorneys, dated 4 November 2008, in which it is denied that Delkor dismissed the appellant on that day. The contents of this letter must be judged against the background of all the facts and events that took place on 3 and 4 November 2008 respectively. Notwithstanding the categorical denial that the appellant was not dismissed, this letter came a tad too late as Whitford had by this stage made it abundantly clear that the appellant was dismissed by *inter alia* presenting him with the withdrawal letter of the 4th instance, instructing him to return the company cell phone and to leave the premises. Needless to say, the letter of 4 November 2008 is completely irreconcilable with the conduct of Whitford on that day, and it certainly does not sway the general probabilities in favour of Delkor in so far as the appellant's dismissal is concerned. The Labour Court accordingly erred in finding that the appellant was not dismissed by Delkor as defined s186(1)(a) of the LRA. In the premises, I consider the commissioner's analysis of the evidence, and her finding that the appellant was dismissed by Delkor to be beyond reproach.

[24] The Commissioner found the appellant's dismissal to be both procedurally and substantively unfair. On the *Sidumo test,* this finding is unquestionably one that a reasonable decision-maker, on a consideration of the totality of the evidence, would have arrived at. Even though the appellant worked for two days only, Delkor was still required to comply with the substantive and procedural requirements for a dismissal. This it failed dismally to do. The

concession thus made by counsel for Delkor − that in the event it is found that the conduct of Whitford on 4 November 2008 constituted a dismissal as defined in s 186(1)(a) of the LRA, then the appellant's dismissal must, for obvious reasons, also be found to be both procedurally and substantively unfair − was wisely made.

[25] Delkor, however, takes issue with the compensation which the Commissioner awarded the appellant. Its attack is two-fold: first that no compensation ought to have been awarded, and secondly that the compensation awarded is so grossly excessive that no reasonable arbitrator on the full conspectus of the evidence could have made such an award. The factors which Delkor contends the Commissioner failed to have regard to are that the appellant was only employed for a period of two days; his dismissal was disputed and he was immediately and repeatedly offered re-employment thereafter.

[26] The issues for determination in relation to the challenge to the Commissioner's award of compensation are whether compensation should have been awarded to the appellant, and if so whether the award of seven months compensation was just and equitable in the circumstances? The remedies available to an employee who is unfairly dismissed are provided for in s193(1) read with 194 of the LRA. Section 193(1) confers the Labour Court or an arbitrator with a discretion to order the employer to:(a) reinstate the employee from any date not earlier than the date of dismissal; (b) re-employ the employee, either in the work in which the employee was employed before the dismissal or in any other reasonably suitable work on any terms and from any date of dismissal; or (c) pay compensation to the employee. In terms of s193(2) of the LRA, the Labour Court or arbitrator is required to order reinstatement unless: (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.

[27] Section 194 of the LRA in turn confers the Labour court or an arbitrator with a wide discretion to award compensation to an employee whose dismissal is found to be unfair, either because the employer did not prove that the reason for the dismissal was for a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both. The award of compensation must, however, be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the day of dismissal.

[28] In *Kemp t/a Centralmed v Rawlings*[4] Waglay JA (as then he was) described the difference in the exercise of the discretion in s193(1) and s194(1) of the LRA, respectively as follows:

> 'The importance of the distinction between a discretion that is exercised in terms of s 193(1)(c) and a discretion that is exercised in terms of s 194(1) is how the reviewing court will consider the matter. When the discretion that is challenged is a discretion such as the one exercised in terms of s 194(1) the test that the court, called upon to interfere with the discretion, will apply is to evaluate whether the decision maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether the decision maker adopted an incorrect approach. When dealing with a discretion however such as provided in s 193(1)(c), the court must consider if the arbitrator or the Labour Court properly took into account all the factors and circumstances in coming to its decision and that the decision arrived at is justified. In essence therefore, a review of a discretion exercised in terms of s 193(1)(c) is essentially no different to an appeal because the reviewing court will be required to consider all the facts and circumstances which the arbitrator or the Labour Court had before it and then decide based on a proper evaluation of those facts and circumstances whether or not the decision was judicially a correct one.

Concurring, Zondo JP (as he then was) held specifically in relation to the exercise of the discretion under s193(1)(c) of the LRA, that the "ultimate question" that the Labour Court or arbitrator has to answer in determining

[4] *Kemp t/a Centralmed v Rawlings* (2009) 30 ILJ 2677 (LAC) at para 55.

whether compensation should or should not be granted is which one of the two options would better meet the requirements of fairness having regard to all the circumstances of the case? He said that when a court or arbitrator decides this issue, it does not exercise a true or narrow discretion but rather passes a moral or value judgment on the basis of the requirements of fairness and justice. [5] It is important to recognise that the *Sidumo* (reasonableness) test does not apply to a review of a compensation award made by a commissioner in terms of s193(1)(c) of the LRA. This is a mistake commonly made by counsel and judges alike. What the reviewing court is required to do is to evaluate all the facts and circumstances that the arbitrator had before him or her, and then decide based on the underlying fairness to the both the employer and employee whether the decision was judicially a correct one.

[29] The remedy, which the appellant sought at the arbitration hearing in the event that his dismissal was found to be unfair, was that Delkor be ordered to pay him compensation. As is apparent from his testimony at the arbitration hearing, he elected not to be reinstated as he believed that due to the humiliating and degrading treatment which he received at the hands of Whitford on 3 and 4 November 2008, in particular, the employment relationship between himself and Delkor had been irretrievably broken down. Prior to the arbitration hearing, the Commissioner was requested in terms of a pre-arbitration minute to *inter alia* make a determination on whether if she decided that the appellant was unfairly dismissed, what effect, if any, would Delkor's requests to the appellant to discuss the matter have on the issue of compensation. The Commissioner found as follows:

> 'On the second issue I was asked to decide on, pertaining to whether Delkor's offer to reinstate the Applicant dated as late as 11 February 2009 has any bearing on whether the Applicant is entitled to compensation, I find this to be nothing other than an attempt to once more…frustrate the Applicant. I base this finding on the following:
>
> - The first time the Applicant returned to his former job, things went horribly wrong;

[5] *Kemp* at para 22.

- That being the situation I find it odd that in the letter dated 11 February 2009 Delkor once more extended the vague offer of settlement to the Applicant. If, during the first attempt the relationship could not be rescued due to the actions of Mr Whitford why should the Applicant once more expose himself to the possible abuse and embarrassment he was exposed to during the first two days of November 2008.'

The Commissioner accordingly found that the "so called extension of the settlement dated 11 February 2009 is of no consequence when considering proper compensation due to the Applicant."

[30] Relying for support on *Kemp* where this Court set aside the award of compensation, despite having found the dismissal of the employee to be both substantively and procedurally unfair, primarily because the dismissed employee refused to accept "a genuine and reasonable offer of reinstatement made to her by the employer", Delkor submits that the arbitrator erred by failing to apply his mind to the principles established in that case– and had she done so − she would have refused to grant any compensation at all. I beg to differ. In *Kemp*[6], this Court dealt specifically with the effect of an offer of reinstatement on an award for compensation, and the nature of the discretion to award compensation. The court held that no compensation at all should be payable to the employee, despite the fact that her dismissal was held to have been substantively and procedurally unfair because amongst other things "[a] genuine and reasonable offer of reinstatement was made to her which she did not accept". This begs the question – did Delkor in the present matter make a genuine and reasonable offer to reinstate the appellant? Delkor's first approach to the appellant, as contained in the letter of 4 November 2008 states *inter alia* that: "there is accordingly no question that your client was dismissed and both you and your client are invited to meet with the writer to discuss the matter." This invitation to discuss the matter is, however, prefaced with the following statements:

'1.Notwitstanding the settlement your client has been hell bent on derailing the process of his re-integration into the company.

[6] *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC).

2. As such he has been obtuse and obstructive and difficult to deal with.

3. There is no question of a repudiation or a dismissal.

4. …'

Then, in response to the appellant's referral of the alleged unfair dismissal dispute to the CCMA, Delkor's attorneys wrote to the appellant's attorneys advising:

'Kindly note that not only is your referral premature, there is no question of your client being dismissed. We once again extend to you the offer set out in our letter dated 4 November 2008.'

The last approach was made at the arbitration hearing, in a letter dated 11 February 2009, wherein the following is stated:

'There is no question that you client was ever dismissed as alleged.

The offer of re-employment as set out in previous correspondence remains, subject to your client agreeing to conduct himself in a reasonable manner.'

[31] Where an employer makes an unconditional offer of reinstatement to an unfairly dismissed employee, the employee's unreasonable rejection of such offer may mean that the employee is not entitled to compensation. This is certainly not the situation that obtains here. To my mind, the offers of the 4th and 5th of November 2008 were merely offers to discuss the matter, with the intention of negotiating the terms of re-employment in circumstances where it is abundantly clear from the evidence that there was nothing to negotiate, as Delkor was obliged, in terms of the settlement agreement, to re-employ the appellant on the same terms and conditions as prior to his resignation. The offers were not, in my view, genuine, reasonable unconditional offers to re-employ the appellant on the same terms and conditions as prior to his resignation.

[32] By the same token, the "so called" offer to re-employ the appellant as expressed in the letter of 11 February 2009 does not constitute a genuine unconditional offer to re-employ the appellant on the same terms and

conditions as prior to his resignation. The letter states that the "offer of re-employment as set out in previous correspondence remains, subject to your client agreeing to conduct himself in a reasonable manner." There are three aspects of this purported offer that are disquieting: firstly it refers to an offer of re-employment as set out in previous correspondence, when the record reveals that no such offer was ever expressly made. Secondly to the extent that it can be viewed as an offer to re-employ – is it an offer to re-employ on the same terms and conditions as prior to the appellant's resignation − or is it an offer to re-employ on wholly different terms? This is not clear. Thirdly, the offer is made subject to the appellant agreeing to conduct himself in a reasonable manner. I fail to appreciate how this can be interpreted as a genuine unconditional offer of reinstatement. Taking into consideration the rather nebulous and ill-defined nature of the purported offers to re-employ the appellant, Delkor's obstinate refusal to re-employ the appellant in terms of its obligations under the settlement agreement in spite of being shown to be in breach thereof, the undignified and disparaging manner in which the appellant was treated by Whitford on returning to work for Delkor after his resignation, and that his dismissal was both procedurally and substantively unfair, I find the appellant's refusal to accept the so called offers of re-employment not to be unreasonable. In circumstances such as those that prevailed in this dispute, I consider it fair and just for the Commissioner to have exercised her discretion under s193(1)(c) of the LRA in favour of awarding the appellant compensation.

[33] Having exercised her discretion under s193(1)(c) of the LRA in favour of awarding the appellant compensation, the Commissioner then awarded the appellant compensation equivalent to seven months of his salary, on the basis of his length of service with Delkor before his resignation, which began in 2005, his inability to secure employment, the manner in which he was treated by Delkor, and that the relationship with Delkor could not be salvaged. The nature of the payment of compensation made to an employee who has been unfairly dismissed is to offset the financial loss which has resulted from the unfair dismissal. The primary enquiry for an arbitrator or a court in determining the quantum of compensation to be awarded to the wronged employee is to

take into account the nature of the unfair dismissal and the scope of the wrongful act on the part of the employer. As is apparent from the Commissioner's reasons for awarding compensation, she took these factors into account. Her reasoning is thus not open to criticism.

[37] As indicated earlier, the court's power to interfere with the quantum of compensation awarded by an arbitrator under s194(1) of the LRA is circumscribed and can only be interfered with on the narrow grounds that the arbitrator exercised his or her discretion capriciously, or upon the wrong principle, or with bias, or without reason or that she adopted a wrong approach. In the absence of one of these grounds, this Court has no power to interfere with the quantum of compensation awarded by the Commissioner. An appeal court will, furthermore, not interfere merely because it would come to a different decision.[7] It is, therefore, for Delkor to persuade this Court that the quantum of compensation awarded by the Commissioner may be impugned on one of the narrow grounds referred to above. This it has simply failed to do. Accordingly, the compensation awarded by the Commissioner must stand. As regards costs, I see no reason, in law or fairness, why costs should not follow the result.

[38] In the result, I make the following order:

1. The appeal is upheld.

2. The order of the Labour Court in the review application is set aside and substituted with the following order:

   'The application is dismissed with costs'

3. The respondent is ordered to pay the costs of the appeal.

[7] *Mphela and Others v HaakdoornbultBoerdery CC and Others* 2008 (4) SA 488 (CC).

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F Kathree-Setiloane AJA

Musi JA and Murphy AJA concurring

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