REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: LCA 65/2012

In the matter between:

NOVANAM LIMITED **APPELLANT**

and

PERCIVAL RINQUEST **RESPONDENT**

Neutral citation: *Novanam Ltd v Percival Rinquest* (LCA 65/2012) [2014] NALCMD 35 (22 August 2014)

Coram: UEITELE J

Heard: 08 March 2013

Delivered: 22 August 2014

Flynote: *Labour law* - Retrenchment - Provisions of s 34 of Labour Act, 2007 - The procedures set out in that section are detailed. It follows, therefore, that if a joint consensus-seeking process as contemplated in that section is not achieved the dismissal of an employee for operational reason will be procedurally unfair.

Labour law - Appeal – Provisions of s 89(1)(a) of the Labour Act, 2007 - A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 '*on any question of law alone*'.

Labour law - Compensation – The word compensate in s 86 (15) of the Labour Act, 2007 - Must be given its ordinary grammatical meaning namely 'payment of the value, estimated in money, of something lost.

Summary: The respondent was employed by the appellant as a 'skipper' on its vessels between the periods 16 October 2002 to 15 December 2011 when his employment was terminated allegedly for operational and economic reasons. On 13 March 2012 the respondent, in terms of ss 82(7) and 86 of the Labour Act, 2007, referred a dispute of unfair dismissal (retrenchment) to the office of the Labour Commissioner. The Labour Commissioner referred the dispute, to an arbitrator for conciliation and arbitration.

The arbitrator was required under section 86(5) of the Labour Act, 2007 to attempt to resolve the dispute through conciliation before proceeding with arbitration. The initial conciliation/arbitration hearing was heard on 02 May 2012, where conciliation failed and the matter was thereafter postponed on a few occasions for arbitration, which eventually proceeded on 03 September 2012. On 02 October 2012 the arbitrator made her finding and made an award. It is against part of the award that the appellant now appeals.

Held that the appellant has failed to discharge the *onus* resting on it to prove that the retrenchment of the respondent was both substantively and procedurally fair.

Held further that in terms of s 89(1)(a) of the Labour Act, 2007 a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 '*on any question of law alone*' and that the issue whether or not the respondent mitigated his loses is a question fact rather than one of law. It follows therefore that the appellant cannot appeal on that ground to this court.

Held further that compensation must not be calculated in a manner aimed at punishing the employer, or at enriching a claimant because it is awarded based on the principle of *restiutio in integrum* and that compensation of 9 months (that is the period between the dismissal of the respondent and the hearing of his complaint) is not punitive but is clearly justifiable on the basis of the manner in which the respondent's employment was terminated.

Held further that the arbitrator erred in law in arriving at the amount of N$143 963-16 accordingly this court sets aside the award of N$143 963-16.

Held further that an arbitrator retains a discretion to order the payment of severance pay higher than the statutory minimum in appropriate circumstances and that the circumstances of this case justify an order for the payment of severance pay higher than the statutory minimum.

ORDER

---

1 The retrenchment of Percival Rinquest by Novanam (Pty) Ltd is both procedurally and substantively unfair.

2 The appellant (Novanam (Pty) Ltd) is ordered to compensate the respondent (Percival Rinquest) as follows:

2.1. The appellant must pay the respondent the remuneration which the respondent would have been entitled to had the appellant not unfairly retrenched him (that is for the period 15 December 2011 to 30 September 2012) at the rate of N$ 28 354-20 per month.

2.2. The appellant must pay the respondent severance allowances which must be an amount equal to one week's remuneration for each year of the respondent's completed continuous service (which is nine years) with the appellant. The respondents monthly remuneration being N$ 28 354-20 per month.

2.3. The appellant must pay the respondent future loss of income for a period of three (3) months. The respondents monthly remuneration being N$ 28 354-20 per month.

2.4. The appellant must pay the respondent the monetary value of the leave days (which are 72) standing to the respondent's credit.

2.5. The appellant must pay the respondents cost in the arbitration proceedings.

3 The appellant is ordered to pay interest at the rate of 20% per annum on the amounts set out in paragraph 2 reckoned from the date of judgment to the date that the appellant pays the amounts.

4 The appellant may deduct the amount of N$ 56 708-40 from the amount referred to in paragraph 2.

5 I make no order as to cost in the hearing of the appeal.

JUDGMENT

UEITELE, J

A. INTRODUCTION AND BACKGROUND

[1] This is an appeal against part of an award made by an arbitrator, under section 86(15) of the Labour Act, 2007[1], on 2 October 2012. The part against which the appellant appeal is the part of the award whereby the arbitrator ordered the appellant to pay the respondent the following:

(a) The amount of N$ 28 354-20 being one month's remuneration *in lieu* of notice;

(b) The amount of N$265 003-47 being the remuneration the respondent would have received if his employment was not unfairly terminated (i.e. for the period 15 December 2011 to 30 September 2012);

---

1 Act No 11 of 2007.

(c) The amount of N$58 894-02 being the severance package the respondent was entitled to;

(d) The amount of N$85 062-60 being future loses for a period of three months; and

(e) The amount of N$143 963-16 (less the amount of N$56 708-40) being the leave days standing to the appellant's credit.

[2] The background to this matter is briefly as follows. The respondent was employed by the appellant as a 'skipper' on its vessels between the periods 16 October 2002 to 15 December 2011 when his employment was terminated allegedly for operational and economic reasons.

[3] During the currency of his employment, that is, during November 2010 the respondent sustained a back and hip injury while he was on board of the appellant's vessel known as the Karas vessel. The injury resulted in the respondent being put on sick leave. The sick leave lasted for a period of approximately nine months, (that is from January 2011 to 15 September 2011). On 16 September 2011 the respondent returned from the extended sick leave and reported for duty. The respondent's evidence, which was not disputed, is that, when he returned for duty he was advised that he must go back home and he will be informed as to when to resume duty. He testified that between September 2011 and 15 December 2011 he kept on enquiring from the appellant as to when he could resume duty. The last advice that he received was that he will resume duty during January 2012.

[4] Contrary to the promise that respondent could resume duty during January 2012, he during that month to be precise, on 7 January 2012, received an amount of N$56 708-40 by electronic transfer from the appellant. The reference on the payment reflected as 'salary/severance pay'. The respondent further testified that on receipt of the money he went to the appellant's human resources department and enquired what the payment was for. Towards the end of January 2012, the appellant's human resources department, to be specific, a certain Daniel Lukas (the Head of the appellant's human resource department)

confirmed that the respondent was retrenched and the payment was in respect of the retrenchment.

[5] During the month of February 2012 the respondent through Legal Shield (a short term legal insurance company) engaged the appellant to resolve the aspects pertaining to the termination of his employment. The discussion bore no fruits and on 13 March 2012 the respondent, in terms of ss 82(7) and 86 of the Labour Act, 2007, referred a dispute of unfair dismissal (retrenchment) to the office of the Labour Commissioner. The Labour Commissioner referred the dispute, to a certain Ms Gertrude Usiku as arbitrator. As the dispute had not been conciliated, the arbitrator was required under s 86(5) of the Labour Act, 2007 to attempt to resolve the dispute through conciliation before proceeding with arbitration. The initial conciliation/arbitration hearing was scheduled for 20 April 2012, but it did not take place on that day and the matter was postponed to 02 May 2012, where conciliation failed and the matter was thereafter postponed on a few occasions for arbitration, which eventually proceeded on 03 September 2012.

[6] On 02 October 2012 the arbitrator made her finding and made an award. The arbitrator made the following award (I quote verbatim from the arbitrator's award):

> 'From the foregoing reasoning and conclusions, I accordingly make the following order:
>
> 1 that the dismissal of the applicant by the respondent was proven on balance of probabilities not to be in compliance with the provisions of s 34 of the labour Act (Act 11 of 2007).
>
> 2 The dismissal of the applicant was procedurally and substantively unfair. The applicant's representative asked that the applicant be remunerated for ;
>
> 1.1 payment of loss of income from the date of the unfair dismissal until the date of finalization of this matter;
> 1.2 payment of One months notice in terms of the Labour Act;
> 1.3 payment of loss of future earnings equal to six (6) months remuneration ; payment of severance allowance
> 1.4 payment of accumulated leave days and

1.5 Further and/or alternative relief.

2 As such the respondent Novanam Limited must pay the applicant Percival Rinquest as follows:

‘2.1 One month’s remuneration of N$28 354-20;

2.1.1.1 Remuneration from the time of the applicant’s unfair dismissal (15 December 2011 to 30 September 2012) an amount of N$265 003-47;

2.2 Payment of severance allowances one week’s remuneration times nine (years) an amount of N$ 58 894-02;

2.3 Future loss of income of three (3) months that amounts to N$85 062-60;

2.4 Accrued leave payment for every five month cycle of 30 days leave as per the conditions of employment which is more favourable than the labour Act an amount of N$143 963-16 less the amount already received by the applicant in the amount of N$56 708-40 therefore a total amount of N$ 524 569-05’.

[7] On 01 November 2012 the appellant filed a notice to appeal. The grounds of appeal are amongst others framed as follows:

(a) Whether the arbitrator erred in law in finding that the retrenchment was substantively unfair? The ground on which the appellant relies is that the respondent was retrenched due to *bona fide* operational requirements of the appellant, and the retrenchment was operationally rational.

(b) The question of law which falls for determination is whether the arbitrator erred in law in finding that the appellant was entitled to an award of N$265 003-04. The appellant advances as a ground of appeal the fact that the arbitrator allegedly did not give any explanation how she reached the conclusion that the respondent was entitled to that remuneration and how she calculated that amount.

(c) The third question which falls for determination is whether the arbitrator was correct in finding that the retrenchment of the respondent was unfair entitling the respondent to severance package of N$58 894-02. The ground of appeal is that the arbitrator did not give any explanation as to how she reached the conclusion that the respondent is entitled to the amount of N$58 894-02 and how that amount has been calculated.

(d) The fourth question which falls for determination is whether the arbitrator erred in law in finding that the respondent is entitled to future loss of income, thus entitling him to an amount of N$85 052-60. The ground of appeal is that the arbitrator does not give any explanation as to how she reach the conclusion that the respondent is entitled to future loss of income and how that amount has been arrived at.

(e) The fifth question which falls for determination is whether the arbitrator sets out the legal premise for finding that leave credit was payable and how the leave days were calculated, and whether it is equitable to make the award which the arbitrator made for the payment of N$143 963-16 less the amount of N$56 708-40.

[8] The respondent opposes the appeal, and as required by rule 7(16)(b) of the Labour Court Rules[2], delivered a statement in terms of which he oppose the appeal. The grounds on which the respondent opposes the appeal are stated as follows:

> '1. The arbitrator was correct in finding that the retrenchment of the respondent was substantially unfair.
>
> 1.1 The arbitrator was correct in finding that the retrenchment of the respondent was not in compliance with the provision section 34 of the Labour Act 11 of 2007.

---

[2] Published under Government Notice No. 279 in *Government Gazette* No 4175 of 2 December 2008.

1.2 The respondent was unfairly dismissed. His dismissal was both procedurally and substantively unfair.

1.3 The respondent was never notified of his proposed retrenchment.

1.4 The respondent was never afforded an opportunity to negotiate with the appellant in good faith regarding the proposed retrenchment and any other alternative to retrenchment.

1.5 The Labour Commissioner was never notified of the appellant's intention to retrench the respondent.

1.6 The appellant's legal representation conceded that the respondent's retrenchment and subsequent dismissal was procedurally and substantively unfair.

1.7 The appellant's legal representative recommended that the respondent be reinstated.

1.8 The arbitrator was correct in awarding the respondent the damages and payment of the amount as stated in the arbitration award.'

[9] I will in the following paragraphs set out the legal principles governing appeals from arbitral awards and the legal principles governing the relief available to a party who is found to have been unfairly dismissal. I will thereafter apply the legal principles to the facts of this case.

B. THE LEGAL PRINCIPLES

[10] In terms of s 89(1)(a) of the Labour Act, 2007 a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 '*on any question of law alone*'. This Court has in a line of cases set out the guideline to determine whether an appeal is on a question of law alone as follows; whether on the material placed before the arbitrator during the arbitration proceedings, there was no evidence which could

reasonably have supported such findings or whether on a proper evaluation the evidence placed before the arbitrator, that evidence leads inexorably to the conclusion that no reasonable arbitrator could have made such findings. Hoff, J[3] put it as follows:

> 'The question is therefore whether on all the available evidence, in respect of a specific finding, when viewed collectively and applying the legal principles relevant to the evaluation of evidence, the factual conclusion by the arbitrator was a reasonable one in the circumstances'.

[11] Section 33(1) & (4) of the Labour Act, 2007 in material terms reads as follows:

> '**33 Unfair dismissal**
>
> (1) An employer must not, whether notice is given or not, dismiss an employee-
> (a) without a valid and fair reason; and
> (b) without following-
> (i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34(1); or
> (ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.
> (2) …
> (4) *In any proceedings concerning a dismissal-*
> *(a) if the employee establishes the existence of the dismissal;*
> *(b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.*'

[12] In the case of *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others*[4] Gibson, J said the clear meaning of the subsection (s 46(3) of the repealed Labour Act, 1992), does not call for aids to construction to determine what it conveys. To me, the section (i.e. s 33(4) of the Labour Act, 2007) looking at the words underlined, means that whenever a worker is dismissed or, disciplinary proceedings are taken against him or her, the burden lies on the employer to justify the dismissal.

---

[3] *House and Home v Majiedt and Others* (LCA 46/2011) [2012] NALC 31 (22 August 2012) at para [7].
[4] 2001 NR 211 (LC) at 215.

[13] Section 34 of the Labour Act, 2007 in material terms reads as follows:

'**34 Dismissal arising from collective termination or redundancy**

(1) If the reason for an intended dismissal is the reduction of the workforce arising from the re-organisation or transfer of the business or the discontinuance or reduction of the business for economic or technological reasons, an employer must-

(a) at least four weeks before the intended dismissals are to take place, inform the Labour Commissioner and any trade union which the employer has recognised as the exclusive bargaining agent in respect of the employees, of-
(i) the intended dismissals;
(ii) the reasons for the reduction in the workforce;
(iii) the number and categories of employees affected; and
(iv) the date of the dismissals;

(b) if there is no trade union recognised as the exclusive bargaining agent in respect of the employees, give the information contemplated in paragraph (a) to the workplace representatives elected in terms of section 67 and the employees at least four weeks before the intended dismissals;

(c) subject to subsection (3), disclose all relevant information necessary for the trade union or workplace representatives to engage effectively in the negotiations over the intended dismissals;

(d) negotiate in good faith with the trade union or workplace union representatives on-
(i) alternatives to dismissals;
(ii) the criteria for selecting the employees for dismissal;
(iii) how to minimize the dismissals;
(iv) the conditions on which the dismissals are to take place; and
(v) how to avert the adverse effects of the dismissals; and

(e) select the employees according to selection criteria that are either agreed or fair and objective.'

[14] The procedures set out in s34 are detailed. They provide that when an employer contemplates dismissing employees for operational reasons it is required to consult with them or their representatives over a range of issues. During the course of such consultations, the employer must disclose relevant information to make the consultation effective. The purpose of such consultation is to enable affected employees to make representations as to whether retrenchment is necessary, whether it can be avoided or minimised, and, if retrenchment is unavoidable, the methods by which employees will be selected and the severance pay they will receive. It follows, therefore, that if a joint consensus-seeking process, envisaged by s 34 of the Labour Act, 2007, is not achieved the dismissal of an employee for operational reason will be procedurally unfair.

[15] Section 86(15) of the Labour Act, 2007 in material terms reads as follows:

'86 Resolving disputes by arbitration through Labour Commissioner

(1) …

(15) The arbitrator may make any appropriate arbitration award including-

(a) an interdict;

(b) an order directing the performance of any act that will remedy a wrong;

(c) a declaratory order;

(d) an order of reinstatement of an employee;

(e) *an award of compensation; and*

(f) subject to subsection (16), an order for costs.'

[16] The *Concise Oxford English Dictionary*[5] defines the word compensation as follows 'an amount of money or something else given to pay for loss, damage, or work done'. This court has accepted that an unfairly dismissed employee must be compensated for the

5 The 11th ed.

financial loss caused by the decision to dismiss him.[6] In the matter of *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & Others*[7] the South African Labour Appeal Court held that:

> 'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

[17] In *Pupkewitz & Sons (Pty) Ltd v Kankara*[8], the Labour Court interpreted and applied s.46(1)(a)(iii) of the repealed Labour Act 1992 (which provided for compensating a dismissed employee) relating to the power of the district labour court. In that case, Mtambanengwe, J held that in calculating the amount of compensation that was payable to an employee who had been dismissed unfairly, regard should be had to the actual loss suffered or the amount the dismissed employee would have been paid had he not been dismissed.

[18] I am therefore of the opinion the word compensate must be given its ordinary grammatical meaning namely 'payment of the value, estimated in money, of something lost'. I therefore endorse the comments of Parker C[9] that compensation consists of:

> '1 an amount equal to the remuneration that the employer ought to have paid to the employee had he not been dismissed or suffered other unfair disciplinary measure or some other labour injustice; and
>
> 2 an amount equal to any losses suffered by the employee because of the dismissal or other disciplinary action or other labour injustice'.

---

[6] Navachab Gold Mine v Ralph Izaaks 1996 NR 79 (LC), Pupkewitz & Sons (Pty) Ltd v Kankara 1997 NR 70.

[7] 16 (2007) 28 ILJ 2238 (LAC) at paragraphs 30-31.

[8] 1997 NR 70.

[9] Labour Law in Namibia, 2012 at 193.

C. APPLICATION OF THE LEGAL PRINCIPLE TO THIS MATTER

[19] Before I venture to apply the legal principles to the facts of this matter; I find it appropriate to pause here and comment that Mr Denk who appeared for the appellant conceded that the retrenchment of the respondent was not in compliance with section 34 of the Labour Act, 2007. In view of the evidence of Mr Daniel Lukas at the arbitration hearing, that the respondent was not given a notice as required by the Labour Act, 2007 and that no discussion took place between the appellant and the respondent with respect to the intended termination of his employment, I am satisfied that the concession was correctly made. In circumstances where an employee is retrenched and the employer is unable to show that the dismissal was for a fair reason reinstatement is the appropriate remedy. The respondent did not seek reinstatement he only sought compensation. The arbitrator awarded the respondent compensation which is the subject of this appeal.

[20] The appellant appeals against the award of one month's remuneration *in lieu* of notice. Mr Denk who appeared for the appellant argued that the award of one month's remuneration *in lieu* of notice is duplicitous as the compensation for future losses of income includes the notice month's pay. I agree with Mr Denk on this score and the award ordering the appellant to pay one month's remuneration *in lieu* of notice is set aside.

[21] Mr Denk attacked the arbitrator's award that the appellant pay the respondent an amount of N$265 003-47 being the remuneration the respondent would have received if his employment was not unfairly terminated (i.e. for the period 15 December 2011 to 30 September 2012). He attacked the arbitrator's award on the ground that the arbitrator did not have regard to the trite principle that a dismissed employee is under a legal duty to mitigate his loses. He referred me to the Zimbabwe Supreme Court case of *United Bottlers v Kudaya*[10] where that Court said*:*

> 'A wrongfully dismissed employee has a duty to mitigate damages by finding alternative employment as soon as possible. A wrongfully suspended employee has a duty by operation of law to remain available for employment by his employer. This is the legal position, as stated in the *Zimbabwe Sun* case *supra*. The issue was further clarified in *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S), wherein McNally JA at pp 418H-419D stated as follows:

---

[10] 2006 JOL 1856.

> "I think it is important that this Court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have been expected to find alternative employment. The figure may be adjusted upwards or downwards. If he could in the meanwhile have taken temporary or intermittent work, his compensation will be reduced. If the alternative work he finds is less well-paid his compensation will be increased.'

[22] I have no qualms with the principle enunciated in the *United Bottlers v Kudaya* case and accept it as the correct proposition of the law in Namibia[11]. Mr Denk, however, overlooks the following, in terms of s 89(1)(a) of the Labour Act, 2007 a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 '*on any question of law alone*'. Mr Van Vuuren who appeared for the respondent argued that the question whether or not a dismissed employee mitigated his or her losses is a question of fact and is therefore not appealable. I agree with Mr Van Vuuren that the issue whether or not the respondent mitigated his loses is a question fact rather one of law. It follows therefore that the appellant cannot appeal on that ground to this court.

[23] Parker opines that an arbitrator should award such amount of compensation as he considers reasonable, fair and equitable, regard being had to all circumstances of the case. Therefore, in determining the amount of compensation, the courts have taken into account the extent to which the claimant's own conduct contributed to the dismissal. The courts have also taken into account the view that compensation must not be calculated in a manner aimed at punishing the employer, or at enriching a claimant because it is awarded based on the principle of *restiutio in integrum*.[12] I am of the view that compensation of 9 months (that is the period between the dismissal of the respondent and the hearing of his complaint) is not punitive but is clearly justifiable on the basis of the manner in which the respondent's employment was terminated. In *Pep Stores (Namibia)*

---

11 See Rossam v Kraatz Welding Engineering (Pty) Ltd 1998 NR 90 (LC) at 95.
12 Supra footnote 9 at 195.

(Pty) Ltd v Iyambo and Others[13] it was held that where an arbitrator awards compensation that is equal to the amount of remuneration that would have been to the employee had he not been dismissed, it may not be necessary for the employee to lead evidence to establish the amount involved. The amount should be within the employer's domain, but if the amount includes compensation for loss of certain benefits, e.g. medical benefits, then the employee must establish by evidence what the losses entail.

[24] Mr Denk furthermore attacked the arbitrator's award that 'the appellant pay the respondent an amount of N$143 963-16. He attacked the arbitrator's award on the ground that the arbitrator allegedly erred in law in awarding that amount of compensation because, argued Mr Denk, even if the arbitrator was of the opinion that the respondent was entitled to 72 days' vacation the amount not be N$143 963-16. The finding by the arbitrator that the respondent had 72 days' vacation leave to his credit is a question of fact and therefore not appealable, but to compute the 72 into monetary value is a question of law. The arbitrator in her award states that 'The formula used for the calculations above (i.e. the amount of compensation awarded) as follows; Basic remuneration divided by 4.333 equals weekly remuneration divided by the number of (6) working days equals the daily rate of remuneration. The formula used by the arbitrator is in line with s 10(3) of the Labour Act, 2007 which provides as follows:

> **'10 Calculation of remuneration and basic wages**
>
> (1) This section applies when, for any purpose of this Act, it is necessary to determine the applicable hourly, daily, weekly or monthly rate of pay of an employee-
>
> (a) whose remuneration is based on a different time interval; or
>
> (b) who is remunerated on a basis other than time worked.
>
> (2) …
>
> (3) To determine the comparable hourly, daily, weekly or monthly remuneration or basic wage of an employee who is paid on an hourly, daily, weekly, fortnightly or monthly basis-

---

[13] Supra footnote 4 at p222-223.

(a) in the first column of Table 1 below, locate the line for that employee's applicable pay period;

(b) read across on that line to the column for the desired comparable rate of remuneration or basic wage, as indicated in the first line of the table; and

(c) apply the formula set out in the cell of the table thus located.

Table 1- Calculation of remuneration and basic wages

	To calculate hourly rates	**To calculate daily rates**	**To calculate weekly rates**	**To calculate monthly rates**
Employees whose remuneration is set by the hour		Multiply the hourly rate by the number of ordinary hours of work each day.	Multiply the hourly rate by the number of ordinary hours of work each week.	Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set by the day	Divide the daily rate by the number of ordinary hours of work each day.		Multiply the hourly rate by the number of ordinary hours of work each week.	Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set by the week	Divide the weekly rate (or calculated weekly rate) by the number of ordinary hours of work each week.	Divide the weekly rate (or calculated weekly rate) by the number of ordinary days of work each week.		Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set by the fortnight	Divide the fortnightly rate by two times the number of ordinary hours of work each week.	Divide the monthly rate by 4,333 times the number of days ordinary worked each week.	Divide the fortnightly rate by two.	Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set by the month	Divide the monthly rate by 4,333 times the number of hours ordinary worked each week.	Divide the monthly rate by 4,333 times the number of ordinary worked each week.	Divide the monthly rate by 4,333..	

[25] From the above table it follows that to obtain the respondent's daily rate of remuneration one has to multiply 4.333 by 6 and this will give you 25.998 and you then divide the monthly remuneration of N$ 28 354.20 by 25.998 to get a daily remuneration rate of N$ 1090.63. If one multiplies the daily remuneration rate of N$ 1090.63 by 72 days one gets the amount of N$ 78 525-36. It follows that the arbitrator erred in law in arriving at the amount of N$143 963-16. I accordingly set aside the award of N$143 963-16.

[26] In the notice of appeal the appellant attacked the arbitrator's award that 'the appellant pay the respondent an amount of N$58 894-02 as a severance pay. In the notice to appeal the ground of attack which was advanced is that the arbitrator erred in finding that the respondent's retrenchment was substantively unfair. This ground was not persisted with at the hearing of this appeal, in my opinion correctly so because the appellant conceded the procedural and substantive unfairness in the retrenchment of the respondent. What is left for me to determine is the question whether or not the arbitrator erred when she awarded the respondent three months' future loss of earnings.

[27] Section 35 of the Labour Act, 2007 in material terms provides as follows:

> '**35 Severance pay**
>
> (1) Subject to subsection (2), an employer must pay severance pay to an employee who has completed 12 months of continuous service, if the employee-
>
> (a) is dismissed;
>
> (b) dies while employed; or
>
> (c) resigns or retires on reaching the age of 65 years.
>
> (2) …
>
> (3) Severance pay in terms of subsection (1) *must be in an amount equal to at least one week's remuneration for each year of continuous service with the employer*.

[28] In the case of *Nicola.Jane.Whall v Brandadd Marketing (Pty)*[14] the South African Labour Court held that:

> 'It has been generally accepted, too, that the purpose of severance pay is to cushion the shock of retrenchment and to serve as a gratuity for services rendered. In other words, severance pay is a form of "compensation" for employees who fall victim to economic forces and the loss of employment : *Cele & others v Bester Homes (Pty) Ltd* (1990) 11 ILJ 516 (IC); *Jacobs v Pre-Built Products (Pty) Ltd* (1988) 9 ILJ 1100 (IC); *Lloyd v Brassey* (1961) All ER 312; *Wynes v Southrepps Hall Broiler Farm Ltd* [1968] ITR 407 (IT). Apart from confirming employees' right to severance pay and the minimum amount thereof, I do not understand the Act to have been intended to alter the principles underlying these cases'.

[29] In my view s 35(1)&(3) of the Labour Act merely confirms that retrenched employees are entitled to severance pay equal to *at least* one week's remuneration for each completed year of service. This provision does not preclude an employer from agreeing to pay more. Nor, in my view, does it preclude this Court from ordering an employer to pay more than the statutory minimum in appropriate circumstances. It follows, in my opinion, that an arbitrator retains a discretion to order the payment of severance pay higher than the statutory minimum in appropriate circumstances.

[30] In this matter the appellant has failed to discharge the *onus* resting on it to prove that the retrenchment of the respondent was both substantively and procedurally fair. I am of the view that the dismissal of the respondent was effected in the most callous manner. In my opinion, the circumstances of this case justify an order for the payment of severance pay higher than the statutory minimum. The applicant should have been retained in employment until he was dismissed for misconduct, for poor work performance, for incapacity to perform his work or until he retired. This means that his employment would have continued well beyond October 2012. This justifies him being awarded three months' compensation pay in addition to that to which he was entitled in terms of the Labour Act, 2007.

---

[14] (J 1130/97) [1998] ZALC 127 (15 December 1998).

[31] Consequently, the appeal fails (except in so far as I indicated above) and is dismissed. For the avoidance of doubt, the award of the arbitrator dated 2 October 2012 is varied to read:

1 The retrenchment of Percival Rinquest by Novanam (Pty) Ltd is both procedurally and substantively unfair.

2 The appellant (Novanam (Pty) Ltd) is ordered to compensate the respondent (Percival Rinquest) as follows:

2.1. The appellant must pay the respondent the remuneration which the respondent would have been entitled to had the appellant not unfairly retrenched him (that is for the period 15 December 2011 to 30 September 2012) at the rate of N$ 28 354.20 per month.

2.2. The appellant must pay the respondent severance allowances which must be an amount equal to one week's remuneration for each year of the respondent's completed continuous service (which is nine years) with the appellant. The respondents monthly remuneration being N$ 28 354-20 per month.

2.3. The appellant must pay the respondent future loss of income for a period of three (3) months. The respondents monthly remuneration being N$ 28 354-20 per month.

2.4. The appellant must pay the respondent the monetary value of the leave days (which are 72) standing to the respondent's credit.

2.5. The appellant must pay the respondents costs in the arbitration proceedings.

3 The appellant is ordered to pay interest at the rate of 20% per annum on the amounts set out in paragraph 2 reckoned from the date of judgment to the date that the appellant pays the amounts.

4 The appellant may deduct the amount of N$ 56 708-40 from the amount referred to in paragraph 2.

5 I make no order as to cost in the hearing of the appeal.

____

SFI Ueitele

Judge

APPEARANCES

APPELLANT:	Mr A Denk Instructed by Lorentz Angula Inc
RESPONDENT:	Mr A Van Vuuren Instructed by PD Theron & Associates