IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 552/17

In the matter between:

BEARING MAN GROUP (PTY) LTD **Applicant**

And

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION **First Respondent**

ERIC MYHILL *N.O* **Second Respondent**

GRAIG GRAHAM SLATER **Third Respondent**

Heard: **9 October 2019**

Delivered: **11 February 2020**

JUDGMENT

TLHOTLHALEMAJE, J

[1] The applicant (BMG) seeks an order in terms of the provisions of section 145 of the Labour Relations Act (LRA)[1], reviewing and setting aside the arbitration award dated 13 March 2017 issued by the first respondent (the Commissioner), acting under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). The Commissioner had found that the dismissal of the third respondent (Slater) was substantively unfair and had ordered his retrospective reinstatement together with backpay in the amount of R286 838.70, less certain deductions.

[2] The background to this dispute is fairly common cause. Slater was employed as a Projects Engineer. On 15 July 2016, he was issued with a notice to appear before a disciplinary enquiry to answer to allegations of gross insubordination (failure to follow/carry out a direct and reasonable instruction from a line manager); and bringing the company's name into disrepute by not attending site as requested in writing by his Line Manger. He was found guilty and dismissed in terms of an outcome issued on 18 July 2016.

[3] Subsequent to the dismissal, Slater referred a dispute to the CCMA which ultimately came for arbitration before the Commissioner. At those proceedings, BMG did not persist with the charge of bringing the company's name into disrepute, and Slater only challenged the substantive fairness of the dismissal.

[4] At the arbitration proceedings, evidence on behalf of BMG was led by Slater's Line Manager, Dustin Pereira, which was essentially that;

4.1 At the time of his employment, Slater was paid the same salary that he was paid at his previous employ, subject to a review after six months period of probation.

4.2 After six months of employment, Slater had requested a salary adjustment from the Managing Director (Pelser). When there was no immediate response to Slater's request, Pereira had followed up the matter with Pelser.

[1] Act 66 of 1995 (as amended)

4.3 A meeting was ultimately scheduled for 1 July 2016 between Pelser, Slater and Pereira. At that meeting, Slater indicated that he was not prepared to perform extra duties outside his job description. Pereira had warned him not to hold the company to ransom as that could have consequences for him.

4.4 The end result of the meeting was that Pelser had agreed to give Slater a 25% salary increase, and adjustment documents in that regard were signed and handed over to the Human Resources department for processing. The adjustment would have taken effect from end of July 2016.

4.5 On or about 7 July 2016, Pereira had sent an email to Slater requesting him to go to a site to assist a customer with an electrical engineering problem. Pereira later received a report from another Line Manager, Cooper, that Slater had said he would not go to the site until he had received an updated contract of employment.

4.6 Pereira had telephonically contacted Slater, and the latter had confirmed that he would not go to the site. Pereira informed Slater that his contract had been submitted to the Human Resources department and again asked him to go to the site. Slater had then agreed to go to the site, and had indeed done so in the afternoon.

4.7 Notwithstanding the fact that Slater had ultimately obeyed the instruction, Cooper was upset by his initial refusal to obey the instruction and had initiated disciplinary proceedings against him.

4.8 Pereira's contention was that Slater was dismissed on account of his grossly insubordinate conduct, which in accordance with BMG's disciplinary code called for instant dismissal. Furthermore, the dismissal followed because the issue of salary adjustment had been resolved on 1 July 2016, yet Slater had refused to go to the site when instructed to do so.

4.9 Under cross-examination, Pereira had conceded that Slater had not at the time the instruction was issued, received written confirmation of his salary adjustment. He further accepted that Slater's initial response to the instruction could have been in a heat of the moment. He further conceded that Slater had regretted his actions and had subsequently complied with the instruction issued on the same day.

[5] Slater's evidence before the Commissioner was that;

5.1 The dismissal was harsh after he had conceded at the internal disciplinary enquiry that he had acted incorrectly by responding in the manner he had to the instruction. He was frustrated by the non-resolution of the requests to have his salary adjusted for over 6 months, and that even though he had reacted in a heat of the moment, the issue was resolved within five minutes with Pereira.

5.2 Even though he was not informed on 1 July 2017 of the 25% increase in his salary, he only discovered on 12 July 2016 that the adjustment had been effected, and that prior to then, there was no communication on the issue between him and Cooper.

5.3 He denied having persistently and deliberately refused to obey the request. He acknowledged that the company's disciplinary code called for instant dismissal in cases of gross insubordination. He conceded to having over-reacted even though he contended that he had every intention of complying with the request.

[6] The Commissioner in concluding that the dismissal was substantively unfair held that;

6.1 It was common cause that Slater initially responded to the request by Pereira by email in which he had stated that he was still waiting for his updated contract, and that as soon as he had heard something he would attend to the site;

6.2 BMG failed to prove the charge of gross insubordination. Even though Slater was initially insubordinate, once Pereira had assured him that the contract was being adjusted, he had then attended to the site.

6.3 Slater's conduct was not grossly insubordinate or serious enough to warrant a summary dismissal. BMG's disciplinary code recommended a final written warning for the first offence of insubordination, and this was consistent with the concept of corrective discipline endorsed by the Courts.

6.4 Slater had conceded in the internal disciplinary enquiry that he had made a mistake by initially responding to Pereira in the manner he did, and this indicated that he was remorseful and amenable to being corrected. Thus, his conduct was not of such a gravity that it made the employment relationship intolerable.

6.5 Slater's frustrations were justified in the light of the inordinate delays in adjusting his salary and updating his contract, and this should have served as a mitigating factor, which the Chairperson of the enquiry failed to take into account prior to recommending a summary dismissal

[7] BMG seeks to have the arbitration award reviewed and set aside on a variety of grounds, including that;

7.1 The Commissioner's findings were irrational, irrelevant and irregular, resulting in an award which is not one which a reasonable decision maker could have arrived at;

7.2 The Commissioner failed to appreciate the nature of the enquiry before him and committed a material misdirection as regards an understanding of the evidence before him;

[8] Slater defended the Commissioner's award on the basis that what BMG seeks is an appeal instead of a review. It was submitted on his behalf that taking into account his concession and the definition of gross insubordination as contained in the disciplinary code, a final written warning would have sufficed

in the circumstances. This was particularly so since there was justification for his conduct. He had further contended that the conduct did not constitute gross insubordination as he was not required to do the job in any event; had expressed remorse and attended to the tasks, and that the incident was resolved within five minutes.

[9] The test on review is trite. An applicant in review proceedings must establish that the decision arrived at by the Commissioner was one that falls outside the band of decisions to which a reasonable decision-maker could come on the available material. Furthermore, it is now accepted that the enquiry is whether despite the Commissioner's reasoning, it can be said that the result is nonetheless capable of justification on the available material. In the end, material errors of fact on the part of the Commissioner, as well as the weight and relevance to be attached to particular facts or a failure to have regard to particular facts are not in themselves sufficient grounds for review. Their effect must be as such as to render the outcome unreasonable[2].

[10] At the core of an enquiry into the substantive fairness of a dismissal is the nature and essence of the allegations of misconduct levelled against an employee. In this case, the allegations related to 'gross insubordination'. In *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*, [3] it was held that the enquiry into the gravity of the specific insubordination considers three aspects: the action of the employer prior to the deed, the reasonableness of the instruction, and the presence of wilfulness by the employee." Furthermore, the LAC held that to the extent that insubordination involves a defiance of authority, such a defiance can be proven by a single act of defiance, and that the employer's prerogative to command its subordinates is the principle that is protected by the class of misconduct labelled "insubordination", and addresses operational requirements of the organisation that ensure that managerial paralysis did not occur.[4]

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[2] *Gold Fields Mining Gold Fields (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2014] 1 BLLR 20 (LAC)
[3] (JA32/2017) [2018] ZALAC 36; (2019) 40 ILJ 150 (LAC); [2019] 2 BLLR 142 (LAC) at para 4
[4] At para 19

[11] In *Sylvania Metals (Pty) Ltd v M.C Mello N.O & others*[5], the Labour Appeal Court further held that;

> "[17] Insubordination in the workplace context generally refers to the disregard of an employer's authority or lawful and reasonable instructions. It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority. It includes a wilful and serious refusal by an employee to adhere to a lawful and reasonable instruction of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given.

And,

> "[18] This Court in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others,* discussed the "*fine line"* between insubordination and insolence, with the latter being conduct that is offensive, disrespectful in speech or behaviour, impudent, cheeky, rude, insulting or contemptuous. While the Court noted that insolence may become insubordination where there is an outright challenge to the employer's authority, "*acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful*". The sanction of dismissal is reserved for instances of gross insolence and gross insubordination or the wilful flouting of the instructions of the employer."

[12] In this case, it was common cause that an instruction was issued to Slater to attend to a client's site. It is further common cause that he had initially refused to obey the instruction unless his contract of employment and salary were adjusted, but had subsequent to speaking to Pereira, carried out the instruction. The issue of his salary had been discussed at the meeting held on 1 July 2016, and it is common cause that although there was an agreement that the adjustment would be done, as at 7 July 2016 it had not been done.

[5] (JA83/2015) [2016] ZALAC 52 (22 November 2016)

[13] I agree with the Commissioner's conclusions that the insubordination in question was not gross to warrant a dismissal to the extent that Slater had ultimately complied with the instruction. However, the Commissioner's further conclusions that there were mitigating factors that justified Slater's frustrations cannot be deemed to be reasonable in the circumstances of the case. Even if there was cause for Slater to be aggrieved at the non-implementation of the salary adjustment, the first issue is that Pereira was attending to the issue, which he also assumed to have been resolved. Second, if Slater was aggrieved, nothing prevented him from carrying out the instruction and then lodging a formal grievance in accordance with MBG's internal procedures to have the matter resolved, instead of reacting in the manner he did. Third, Slater had been warned at a meeting of 1 July 2016 not to hold the company to ransom over the issue, as that may have dire consequences for him.

[14] In a nutshell, Slater had been insubordinate, and had sought to hold BMG to ransom over the salary adjustment. Accordingly, there is nothing in the prior actions of BMG that justified Slater's response. Even if there was, Slater's conduct cannot in my view be justified, especially in circumstances where the refusal to attend to a client at a site might have had prejudicial results for BMG, and where his grievance over the salary adjustment could have been dealt with and resolved by other means, other than a refusal to obey a reasonable and lawful instruction.

[15] BMG is correct in submitting that Slater effectively got away 'scot-free' despite his misconduct, which in any event was calculated in view of the outstanding adjustment. I agree with the submissions made on its behalf that Slater was a senior employee and ought to have been aware of his obligations, and the importance of being exemplary to his subordinates. The mere fact that Slater was remorseful and had immediately carried out the instruction does not detract from the fact that he was insubordinate in the first instance, which conduct deserves censure.

[16] In the end, it was submitted on behalf of BMG that at most, Slater should have been reinstated with a Final Written Warning. This proposition was equally supported by Slater's counsel, who had submitted that the sanction would

have been appropriate in the light of his (Slater's) concessions. I agree with these submissions.

[17] In summary, Slater's conduct of refusing to obey a lawful and reasonable instruction issued by Pereira constituted insubordination, which however on the facts, cannot be deemed to have been serious or gross to call for a summary dismissal. BMG's disciplinary code and procedure provided that ordinary insubordination was to be met with a final written warning, and the Commissioner's conclusions therefore to reinstate Slater retrospectively without any form of sanction are not conclusions that fall within a band of reasonableness in the light of the material served before him. In the end however, these material errors of fact on the part of the Commissioner (insofar as the reliance on mitigating factors), did not have the effect of rendering the entire outcome unreasonable.

[18] I have further had regard to the issue of costs. Upon a consideration of the requirements of law and fairness, and given the nature of the order below, it is deemed that a costs order is not warranted in these circumstances.

[19] Accordingly, the following order is made;

Order:

1. The arbitration award dated 13 March 2017 issued under case number GAJB17588-16 by the Second Respondent is reviewed only to the extent that an amendment and addition is made to its paragraph 56 to read as follows;

'56.1 BMG is ordered to reinstate Mr Craig Graham Slater as an Electrical Engineer with retrospective effect to his date of dismissal (20 July 2017) on the same terms and conditions that applied at the time of his dismissal.

56.2 Mr Craig Graham Slater is to be issued with a Final Written Warning in accordance with BMG's applicable Disciplinary Code upon resumption of his duties'

2. There is no order as to costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Qudsiyyah Majam of Mcgregor Erasmus Attorneys

For the Third Respondent: Adv. M Meyersowitz, instructed by Gittins, Youngman & Associates