THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 654/2021

In the matter between:

SOUTH AFRICAN NATIONAL BLOOD SERVICE Applicant

and

NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS' UNION obo REITUMETSE MATHOBISA First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

SAMSON PHOMODI *N.O.* Third Respondent

Heard: 14 March 2023

Delivered: 16 March 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 16 March 2023.)

JUDGMENT

VAN NIEKERK, J

[1] The applicant seeks to review and set aside an arbitration award issued by the third respondent (the arbitrator) on 15 March 2021. In his award, the arbitrator found that the first respondent (the employee) had been unfairly dismissed, and reinstated her with retrospective effect.

[2] The material facts are not in dispute. The employee was employed by the applicant as an inventory technician. She was dismissed on 11 August 2020 after a disciplinary hearing, when she was found to have committed an act of gross negligence. The applicant does not dispute that she handled what was referred to as a lab crate and stacked it in an area designated for other purposes, thereby switching off the fridge and causing products in the fridge to go out of temperature range. In the pre-arbitration minute, the employee conceded that she had placed crates in an improper/undesignated area which had caused the fridge to switch off resulting in losses suffered by the applicant.

[3] The arbitrator's award is supported by the following reasoning:

> [30] I have considered the submissions and arguments of both parties in arriving at my decision. It is my view that the dismissal of the applicant was too harsh and inconsistent with the disciplinary code of the respondent. The submission of the chairperson of the hearing that the disciplinary code of the respondent is just a guideline is unacceptable considering that she has used the same discipline required to correct the issue final warnings to the colleagues of the applicant. The chairperson in contradicting her and outcome of the hearing submitted that she dismissed the applicant because she did not show remorse which was very untrue and misleading to the commission. I therefore find, dismissal was substantive really unfair because while the applicant had caused the switch to trip and the fridge to lose its temperature the respondent should have treated the applicant the same as her colleagues who were given a final written warning for the same or worse charges as the applicant. In terms of the Labour Relations Act and Code of good practice, the respondent has the right to dismiss the employees however the employees have a right not to be unfairly dismissed. In this

case, it is my view that the respondent does apply discipline wrongly and unfairly by targeting the applicant.

[31] In the light of the above, I have found that the dismissal of the applicant on the balance of probabilities to be substantively unfair.

[4] The applicant has raised four grounds for review. The first is that the arbitrator failed to take into account that the applicant did not act inconsistently in the treatment of employees involved in the same incident that gave rise to the employee's dismissal, in that the employee's comparators had not engaged in the same misconduct. Secondly, the applicant submits that the arbitrator committed a material error of law relating to the issue of consistency. Thirdly, the applicant contends that the arbitrator ignored material evidence by finding that the employee's dismissal was excessively harsh. Finally, the applicant submits that the arbitrator ignored the employee's own evidence relating to a lack of trust between the parties, which made continued employment intolerable. The applicant submits that in consequence of these reviewable irregularities, the arbitrator came to a decision to which no reasonable decision-maker could come on the evidence that served before him.

[5] The test to be applied on review is well-established. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 28 *ILJ* 2405 (CC) at para 110, the Constitutional Court held that the outcome of the proceedings under review, in the form of the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* (2014) 35 *ILJ* 943 (LAC), the court held that the review court must ascertain whether the arbitrator considered the principal issue in dispute, evaluated the facts presented at the hearing, and came to a conclusion that is reasonable. In essence, the test is a two-stage test. To succeed, an applicant must establish some reviewable irregularity on the part of the arbitrator and given the existence of any such an irregularity, establish that the outcome of the proceedings in the form of the arbitrator's ruling or award, falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence.

[6] More recently, in *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2021] 5 BLLR 475 (LAC) restated the review test in the following terms:

> The test for review is this: "Is the decision reached by the arbitrator wonder that a reasonable decision maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justifications for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.
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> This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision maker could make."

[7] What the arbitrator's reasoning discloses is that he considered the employee's dismissal to be unfair because:

a. the applicant's disciplinary code and procedure provided a penalty of a final written warning for an act of gross negligence;

b. the dismissal was inconsistent with the lesser sanction of final written warning issued to other employees for the same or similar conduct;

c. to the extent that the applicant relied on a failure to show remorse as a basis to depart from the guideline offered by the disciplinary case and as a differentiating factor between the employee and her comparators, the evidence indicated that the employee had in fact turned remorse.

[8] There is no dispute regarding point (a) above. It was common cause that the disciplinary code provided for the penalty of a final written warning for acts of gross negligence. It is also not in dispute that the applicant's witness Ms Delene Duncan regarded the disciplinary code as a guideline, and took the

view that she had the right to deviate from those guidelines depending on the exigencies of each case. To the extent that the arbitrator considered the disciplinary code as a document to be applied in a rigid and inflexible fashion, this is clearly inconsistent with the nature of the code. Clause 2 of the disciplinary code says as much, as does clause 8.8, which specifically states that the penalties referred to are '*intended to serve as guidelines to management in implementing discipline'*. There was no basis therefore for the arbitrator to conclude that the penalty of a final written warning was a mandatory or the only appropriate penalty in circumstances where the employee had been found guilty of gross misconduct.

[9] That leaves the issue of the arbitrator's finding on inconsistency. At the arbitration hearing, the employer contended that she had been treated differently to three other employees, Mr Desmond Maula, Ms Meriam Khumalo and Ms Abigail Ketlholwe. It was not in dispute in the proceedings under review that the charges brought against the applicant were different to those brought against those employees she named as comparators. The applicant's witness Ms Babalwa Mapete testified that the employee had been charged for switching off the fridge, whereas her named comparators had been charged with dereliction of duty for failing to attend to SMS notifications informing them that the average temperature was out of range. This evidence was confirmed by Ms Duncan, who stated that the charges were different. The arbitrator finds, in disregard of this unchallenged evidence, that the applicant '*should have treated the Applicant the same as her colleagues who were given final written warning for the same or worse charges as the applicant…*' There is no evidence to suggest, as I have indicated, that the charges were the same, nor is there any evidence to suggest that the charges were 'worse', whatever the arbitrator meant by the use of that term. In short, there was no evidence before the arbitrator that the applicant had committed the same or more serious misconduct than those employees who were issued with final written warnings. The test to be applied to determine inconsistent conduct in the form of contemporaneous inconsistency on the part of an employer is objective, to the extent that the comparator must necessarily be a similarly circumstances employee subjected to different treatment. Thus, in *Southern*

Sun Hotel Interests (Pty) Ltd v CCMA & others [2009] 11 BLLR 1128 (LC), this court noted that an inconsistency challenge will fail if the employer is able to differentiate between employees who have committed similar transcriptions on the basis of amongst other things, differences in personal circumstances, the severity of the misconduct or any other material factors. In short, the arbitrator's finding that the employee had committed the same or 'worse' misconduct than those found guilty of failing to respond to an SMS message is unsupported by the evidence. Further, by finding that the applicant issued in its application to plan and unfairly targeted the employee, the arbitrator ignored the legal principle to the effect that the parity principle is only a single factor to take into account in the determination of the fairness of a dismissal, it is by no means decisive (see *Absa Bank Ltd v Naidu and others* (2015) 36 *ILJ* 602 (LAC)). The terms of the award suggest that the arbitrator considered what he found to be a lack of consistency on the part of the applicant to be dispositive of the issue of substantive fairness. This approach collapsed the fundamental distinction between a finding of inconsistency on the one hand, and the question of whether or not the employee's dismissal was in any event fair, this being the true issue for determination. The arbitrator thus committed a material error of law by conflating these questions, a discrete basis for review, which logically, results in an incorrect and unreasonable award.

[10] Given the finding to which I have come both in respect of the arbitrator's finding that the employees dismissal was too harsh by reason of the fact that it was inconsistent with the applicant's disciplinary code, as well as the arbitrator's material error of both fact and law in his assessment of the inconsistency challenge to the employee's dismissal, the applicant has satisfied the first stage of the review inquiry. The second stage requires the court to determine whether despite any reviewable irregularities committed by the arbitrator, the result or outcome of the proceedings can nonetheless be sustained by reference to a test of reasonableness. As the authorities indicate, where an arbitrator commits a gross irregularity in the form of an error of law, the distorting effect of this will inevitably have the consequence of an unreasonable result (see *Head of Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at paragraph 33). To the extent that the

arbitrator committed an error of fact in his determination that the misconduct with which the applicant had been charged was the same as that of her comparators, similarly, a material error of this order points to a result that is *prima facie* unreasonable. Once it is accepted that the finding on inconsistent conduct on the part of the applicant is the consequence of both an error of law and an erroneous factual finding, it is difficult to appreciate how the outcome (i.e. the finding of a substantively unfair dismissal) can be sustained on the grounds of reasonableness.

[11] Given the conclusions to which I have come, it is not necessary for me to consider the further differentiating factor raised by the applicant in the course of its submissions on the alleged inconsistent application of discipline, i.e. what the applicant asserted to be a lack of remorse on the part of the employee, as opposed to the employee's more contrite comparators. In this context, I would be remiss not to observe that the employee's representative sought to rely on a handwritten note made by the chair of the disciplinary hearing to contend that the employee had in fact demonstrated remorse during the phase of the disciplinary inquiry, when she was invited to introduce factors in mitigation. This matter had never been put to Ms Duncan during her evidence in chief. In the absence of an opportunity afforded to Ms Duncan to comment on what amounted to a contention that her evidence was false, it was grossly unfair for the employee's representative to introduce this evidence only once the applicant had closed its case. It was similarly unfair of the arbitrator to allow the evidence and even worse, to rely on it to make a finding that the witness deliberately mislead the commission. Further, in relation to the issue of any breakdown in the trust relationship, this was a matter canvassed by the employee's representative when the employee gave evidence. The record reflects that in response to a question as to whether the trust relationship between the employee and management had broken down, she said '… I don't see that there is a trust relationship'. At this point, the arbitrator inappropriately intervened by advising the employee's representative not to cross-examine his witness. There was no cross-examination – the witness was asked a question, the answer to which did not

advance her case for reinstatement. This is an unfortunate example of the 'helping hand' on the part of the arbitrator and in itself, a basis for review.

[12] Finally, in so far as the remedy is concerned, the entire record is before the court and the court is in as good a position as any other commissioner would be to determine the dispute between the parties. For the reasons recorded above, there was no inconsistency on the part of the applicant, the employee's misconduct was serious and had grave financial and other consequences for the applicant. I see no reason to interfere with the sanction imposed by the applicant and intend therefore to substitute the award with one to the effect that the employee's dismissal was substantively fair. Neither party seriously pursued the issue of costs and I am satisfied for the purposes of section 162 of the LRA that the requirements of the law and fairness are best met by each party bearing its own costs.

I make the following or order:

1. The arbitration award issued by the third respondent under case number GAVL 2955 – 20 on 15 March 2021 is reviewed and set aside.

2. The award is substituted by the following:

> 'The applicant's dismissal was substantively fair, and her referral is dismissed'.

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André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: S Dube, Edward Nathan Sonnenbergs Inc

For the respondent: Adv K Pooe

Instructed by: Moabelo Attorneys