IN THE LABOUR COURT IN JOHANNESBURG

CASE NUMBER: JR688/21

Reportable

In the matter between:

LUELLA CLIFTON **APPLICANT**

and

GLENCORE OPERATIONS SA (PTY) LTD **FIRST RESPONDENT**

E JULIUS N.O **SECOND RESPONDENT**

CCMA **THIRD RESPONDENT**

Heard: 12 March 2024

Delivered: 25 April 2024

Summary: The dispute between the employer and employee concerns the date of dismissal. The employee maintains that termination of employment happened on 31 August 2020 as set out in a collective agreement with unions following a section 189A process, and that she is entitled to a retrenchment package of approximately R1.1 million. The employer maintains that she committed misconduct, and was dismissed for that reason on 29 September 2020 and no severance pay is due. The court found on a conspectus of the facts that the employer was entitled to take disciplinary action in September 2020 against the employee, and that the arbitrator had not committed a reviewable defect in finding the dismissal fair.

JUDGMENT

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Norton AJ

Introduction

1. During mid 2020 Glencore (or the "employer" or "First Respondent") embarked on a large scale retrenchment process.[1] Ms Clifton (the "employee" or the "Applicant") was employed as a Cost Consultant since 2008, and was part of that process.
2. The issue before this court is the date of termination of employment and the consequences that flow thereafter. Ms Clifton says in was the 31 August 2020, whilst Glencore maintains it was 29 September 2020. What turns on the timing of the termination is that if the date of 31 August can be sustained then Ms Clifton is eligible for payment of a generous retrenchment package (of approximately R1.1. million); if it is 29 September then she is not, as the termination on that date constitutes the date of dismissal for misconduct.
3. After Glencore dismissed Ms Clifton she referred an unfair dismissal claim to the CCMA. She argued that at the time of the dismissal, she was no longer an employee and therefore disciplinary action taken against her in September 2020 was null and void. Consequently, the termination date of 31 August 2020 applies and accordingly, so Ms Clifton argues, she is owed a retrenchment package, along with her ex colleagues.
4. Glencore in turn argues that the termination date of 31 August applied to the majority of employees but not her as she applied for re-deployment and that process had not concluded. Furthermore she attended work sporadically during September, utilised the company's medical aid benefit, and was paid for that month. She was according to Glencore still an employee in September, and as such the company was entitled to take disciplinary action against her during that month.
5. At the CCMA only procedure was challenged and not the substantive fairness of the dismissal. The CCMA found that her dismissal was fair. The commissioner's arbitration award issued by the CCMA on 12 March 2021 is now the subject of Ms Clifton's review challenge.
6. Ms Clifton submits that the commissioner committed a reviewable defect in terms of section 145(2) of the LRA when finding that her dismissal by Glencore was fair.

[1] As per section 189A of the LRA

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The arbitration award and the review challenge

7. The arbitrator summarised and analysed the evidence as follows:

With respect to Ms Clifton's version that the termination date was 31 August 2020:

7.1. A collective agreement signed with the unions put the termination date of employment at 31 August 2020[2]

7.2. She had agreed with her financial manager (Mr Metler) that she would carry out a handover of her duties in September, that this was done in good faith because she could not do so during August because she had injured her knee.

7.3. She said Mr Metler had told her that her termination date would be 31 August 2020 (but she did not call him to testify).[3]

With respect to Glencore's version that the termination date was 29 September:

7.4. Glencore had not provided Ms Clifton with exit documents, unlike other employees who terminated on 31 August 2020.[4]

7.5. Ms Clifton had signed a VSP but it had not been approved by the employer.

7.6. Ms Clifton continued to work in September.

7.7. The re-deployment selection process continued after 31 August 2020.[5]

8. The commissioner concluded,

Having said the above, I am of the view that the Respondent has successfully discharged the onus as required for section 191(2) of the LRA and the Applicant is not entitled to the relief as requested

I find that the Applicant's employment was not terminated on 31 August 2020 and that the Applicant's dismissal date was 29 September 2020 as per the outcome of the disciplinary hearing. The Respondent was therefore well within their rights to take disciplinary action and dismiss the Applicant…The Applicant's dismissal was procedurally fair."

9. Ms Clifton avers that the commissioner's conclusions were *"unreasonable…based on irrelevant considerations,* (that she ignored*) relevant evidence and misconceived the nature of the enquiry*."[6] Her reasons / grounds are as follows:

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[2] Para 32

[3] Para 35 and 36

[4] Para 38

[5] Para 38

[6] Para 31 of the Founding Affidavit

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9.1. The VSP form "*did not reflect whether my application was approved or rejected. It was left blank…It is evident from the collective agreement that my services had to be terminated, either on a voluntary or forced basis, by no later than 31 August 2020.*"[7]

9.2. "*I returned to the office during my first week in September 2020. The second respondent failed to appreciate why…she ignored relevant evidence that I had a discussion on 28 August 2020 with Mr Aron Metler during which he informed me my services would be terminated on 31 August 2020...but he still needed me to do the handover…(*Glencore*) failed to call Metler to dispute my evidence*…"[8]

9.3. "…*I was not redeployed*…"[9]

9.4. "(Glencore)…*evaded the terms of the collective agreement by simply ignoring its provisions*"[10]

10. In summary it can be gleaned from the Applicants pleadings that there are two main grounds: (firstly) that the commissioner failed to pay sufficient attention to the termination date of 31 August 2020 in the collective agreement – and that strict compliance was required; and (secondly) the commissioner erred by assuming that the onus to call Mr Metler to testify rested with the Applicant and not Glencore.

The evidence

11. Following the section 189 A process (between 17 June – 16 August 2020) led by the CCMA, Glencore signed a collective agreement with NUMSA, NUM, Solidarity and non unionised representatives on 14 August 2020.

12. The agreement made provision for voluntary severance packages ("VSPs"), alternatively forced retrenchment packages. The agreement also made provision for re-deployment and in those circumstances severance would not be paid. If re-deployment was not possible then the employee would be eligible for a VSP. VSPs were subject to management approval.[11] The termination date was set for 31 August 2020. Upon termination the company would provide the employees with service certificates, retrenchment letters, exit medical certificates, UI-19 forms and the like.

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[7] Para 31.1

[8] Para 31.3 and 31.4

[9] Para 31.6

[10] Para 31.7

[11] See too the notification dated 28 July 2020 on pg 98 "*Your application will be subject to management approval.*" Signed by the COO – Amanda Magro

13. Ms Clifton applied for a VSP on 3 August.[12]

14. Ms Clifton applied for Re Deployment on 7 August. [13]

15. On 21 August Glencore issued a circular to employees which read,

    "Please note that employees who indicated their interest to be redeployed will not exit on or before 31 August 2020…Employees who indicate that they would like to be redeployed will be accommodated where possible. If you get redeployed you will be transferred to that unit and not receive a VSP. Once you have been informed that there are no suitable positions in which to accommodate you, you will receive your VSP and exit. We foresee that this process will be finalised during September 2020."[14]

16. Ms Clifton took sick leave from 24 – 27 August, and again from 4 - 14 September 2020.[15]

17. Glencore suspended her on 4 September and charged her with three counts of gross misconduct arising from events that took place between 26 July to 31 August 2020. Ms Clifton did not attend her disciplinary hearing scheduled for 28 September and she was dismissed on 29 September. Ms Clifton triggered the internal appeal process, without success, and her dismissal was confirmed.

18. Glencore called Ms Zylstra to the CCMA to testify. In summary she testified that:

18.1. If employees (like Ms Clifton) applied for VSP the retrenchment date would be 31 August. A VSP was not automatic and required management's approval. If approved the employees would be required to sign a voluntary retrenchment agreement.[16]

18.2. If the employee applied for redeployment, a recruitment and selection process would follow, and that would be completed between September to October 2020. VSPs were subject to management approval.

18.3. The redeployment process was continuing at the time Ms Clifton was suspended. Her VSP would only be considered once it was clear that she couldn't be redeployed.[17]

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[12] Applicant's Heads of Argument, para 5

[13] [g 94

[14] Pg 96

[15] Answering Affidavit, para 14

[16] Ans Affidavit, paragraphs 23.1 and 23.2

[17] Ans Aff para 23.3

18.4. Ms Clifton did not receive exit documents, because Glencore did not envisage her departure by 31 August.

18.5. She attended work and later submitted a sick note in September – not the usual conduct of someone who claims to have terminated employment by 31 August.[18]

19. In summary Ms Clifton relied on the termination date in the collective agreement, she argued that she sought to complete a handover of tasks on a gratuitous basis in September, and that Mr Metler had informed her that the termination date would be 31 August 2020.

20. She also testified that she was not offered any alternative positions. There were no vacant positions she said.

21. In cross examination Ms Clifton conceded that she had received no notification from Glencore that her VSP had been approved; that she had seen the communique of 21 August; and that she had used the medical aid on the basis of being an employee and not as a direct paying member.[19]

Discussion and analysis

22. In the Applicant's Heads of Argument they argue that Glencore was bound by the terms of the collective agreement. Of course they were, but that does not mean that Ms Clifton's termination date was the 31 August as mentioned in that agreement. Context is important. As the Labour Appeal Court said in *Hurbert v Head of Education: Western Cape Education Department and others*[20] when interpreting a collective agreement subject to a labour dispute, "*context and purpose must be taken into account as a matter of course…*"[21]

23. It is clear from the agreement that if an employee applied for redeployment (as Ms Clifton had) then a VSP would not apply if the redeployment was successful. It could never be in that context then, that despite this provision the termination date would in all circumstances be 31 August.

24. As mentioned Ms Clifton had applied for redeployment, and on 21 August Glencore had informed staff that the redeployment process would take place after the retrenchment process had completed, and that if redeployment was not possible that

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[18] Para 23.5

[19] Paragraph 24 of the Answering Affidavit.

[20] (2022) 43 ILJ 1678 (LAC). See too *Cape Clothing Association v De Vos & others* (2014) 35 ILJ 469 (LC)

[21] At para 13

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the termination date with payment of a VSP would take place in September or October.

25. The agreement also set out the administrative documents / exit documents which would be provided to terminating employees. It is common cause that these were not provided to Ms Clifton. The inference is clear – Glencore did not contemplate her termination on 31 August. Furthermore the agreement makes it clear that the VSP is subject to management approval. There had been none in Ms Clifton's case.

26. The Applicants cannot simply rely doggedly on the termination date of 31 August in the collective agreement when faced with the context of the other factors such as the need for VSP approval as well as the provision of exit documents prior to termination (which were not provided to her). This first ground of review thus fails.

27. On the issue of Mr Metler and the weight to be accorded to Ms Clifton's say so that he had told her that her termination date would be 31 August; it is trite that she who avers must prove. The evidentiary burden rested on the employee to adduce sufficient evidence to combat a *prima facie* case made by the employer.[22] The evidentiary burden rested on her to call him as a witness to testify to that date and she failed to do so. The evidentiary burden did not rest with the employer to disprove her says so by calling him. At the end of the day, little weight can be placed on Mr Metler's alleged utterance of the date. This second ground too fails.

28. Much however can be placed on the fact that she continued working on an adhoc basis in September (noting the sick leave), that she was paid for that month; that Glencore did not get back to her regarding redeployment or a VSP in August or September, and that she used her medical aid in September.

29. Finally I need to comment on the irony that the employee advances a case that Glencore had no right to dismiss her in late September as (according to her) employment had already terminated on 31 August. In other words there could have been no dismissal in fact or in law. Yet it is the employee who seeks the protection of the CCMA's unfair dismissal jurisdiction under the LRA's unfair dismissal provisions.

30. Expressed differently, it is notionally contorted, for the employee on the one hand to ground her case on an alleged factual basis that termination of employment took place on 31 August, and on the other hand to seek a finding from the CCMA that Glencore's dismissal of her for misconduct on 29 September was unfair. Ms Clifton

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[22] See Principles of Evidence, PJ Schwikkard, para 31.2 at pg 638

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seeks the CCMA's refuge and remedy (compensation of three months salary as well as payment of the VSP) under the unfair dismissal regime, yet her case relies on a finding that arguably there was no dismissal, and that the employment relationship came to an end on 31 August as per the collective agreement. A conundrum indeed.

The test for review

31. The test for review is set out in section 145 (2) of the LRA – an arbitration award may be set aside if the commissioner committed misconduct, a gross irregularity or exceeded his or her powers, or if the award was irregularly obtained. It is trite that the test is infused with the standard of reasonableness, established by the Constitutional Court *in Sidumo and another v Rustenburg Platinum Mines*.[23] The standard is expressed in the negative, "*Is the decision reached by the commissioner one that a reasonable decision maker could not reach*?"

32. I am persuaded that the commissioner did not commit a reviewable defect, based on the discussion of the evidence set out above. Her award and analysis was entirely sensible, reasonable and justifiable. Both grounds of review have failed.

33. Regrettably Ms Clifton committed misconduct towards the end of her career with Glencore during the retrenchment and exiting process. The nature of the misconduct is left unsaid in the pleadings and record. She was dismissed and thus lost what would have been her right to an attractive severance package, or to continued employment by way of the redeployment process. She has desperately sought to recover the situation in the CCMA and now in the Labour Court. Neither can come to her assistance.

34. In the circumstances I make the following order:

Order

35. The review application is dismissed.

36. No order as to cost.

D Norton
Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv Basson

Du Toit Smuts

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For the First Respondent: D Masher

Edward Nathan Sonnenbergs Inc.

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