IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA 18/2014

In the matter between:

TRANS HEX GROUP LTD **Appellant**

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

STEPHAN CLOETE N.O **Second Respondent**

NATIONAL UNION OF MINEWORKERS OBO J JOSEPH **Third Respondent**

Heard: **22 September 2015**

Delivered: **30 October 2015**

Summary: Employee dismissed for driving company vehicle without permission. At arbitration dismissal found substantively unfair and employee retrospectively reinstated into his employment subject to a final written warning. Labour Court dismissed review on basis that decision was one which reasonable commissioner could reach. Held on appeal that decision fell within the bounds of reasonableness required. Appeal dismissed with costs.

Coram: Waglay JP, Musi JA *et* Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

[1] This is an appeal, with the leave of the court *a quo*, against the judgment of the Labour Court (Steenkamp J) in which the appellant's review of the award of the second respondent (the commissioner) was dismissed with no order as to costs.

[2] Mr Josef Joseph, a lubrication assistant with 16 years' service with the appellant, Trans Hex Group Limited, was dismissed in March 2013 for driving a company vehicle without permission. Mr Joseph admitted his misconduct, which he reported without delay and for which he expressed remorse. In a separate disciplinary enquiry held on the same day and related to the same incident, he received a final written warning valid for six months for causing approximately R100 000 damage to the company vehicle and a wall into which it had been driven.

Arbitration award

[3] Aggrieved by his dismissal, Mr Joseph referred an unfair dismissal dispute to the CCMA for determination. While the appellant's disciplinary code recommended a written warning for a first offence, Mr Heinrich Dreyer, the appellant's superintendent of earthmoving equipment and light vehicles who chaired the disciplinary enquiry, emphasised in his testimony that Mr Joseph's dismissal was appropriate in spite of his long service and the remorse shown in that the offence was serious, had occurred in a high risk area and in breach of applicable health and safety regulations. Mr Joseph's misconduct was

distinguished from that of a fellow employee, Mr F Diergaardt, who had received a warning for his unauthorised use of company equipment in circumstances in which he had acted on the instruction of his supervisor while Mr Joseph had not.

[4] Mr Joseph testified that he had responded to a radio call for the lubrication of trucks at the workshop while awaiting the arrival of his team leader. In responding to the call, he drove a company truck to the workshop without permission, without a licence, without undertaking a pre-trip inspection on the vehicle and without stopping at any intersections along the way. When he attempted to bring the vehicle to a stop outside the workshop, he failed to engage the brakes timeously and drove into a wall causing damage to both the vehicle and the wall. Mr Joseph acknowledged that he had endangered the lives of others through his conduct when alternative courses of action had been available to him. He took issue however with the fairness of his dismissal given his long service, his immediate report of the incident, the remorse shown by him, the warning recommended as an appropriate sanction in the disciplinary code and given that Mr Diergaardt had received a sanction short of dismissal for similar misconduct.

[5] The commissioner, in the arbitration award, erroneously identified the only decision he was required to make to be "whether the applicant's dismissal was <u>the</u> most appropriate sanction" (my emphasis), while stating that he was required to exercise his "discretion reasonably, honestly and with due regard to the general principles of fairness." Referring to the Code of Good Conduct: Dismissal,[1] the commissioner noted that dismissal must be "appropriate" in light of the facts of the case and that the ultimate justification for an employers' power to impose discipline flows from its right to manage the business effectively. Having regard to the nature of the employment relationship as one of trust and confidence, the commissioner stated that "...conduct clearly inconsistent therewith entitled the "innocent" party to cancel the agreement".

[1] Schedule 8 to the Labour Relations Act 66 of 1995 (as amended).

[6] Nevertheless, with reference to *Edcon Ltd v Pillemer NO and Others,*[2] the commissioner stated that the employer bore "the burden of proof to show that the trust relationship has broken down irretrievably" and found "no evidence whatsoever…that the trust relationship has irretrievably broken down when the destruction of the trust relationship is 'the ultimate justification for dismissal'". The commissioner found that the contravention of the rule did not "go to the heart of the employment relationship", was unintentional, was not dishonest; that, Mr Joseph had shown "considerable remorse" for his misconduct, he had received a final warning for damaging the company property, his long service warranted progressive discipline with his behaviour capable of correction and his personal circumstances mitigated against dismissal. It was therefore found to be "fair and reasonable to conclude that the respondent could have issued him with a sanction, which was an alternative to that of a dismissal." The dismissal was therefore found substantively unfair and Mr Joseph was retrospectively reinstated into his employment with the appellant subject to a final warning valid for 12 months for the unauthorised use of a company vehicle.

Review by Labour Court

[7] The appellant took the matter on review to the Labour Court. It contended that the commissioner had misconceived the nature of the enquiry before him in applying the incorrect test, namely whether dismissal was the most appropriate sanction. Having regard to the decisions of *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*[3] and *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (Gold Fields)*,[4] the Labour Court found that while the commissioner had not formulated the test correctly it "may be a matter of semantics" in that he had understood the nature of the enquiry before him.

[2] [2010] 1 BLLR 1 (SCA).

[3] 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA).

[4] (2014) 35 ILJ 943 (LAC) with reference to *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) (*Sidumo*).

[8] The appellant also took issue with the commissioner's erroneous finding that the legal principles in *Edcon* applied to the facts of the case, with which the Labour Court agreed; finding that there was no obligation on the appellant to present evidence to prove that Mr Joseph could not be trusted because of dishonesty. However, regardless of the commissioner's mistaken application of *Edcon,* the Labour Court concluded that a sanction short of dismissal was fair and appropriate and was not a decision which was so unreasonable that no other commissioner could have reached it. The review application was therefore dismissed with no order as to costs.

Evaluation

[9] The Constitution seeks to give effect not only to the right to fair labour practices,[5] but also to the right to administrative action which is lawful, reasonable and procedurally fair.[6] In *Sidumo,* the Constitutional Court made it clear that "the reasonableness standard should now suffuse section 145 of the LRA".[7]

[10] This Court has emphasised that the decision in *Sidumo* does not mean "...that the grounds of review in section 145 of the Act are obliterated [but]... that they are suffused by reasonableness."[8] In *Gold Fields,* it was stated that:

> '...where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that

[5] Section 23.
[6] Sections 33.
[7] At paras 105 and 110. S145 of the Labour Relations Act 66 of 1995 (LRA) allows any party to an arbitration award who alleges a defect in proceedings before an arbitrator to apply to the Labour Court for an order setting aside such award. S145(2) defines a defect as misconduct committed in relation to the duties of the arbitrator; a gross irregularity in the conduct of the arbitration proceedings; the exceeding of powers; or improperly obtaining an award.
[8] See *inter alia Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 101.

falls in a band of decisions to which a reasonable decision-maker could come on the available material.'[9]

[11] The erroneous recordal or categorisation of an issue by the arbitrator will not justify the setting aside of the award unless such error is material to the outcome, caused unfairness or prejudice[10] and where (as was the case in *National Union of Mineworkers v Samancor Ltd (Tubatse Ferrochrome) and Others* [11] where the arbitrator erroneously categorised the dismissal) it results in an award which is so unreasonable that it falls to be set aside.[12]

[12] While the commissioner erroneously formulated the issue for determination to be whether dismissal was the most appropriate sanction, he had regard to whether dismissal was fair upon a consideration of the relevant circumstances in the manner required by *Sidumo*:

> 'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'[13]

[13] In determining that the misconduct committed warranted the imposition of a sanction short of dismissal, the commissioner relied on the absence of dishonesty on the part of Mr Joseph, his "unintentional" breach of the rule, the considerable remorse shown by him, his long service, the final written warning already received by him for causing the damage to company property and on the principle of progressive discipline. The circumstances relevant to sanction were considered, including those both aggravating and mitigating, in light of

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[9] At para 14. With reference to s145(2)(i), (ii) and (iii) of the LRA.

[10] *National Union of Mineworkers v Samancor Ltd (Tubatse Ferrochrome) and Others* [2011] 1 BLLR 1128 (SCA); *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC).

[11] [2011] 11 BLLR 1041 (SCA).

[12] See paras 8, 10 and 12.

[13] At para 79.

the breach. Mr Joseph's admission of wrongdoing, his remorse, his lengthy service and the reason for his conduct were significant factors, as was the absence of an indication that progressive discipline would not assist to adjust Mr Joseph's conduct in the future.

[14] The appellant contends that the commissioner failed to give due regard to the seriousness of the offence and the context of the misconduct in that he drove through a high risk area of the mine, which is a highly regulated health and safety environment without authorisation or a valid licence, without obeying traffic signals, caused substantial damage to appellant's property, put other workers' lives at risk and violated serious health and safety regulations. It is so that the Mine Health and Safety Act 29 of 1996 (MHSA) serves to protect the health and safety of persons at mines, requiring employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines and promote a culture of health and safety in the mining industry. However, while the appellant places great reliance on compliance with the applicable health and safety legislation, no evidence was put up to show that it took any action against a more senior supervisor who had instructed the respondent employee's colleague to breach the same rule; nor were adequate steps shown to have been taken to ensure that untrained employees did not have access to vehicles that could constitute a danger and breach of the health and safety.

[15] It is equally relevant that the appellant's disciplinary code recommends a written warning for a first offence which in the manner committed by Mr Joseph breached mine health and safety regulations applicable. While deviations from disciplinary sanctions that are recommended in a code are permissible when warranted,[14] such deviations are not to be imposed without justification.

[14] *Solidarity obo S W Parkinson v Damelin (Pty) Ltd and Others* [2014] ZALCJHB 480 (4 December 2014).

[16] I am satisfied that the commissioner had regard to the appropriateness of the sanction and properly applied his mind to the fairness of the dismissal imposed on a consideration of the relevant circumstances. This is so despite his erroneous recordal of both the issue for determination and that the decision in *Edcon* found application to the facts of the case. In arriving at the decision that he did, the commissioner analysed the facts and arrived at a "plausible and reasonable justification for sanction".[15] The outcome was not one which a decision-maker acting reasonably on the material before him could not have reached. The commissioner was not required to defer to the appellant's decision but to decide whether that decision was fair. He committed no reviewable irregularity in doing so and the Labour Court correctly concluded that the review application fell to be dismissed.

[17] On the issue of the costs, there is no reason in law or fairness as to why costs should not follow the result. It follows that the appeal falls to be dismissed with costs.

<u>Order</u>

[18] In the result, the following order is made:

1. The appeal is dismissed with costs.

Savage AJA

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[15] *Wasteman (Pty) Ltd and Others v SAMWU* [2012] 8 BLLR 778 (LAC); (2012) 33 ILJ 2054 at page 13.

I agree

pp Kubushi

Waglay JP

I agree

pp Kubushi

Musi JA

APPEARANCES:

FOR THE APPELLANT: Mr G Hulley

Instructed by Bowman Gilfillan Inc.

FOR THE THIRD RESPONDENT: Mr C Kahnovitz SC

Instructed by Cheadle Thompson & Haysom Inc.