



REPUBLIC OF SOUTH AFRICA

**THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JR 1088/2011

Reportable

In the matter between:

INTERNATIONAL FERRO METALS (SA)(PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION ("CCMA")**

First Respondent

JOSEPH TSABADI N O

Second Respondent

MICHAEL MADLANKOSI BASI

Third Respondent

Heard: 03 July 2012

Delivered: 05 July 2012

JUDGEMENT

MOSAM AJ:

1. This matter concerns a review application to set aside a decision taken by the Second Respondent ("*the Arbitrator*") on 12 April 2011 wherein the Arbitrator made an award that the Applicant had inconsistently applied discipline in dismissing the Third Respondent ("*the Employee*") and that the Employee's dismissal was therefore substantively unfair.

The relevant facts

2. It is not necessary for the purpose of this judgment to restate the facts, but the salient ones are mentioned below.
3. On or about 9 December 2010, the Applicant instituted disciplinary proceedings against the Employee in which the Employee was required to answer a charge that he had acted dishonestly in that he had fraudulently acquired a sick note to cover or excuse his absence when he had been sent home from work because he was allegedly found under the influence of an intoxicating substance ("*the charge*"). These disciplinary proceedings culminated in the Employee being found guilty of the charge and thereafter dismissed from the employ of the Applicant on 14 December 2010.
4. The Employee referred a dispute to the CCMA in which he alleged that his dismissal was procedurally and substantively unfair. The dispute was

arbitrated before the Arbitrator on 23 March 2011.

5. In his arbitration award and in considering the substantive fairness of the Employee's dismissal, the Arbitrator held the following:

"[32] I am respectfully in agreement with the respondent [the Applicant] that the applicant's [the Employee's] conduct has seriously damaged the relationship of trust which is the hallmark of any employment relationship. Even during these arbitration proceedings; the applicant did not show any remorse but remained defiant. It is my finding, therefore, that the dismissal of the applicant was procedurally fair. However; substantively the dismissal of the applicant is found to be unfair from a consistency point of view. The dismissal of the applicant cannot stand from a consistency point of view [sic] as I do indeed have [sic] reason to disturb the Respondent's finding as well as penalty imposed. There is sufficient factual and legal basis for me to Interfere [sic] with the Respondent's decision as well as penalty imposed for the reasons stated in paragraph [35] infra.

[33] The Applicant's supervisor was equally guilty of dishonesty. Firstly; he sent the Applicant home prematurely before a second alcohol test could be conducted on the Applicant. Secondly, he did not report the incident or bring it to management's attention. Only the security officers on duty made an OB entry. Lastly; as if all these were not grossly dishonest enough, he tampered with the Applicant's clock-in cards/time sheets thereby entitling the Applicant to payment for the day that he tested positive for alcohol. Had the senior supervisor not discovered these clocking irregularities, the Applicant would have been paid for the day that he did not work after he was sent home for testing positive for alcohol. For all these acts of gross dishonesty charges were brought against the supervisor who is more senior than the Applicant and he gets away with a final written warning and the Applicant gets dismissed. It is my view that the Respondent was highly inconsistent in meting out discipline.

[34] My finding that the Respondent was inconsistent in meting out discipline should not be misconstrued to imply that I condone the Applicant's conduct. The Applicant's conduct is abhorable to say the least. However, what is good for the supervisor, a senior employee, is

also good for the Applicant, who is a junior employee.

[35] It is my finding, therefore, that the dismissal of the Applicant was procedurally fair but substantively unfair. The dismissal of the Applicant does not stand as I do have sufficient reason to disturb the Respondent's finding as well as penalty imposed. There is sufficient factual and legal basis for me to interfere with the Respondent's decision as well as the penalty imposed."

6. The decision of the Arbitrator to reinstate the Employee with no back pay is the subject matter of this review application.

Review for reasonableness

7. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others** 2004 (4) SA 490 (CC), the Constitutional Court at paragraph 47 set out the factors that a Review Court should consider in deciding whether a decision was reasonable. The specific factor highlighted is the nature of the decision and another is the competing interest involved.
8. In **Fidelity Cash Management Services v CCMA & Others** (2008) 3 (BLLR) 197 (LAC), the Court said:

"Whether or not an arbitration award or decision of finding of a CCMA Commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the Commissioner and what the issues were that were before him or her."

9. In **Fidelity Cash** it was also said:

"There is obviously an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision maker is bound to take into account, is essential to a reasonable decision. If a decision maker fails to take into account a factor that he or she is bound to take into consideration, the resultant decision can hardly be said to be that of a reasonable maker." Ngcobo J in **Minister of Health v New Clicks SA** 2006 (2) SA 311 (CC).

10. In the recent Labour Appeal Court case of **Andre Herholdt v Nedbank Limited Case No: DA 20/2010**, unreported (judgment delivered 4 May 2012), Murphy AJA, stated *inter alia* the following:

" [39] ... The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognises that dialectical and substantive reasonableness are intrinsically interlinked in that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome."

Grounds of review

11. The grounds of review raised by the Applicant is that the Arbitrator committed a reviewable irregularity and thereby arrived at a decision which no reasonable

decision maker could have reached in finding that the Applicant had inconsistently applied discipline in dismissing the Employee and that the Employee's dismissal was therefore substantively unfair (*"the first ground of review"*).

12. Furthermore the Applicant contended that the Arbitrator committed a reviewable irregularity and thereby arrived at a decision which no reasonable decision maker could have reached in finding that retrospective reinstatement was the appropriate remedy (*"the second ground of review"*).

13. The Applicant also attacked the Arbitrator's finding that the Applicant had inconsistently applied discipline in dismissing the Employee (*"the third ground of review"*).

14. Lastly, the Arbitrator committed a reviewable irregularity by failing to advise the Applicant that he intended to *mero motu* consider inconsistent application of discipline in determining the substantive fairness of the Employee's dismissal (*"the fourth ground of review"*).

Discussion

15. The gist of the Applicant's review relates to the Arbitrator's finding that the Applicant acted inconsistently in issuing the supervisor with a final written warning and in turn, dismissing the Applicant.

16. It was submitted by Mr van As, correctly so, in my view, that it is apparent from the record that the supervisor received a final written warning for failing to report the Employee's absence from work on 3 October 2010 and that the supervisor's misconduct is clearly distinguishable from the Employee's more serious and dismissible misconduct, namely the submission of a fraudulent medical certificate which *per se* involves an element of dishonesty.
17. In **Mphigalale v Safety and Security Sectoral Bargaining Council & Others**, Savage AJ¹ made reference to Conradie JA in **De Beer's Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & Others**² wherein it was stated:

'A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium over minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

18. Savage AJ goes on to state the following:

"[18] This 'sensible operational response to risk management' is one which must be undertaken fairly. In determining whether a decision to dismiss is fair, a commissioner must take cognizance of the fact that the discretion to dismiss lies primarily with the employer and interference with the sanction imposed should not be lightly contemplated, with a measure of deference afforded to the sanction imposed by the employer. The Code of Good Practice: Dismissal

1 [2012] 33 ILJ 1464 (LC)

2 [2000] 21 ILJ 1051 (LAC)

establishes a guideline to test the fairness of a dismissal, which includes consideration as to whether 'the rule of standard has been consistently applied by the employer'. As a general rule, fairness requires that like cases be dealt with alike, whether in the consistent enforcement of a rule or in the imposition of a penalty. ..."

19. Conradie JA in **SACCAWU & Others v Irvin & Johnson Ltd**³ found that:

'The best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. ... A wrong decision can only be unfair if it is capricious, or induced by improper motives, or worse, by a discriminating management policy.'

20. It was therefore correctly submitted by Mr van As that had the Arbitrator properly applied his mind to the misconduct committed by the Employee, as compared to the misconduct committed by the supervisor, he would have concluded that such misconduct is distinguishable and that the Applicant had therefore not inconsistently applied discipline in dismissing the Employee but not dismissing his supervisor.

21. I am satisfied that the Applicant has (per **Andre Herholdt** *supra*) crossed the threshold for the review to succeed.

3 [1999] 20 ILJ 1957 (LAC)

22. Therefore, in failing to arrive at such a conclusion, the Arbitrator committed a reviewable irregularity and thereby arrived at a conclusion which no reasonable decision maker could have reached in the circumstances.
23. It therefore follows that the Applicant must succeed on the first ground of review and therefore it is not necessary for me to consider the other grounds of review.
24. Mr van As submitted that in the event I uphold the first ground of review, I should substitute the arbitration award with a finding that the dismissal of the Employee was substantively fair.⁴ I agree.

Costs

25. The Court has a broad discretion, established by section 162 of the LRA, to make an order for costs according to the requirements of the law and fairness. The Applicant has been successful in this matter and there are no reasons before me to suggest why costs in this matter should not follow the result.

Order

26. Accordingly I make the following Order:

⁴ **Tedco Plastics (Pty) Ltd v NUMSA & Others** [2000] 21 ILJ 271 (LC); **Protekon (Pty) Ltd v CCMA & Others** [2005] 26 ILJ 1105 (LC)

26.1. The arbitration award of the Arbitrator is reviewed and set aside.

26.2. The Arbitrator's arbitration award is substituted with an order to the effect that the dismissal of the Employee was for a fair reason and accordingly his claim for unfair dismissal is dismissed.

26.3. The Employee is to pay the costs of these proceedings.

A MOSAM

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPELLANTS: M J VAN AS

Instructed by : Edward Nathan Sonnenbergs Inc.

FOR THE RESPONDENTS: N DAROCHA

Instructed by : Magolego Troskie Inc.