REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 716/10

In the matter between:

G4S SECURITY SERVICES SA (PTY) LTD	**Applicant**
and	
COMMISSIONER DANIEL DU PLESSIS N.O.	**First Respondent**
CCMA	**Second Respondent**
CHRISTOPHER L MUKEFE	**Third Respondent**

Heard: **22 February 2012**

Delivered: **27 February 2012**

Summary: Review – LRA s 145 – within range of reasonable outcomes – not reviewable.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application in terms of section 145 of the LRA to review and set aside an arbitration award by the first respondent ("the arbitrator") in which he found the dismissal of the third respondent ("the employee") to have been procedurally fair, but substantively unfair. He ordered the applicant to reinstate the employee, coupled with a final written due to absence without leave and a final written warning due to insubordination. The warnings were to be valid for 12 months and back pay was limited to 3 months.

[2] The applicant submits that the conclusion reached by the arbitrator, based on the evidence before him, is so unreasonable that no other arbitrator could have come to the same conclusion.[1]

Background facts

[3] The employee was a security guard. He was employed by the applicant from 21 October 2005 until his dismissal on 29 January 2010.

[4] He was stationed at the University of Cape Town at a site known as the Chinese school. On 5 January 2010 he was due to take his lunch break from 1400 until 1500. The security guards had to fill in a register, setting out when they went on lunch, at the control centre known as Burnage House. This centre is about a seven minutes' walk away from the Chinese school. He left his site between 10 and 15 minutes early, but noted in the attendance register at Burnage, as well as in his pocketbook, that he only went on lunch at 1400.

[5] The head of the company's operations at UCT, Mr Pierre Heydenrych, saw the employee at the side of the road before 1400 on 5 January 2010. When he stopped to question him, the employee said that he was on his lunch break and he was going to the shops to buy food.

[1] i.e. in accordance with the test set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

[6] The employee was called to a disciplinary hearing to answer to the following charges[2]:

6.1 "(Clause 5): Misconduct in that you left your post without being properly relieved or given permission to do so. On the 5th of January 2010; at about 13h45. In doing so you compromised the effective security operation of such post (Chinese school) and placed the company in breach of its service.

6.2 (Clause 6.1): Misconduct in that you were dishonest in the course of duty. On the 5th of January 2010 in that you represented to management that you were on an authorised lunch break; entries specified company documents [*sic*]; i.e. registers and pocket book.

6.3 (Clause 6.4): Misconduct in that you made a fraudulent entry in your pocket book on the 5th of January 2010 and further supported in relevant registers.

6.4 (Clause 6.5): Misconduct when you refused to obey a lawful instruction given to you by one of the G4S controllers on the 5th of January 2010."

[7] He was found guilty and dismissed, inter alia on the grounds that he understood the meaning of "desertion of post" – the clause in the company's disciplinary code to which the first charge of misconduct referred.

Evidence at arbitration

[8] Heydenrych testified that security personnel were not allowed to leave their posts early when going on lunch. The entries in their pocketbooks and the register at Burnage also had to reflect accurately when they actually left their site.

[9] The other witnesses for the applicant could not verify whether a relief guard took over for the employee during his lunch break on the day in question.

[2] Sentence construction as in the original.

[10] The employee testified that, although his lunch break commenced at 1400, he could leave a few minutes early in order to arrive at Burnage at 1400. He also claimed that he had not deserted his post because the employer knew where to contact him.

The arbitration award

[11] The arbitrator, in discussing the first charge, had regard to the definition of "desertion of post" as described in the company's disciplinary code. The first charge referred to clause 5 of the code, under the heading "post desertion". It is described as follows:

> "This offence relates to the situation whereby an employee, without valid permission or cause, leaves his/her post of duty (i.e. at a client's premises) without having been properly relieved; thereby compromising the effective security operation of such post and/or premises, and placing the company in breach of its service contract with such client."[3]

[12] The arbitrator pointed out that the code also refers to "absenteeism" and "poor timekeeping", which includes latecoming or leaving a post early. The code includes guidelines pertaining to sanctions for different types of misconduct. The suggested sanctions range progressively from a warning to dismissal for being "absent without leave for 3+ shifts". "Poor timekeeping" is described as follows:

> "Specific situations in terms of this offence would include reporting late for duty; leaving work early (which may also include 'desertion of post'); extended or unauthorised breaks during working hours; neglecting and booking on duty or clocking in procedure and loitering."

[13] The arbitrator referred to the distinction between "desertion" and "AWOL" in military terms. This was entirely inappropriate in the workplace environment, even for a security company; nevertheless, it is so that the actual misconduct could as well have been dealt with as being absent without leave (ie "poor timekeeping" in terms of the employer's code) and would have attracted a lesser sanction than dismissal for a first offence.

[3] The Code refers to the company's "clients" throughout, when it should properly refer to its customers.

[14] The arbitrator further said that it was “common cause” that the employee could leave the site 5-10 minutes before the start of the lunch break and that “everybody left their sites early” in order to be at Burnage at the start of the lunch break. That recordal of the evidence is wrong. It was the employee’s evidence, but it was not common cause. The arbitrator nevertheless found that the employee was not on his way to Burnage, but accepted the employer’s evidence that he was on his way to the shops. He also pointed out that the employee “was not altogether a truthful witness” and that he kept “changing his story”. He accepted that the employee did not have permission to leave his site early and “clearly did something wrong”; but he found that he should have been given a final written warning for being absent without leave.

[15] The arbitrator also found that the employee had been dishonest; he lied to Heydenrych. However, there was no evidence that the trust relationship had broken down. Therefore reinstatement remained the primary remedy, albeit coupled with two final written warnings – one for unlawful absence and one for not adhering to a lawful instruction.

[16] The latter final written warning arose from the fact that the employee only acceded to the instruction to return to his post his supervisor had to repeat it in the absence of a senior controller.

[17] The arbitrator made a factual error with regard to the employee’s entry in his pocketbook. He found that the employee recorded that he was on lunch from 1400 to 1500, and that it was not fraudulent because that was the assigned lunch break. But that misses the point that the employee recorded his lunch break as having been from 1400 to 15oo when he had in fact left his post some 15 minutes earlier.

[18] Against this background the arbitrator found that the dismissal was procedurally fair but substantively unfair, and replaced it with a sanction of two final written warnings; and ruled that the employee was to be reinstated, but was only entitled to three months’ back pay.

Evaluation

[19] In considering the grounds of review – aimed at the findings on the misconduct itself, the appropriate sanction and the question of whether the trust relationship had broken down – I must be guided by the reminder that this a review, not an appeal.

[20] In *Sidumo*[4] the Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision-maker could make. And the reasonableness test is still aptly described in the pre-*Sidumo* case of *Computicket v Marcus NO and others*[5]:

> "The question I have to decide is not whether [the arbitrator's] conclusion was wrong but whether ... it was unjustifiable and unreasonable."

[21] And in *Fidelity Cash Management Service v CCMA & others*[6] Zondo JP applied the *Sidumo* test thus:

> "It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently."
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> And:
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> "The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the

[4] Supra paras 118-119.

[5] (1999) 20 *ILJ* 343 (LC) 346.

[6] [2008] 3 BLLR 197 (LAC) paras [98] and [100].

> circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached."

[22] This is one of those cases where the arbitrator's sense of fairness must prevail and the court should not lightly interfere. The arbitrator accepted that the employee had committed misconduct; and on that basis, he had to be punished. But dismissal, in the view of the arbitrator, was unfair.

[23] With regard to the breakdown – or not – in the trust relationship, it is common cause that the employer led no evidence in this regard. Its representative did make some submissions in argument, but the arbitrator correctly pointed out that no evidence of a breakdown was led. In this regard the Supreme Court of Appeal held in *Edcon Ltd v Pillemer NO & Others*[7]*:*

> "It is inevitable that courts, in determining the reasonableness of an award, have to make a value judgment as to whether a commissioner's conclusion is rationally connected to his/her reasons taking account of the material before him/her. That this is the correct approach has been stated on a number of occasions by the LAC, this court in the Sidumo matter as well as the Constitutional Court in the same matter. In my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her. She did not stray from what was expected of her in the execution of her duties as a CCMA arbitrator. The challenge, therefore, to Pillemer's award on this basis is without merit."

[24] The same goes for the arbitrator's award in this matter. As the Constitutional Court stated in *Sidumo*[8]:

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[7] [2010] 1 BLLR 1 (SCA) para [23] (per Mlambo JA).

[8] *Supra* para [116].

> "In respect of the absence of dishonesty, the Labour Appeal Court found the commissioner's statement in this regard 'baffling'. In my view, the commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct. However, the commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the mine's valuable property which he did not do. However, this is not the end of the enquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach."

[25] This is what the commissoner did in this case. And, as Davis JA pointed out in *Ellerine Holdings Ltd v CCMA & others*[9]*:*

> "[A] court must be careful to parse an award by [an arbitrator] in the same fashion as one would an elegant judgment of the Supreme Court of Appeal or the Constitutional Court. These awards must be read for what they are, awards made by arbitrators who are not judges. When all of the evidence is taken into account, when there is no irregularity of a material kind i nthat evidence was ignored, or improperly rejected, or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity..."

[26] The effect of the arbitration award is that the employee did not lose his employment, but he would lose his wages for two months; and he would be subject to two written warnings valid for 12 months. This is a not insignificant sanction, and one that falls within a range of reasonable sanctions, given the misconduct: i.e. that the employee was away from his post for about 15 minutes without permission, and that he lied about that fact (to his supervisor and in making the relevant entries). This was coupled with the fact that he had had a clean disciplinary record for the duration of his employment, being almost five years.

Conclusion

[27] The arbitrator arrived at a decision on sanction, based on the proven misconduct, that falls within a range of reasonable sanctions. It is the arbitrator's sense of fairness that must prevail in this regard, not that of the

[9] [2008] JOL 2287 (LAC) p 13.

employer or of this Court. The conclusion reached by the arbitrator is one that a reasonable arbitrator could reach, even if another arbitrator may have arrived at a different conclusion.

[28] The award is not open to review, as opposed to appeal. With regard to costs, both parties submitted that costs should follow the result. I agree.

Order

[29] The application is dismissed with costs.

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Steenkamp J

APPEARANCES

APPLICANT:	W Hutchinson Instructed by Moodie & Robertson, Johannesburg.
THIRD RESPONDENT:	K Allen Instructed by KT Potelwa Inc, Cape Town. Bouwers Inc, Johannesburg.