



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2452/10

In the matter between:

**PUBLIC SERVANTS ASSOCIATION OF
SOUTH AFRICA OBO MKH NTSIME**

Applicant

and

EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

ARBITRATOR COEN HAVENGA

Second Respondent

**DEPARTMENT OF EDUCATION,
NORTH WEST PROVINCIAL GOVERNMENT**

Third Respondent

MEC FOR EDUCATION,

NORTH WEST PROVINCIAL GOVERNMENT

Fourth Respondent

Heard: 18 January 2013

Delivered: 03 April 2014

JUDGMENT

HAFFEGEE AJ

Introduction

- [1] This is an application to review and set aside an arbitration award made by the second respondent (“the Commissioner”) 30 July 2010 in which the dismissal of the applicant was found to be both procedurally and substantively fair.
- [2] The applicant started employment with the third respondent (“the department”) since 1989 and was employed as an Institution Support Coordinator (ISC) since 1998 until his dismissal on 22 August 2007.
- [3] The employee was charged with misconduct during about February 2007. Some of the events for which the employee was charged occurred during June 2006. He was found guilty of five counts of misconduct at a disciplinary hearing. The employee was given an opportunity to accept demotion as an alternative to dismissal. The employee did not accept demotion and was consequently dismissed.
- [4] The employee referred a dispute to the first respondent (the ELRC). The Commissioner arbitrated the dispute on three days during March, April and May 2010. The Commissioner concluded that the employee’s dismissal was substantively and procedurally fair.

Arbitration award

- [5] The applicant aptly summarised that the employee was essentially dismissed for the following reasons:
 - 5.1 he failed to visit Mphela Secondary School (the school) during 2006, did not attend a meeting at the school on 3 May 2006, and did not attend a scheduled visit at the school on 22 June 2006;
 - 5.2 he did not attend an afternoon session of training on 19 June 2006 at Rustenburg Technical School; and
 - 5.3 he displayed disrespect, amongst others, to his area manager on 2 June 2006.

- [6] The Commissioner concluded that the employee was indeed guilty of the acts of misconduct. In so doing he canvassed in detail the evidence presented at the arbitration. He regarded some important facts as not being in dispute:

‘It is not disputed that the [employee] did not visit [the school] during 2006. It is not disputed that the school is a so-called trapped school, i.e. an underperforming school. It is not in dispute that the [employee] did not attend certain scheduled meetings, or left early’.

- [7] The Commissioner rejected the employee’s contention that various people had conspired against him and that the employer’s version of events was untrue. Amongst others, he stated the following in this regard:

‘I can find no substance in the allegation that the [employer’s] version is a fabrication and a lie. The allegation of a conspiracy is improbable. This version of the [employee] was never put to any of the witnesses during the arbitration hearing to afford them the opportunity to respond. Considering the fact that the applicant is literate and represented by an experienced legal representative one would have expected it to be done. He could not explain why the accusation was not put to the witnesses. He never filed a formal grievance, despite the fact that by his own admission is well versed in disciplinary matters’.

- [8] The Commissioner considered each of the factors set out in Item 7 of the Code of Good Practice: Dismissal contained in schedule 8 of the Labour Relations Act (“the Act”) and concluded that the employee had indeed contravened rules that were valid or reasonable, known to the employee and that “there was no evidence of inconsistency and arbitrary action on the part of the employer” or that the employer has “habitually or frequently condoned similar offenses in the past.”

- [9] The Commissioner canvassed in detail whether dismissal was an appropriate sanction. He referred to the Constitution of the Republic of South Africa (“the Constitution”) and emphasised that it provides that “a child’s best interests are of paramount importance in every matter

concerning the child” and specifically stated that he bore this factor in mind “as surely it was not in the best interests of the learners of [the school] as an underperforming school that needed intervention that the [employee] failed for a year to visit and support the school.” He concluded that the acts of misconduct committed by the employee cannot be “ascribed to mere negligence”. Importantly, he stated the following:

‘One would expect of a person of his position, level of education and status to have dealt with the situation differently. The fact that he ascribed the whole matter to a conspiracy is indicative of a breakdown in the employment relationship. His actions indeed amounted to gross dishonesty. His actions were of such a nature that it surely will have a negative impact on the trust relationship’.

- [10] The Commissioner indicated that he had due regard for the principles set out in *Edcon Ltd v Pillemer NO and Other*.¹ that the employer bears the burden of proving that the trust relationship between employer and employee has broken down irretrievably.
- [11] The Commissioner regarded the employee’s length of service and status (seniority) as aggravating “since higher standards of work may be expected of senior employees”. The Commissioner accordingly concluded that dismissal was an appropriate sanction.
- [12] In considering the procedural fairness of the dismissal, the Commissioner did not consider the delay in instituting disciplinary action from the time the misconduct was committed during about June 2006 to the time disciplinary action was taken during about February 2007 as unfair.

¹ [2010] 1 BLLR 1 (SCA)

Grounds of review

[13] The employee has submitted several grounds of review. He contends that the Commissioner committed misconduct by not applying his mind and ignoring relevant evidence and/or arguments alternatively that he came to conclusions that a reasonable arbitrator could not have reached in the following respects:

- 13.1 He concluded that the trust relationship between the employer and employee had broken down and that the employee was responsible for the breakdown in the trust relationship when there was insufficient evidence of this.
- 13.2 He concluded that the employee was guilty of more than negligence and rather of gross dishonesty without any factual basis for such a conclusion.
- 13.3 He viewed lengthy service as an aggravating factor rather than as a mitigating factor and/or over-emphasised the employee's status as an aggravating factor.
- 13.4 The Commissioner over-emphasised the employee's allegation of a conspiracy and failed to view the allegation in the correct context.
- 13.5 The Commissioner over-emphasised the interests of children as against the rights of the employee to be protected against unfair labour practices and unfair dismissal.
- 13.6 He failed to appreciate the lack of progressive discipline and that given the prevailing circumstances, dismissal was too severe, inappropriate and an unfair penalty.

13.7 He failed to appreciate that there had been an unexplained delay in instituting disciplinary proceedings between June 2006 and February 2007.

13.8 The Commissioner failed to take proper cognizance of the provisions of sections 17 and 18 of the Employment of Educators Act of 1998 (EEA).

Evaluation

[14] There are two important observations to note regarding the grounds of review: First, most of the grounds do not fulfil the requirements for review applications because they are in fact grounds for appeal. Second, the applicants in essence challenge the finding that the sanction of dismissal was appropriate. Even if I am wrong in concluding that the concert review amounts to no more than grounds for appeal, for the reasons set out below I am satisfied that the grounds of review are still not sufficient for the application to succeed.

Conclusion that the trust relationship had broken down

[15] The applicants complain that the Commissioner concluded that the trust relationship had broken down irretrievably even though there was a “single (indirect) reference to broken relationship (of trust)” and that the response was preceded by a leading question. This is not a correct reflection of the record. During the arbitration, the Department’s representative seeks the Commissioner’s assistance, which indicates that he may ask a leading question. The Commissioner responds, “[a]sk the question and see whether there is an objection...” The representative then asks the witness, “[h]as the working relationship between the [employee] and the Department irretrievably broken down?” The employee’s representative did not object to this question.

[16] It is also not correct, as submitted on behalf of the applicants that “the witness proceeded to immediately deal with implementation of policies and did not explain why the trust relationship had irreparably broken

down.” The record shows that the witness testified that the employee did not implement its policies fully whilst employed and that there had since been amendments to the policies, she questioned whether he would be able to do so on his return.

Conclusion of dishonesty and view that contention of conspiracy indicated a breakdown in the relationship

- [17] The applicants contended that given that the employee was found guilty essentially of failing to visit the school, not attending meetings and displaying disrespect, no allegations of dishonesty were made and no evidence of dishonesty was presented. Accordingly, the Commissioner's conclusion that the employee's actions amounted to gross dishonesty is mere conjecture.
- [18] The Commissioner's award states that the employee's failure to exercise his duties and comply with instructions cannot be ascribed to mere negligence. He continues by stating that the fact that the employee ascribes the whole matter to conspiracy is indicative of a breakdown in the employment relationship and that the employee's actions indeed amount to gross dishonesty. I understand that to mean that even if the employee had acted negligently he was not honest in ascribing to conspiracy his failure to exercise his duties and comply with instructions. The conclusion of gross dishonesty is not unreasonable given that the Commissioner had concluded that the allegation of a conspiracy as an excuse for misconduct was unfounded.
- [19] The employee has not made any real attempt to put up a defence that he did not commit the acts of misconduct. Having taken this approach, he resorts to attributing his failure to carry out his duties and to obey lawful and reasonable instructions to sinister motives by others. According to him, others within the Department did not like him; wished to get rid of him; concocted allegations against him; and had generally colluded to get rid of him. This is inexplicable given that the employee does not put up much of the defence for not carrying out his duties and obey lawful

instructions. In essence, the employee is himself presenting evidence to show that the relationship between him and others within the Department had broken down.

- [20] Accordingly, I find the conclusions reached by the Commissioner that the employee's assertion that others within the Department had conspired against him is an indication that the relationship between the employee and the Department had broken down, to be a conclusion that a reasonable decision-maker could make.

Overemphasis of the interest of children

- [21] The Commissioner refers to section 28(2) of the Constitution of the Republic of South Africa, 1996, which provides that the child's best interests are of paramount importance in every matter concerning children and stated that he kept this in mind because the employee's actions were not in the best interests of the learners of the school given that it was an underperforming school that needed the intervention of the employee. The applicants complained that because no evidence had been presented to the arbitrator that the employee had violated the fundamental rights of children, the Commissioner's conclusion amounted to conjecture.
- [22] The Commissioner referred to the Constitution to emphasise that the best interests of children ought to be borne in mind on matters concerning children and did not, given on the applicant's own version, conclude that "the fundamental rights of children had been violated by [the employee]".
- [23] The applicants do not state how reference to the best interests of children were overemphasised in relation to the rights of the employee to the extent that the Commissioner made conclusions that a reasonable Commissioner could not have reached. This ground of review has no substance.

Appropriate sanction

[24] The applicants raise several grounds of review that are in essence a challenge of the finding that the sanction of dismissal was appropriate. At least three of the grounds fall under this broad challenge:

24.1 the Commissioner did not deal properly with the employees explanation/defence for not attending the school;

24.2 the Commissioner's view that lengthy service and status/seniority were aggravating factors; and

24.3 the Commissioner's failure to consider the lack of progressive discipline.

[25] The applicants have not challenged the conclusion that the employee committed misconduct in that he had failed to perform his duties and had not obeyed instructions. The relief sought by the applicants is that this Court set aside the award and replaced it with a finding that the employee's dismissal was substantively unfair, and to replace the sanction of dismissal with a final written warning.

[26] The Commissioner canvassed the employees' evidence and arguments in detail. The employee did not deny that he had not visited the school and that the school was an underperforming school. However, the Commissioner records the following explanation given by the employee for his failure to visit the school:

'he alleges that his actions with the result of the lack of certainty around the future of the school principal unintended legal suit by her. He testified that all the witnesses called by the respondent online and it is all a conspiracy against him to bring him down. He testified that nobody liked him and nobody lifted a finger to assisting. He admits that he never visited [the school] during 2006'.

The Commissioner records the following finding in relation to the employee's explanation for his conduct:

'The [employee's] explanation for his conduct is not reasonably acceptable and do not provide justification for its conduct. He was an experienced official of many years service. He testified that he was afraid the Principal might accuse him of assaulting her in the office and that was why he did not visit the school. Surely it was simple to set up a visit without him having to be alone with the Principal, if it indeed was an issue. The fact that he did not trust her is no justification to renege on his duty towards an underperforming school and its learners and educators. He agrees he had the support of legal services. It was made clear to him that there is no impending threat of legal action against him in his personal capacity, and his perception was not justified and do not provide justification for his conduct. The issue with the payment of petrol claims also cannot be accepted as a valid reason for forsaking his duty in respect of assisting an underperforming school and its learners and educators. He testified that he did not report his leaving from the meeting, but can not remember whom he reported to when he left. I find this improbable'. (sic)

- [27] The Commissioner considered carefully the evidence before him. As I have stated above, the employee did not deny failing to visit the school but presented excuses for his failure. The Commissioner concluded that these did not justify his failure to visit the school and concluded that the employee had indeed breached the relevant rules of being guilty of misconduct. This is not inconsistent with what a reasonable decision maker could conclude based on the evidence before him.
- [28] The applicants did not pursue with any conviction that the reasons given by the employee were sufficiently valid to justify his misconduct. In other words, the stance taken at the hearing of this matter in this Court was not to challenge the conclusion that the employee had breached the relevant rules. Instead, the real challenge was against the conclusion that dismissal was an appropriate sanction. In that sense the reasons the employee gave for his failure to visit the school are at best to be regarded as mitigating factors when considering an appropriate sanction. The Commissioner makes no specific mention of these factors, he states

that he is “satisfied on the facts before me that the [employee] is indeed guilty of the misconduct he was charged with”.

- [29] The Commissioner considered the issue of sanction carefully and in great detail and displays an awareness of the relevant principles when deciding whether dismissal is appropriate by canvassing of various decisions of this court and those of other courts. The conclusion that dismissal was an appropriate sanction is a reasonable one and, moreover, one with which I agree.

Delay in instituting disciplinary action

- [30] The Labour Appeal Court, in *Maluti Transport Corporation Ltd v Manufacturing Retail Transport and Allied Workers Union and Others*,² addressed the issue of estoppel by election in the labour law context (albeit in the context of a strike ultimatum) and said that two basic requirements are to be met to retract an earlier election: a good reason and timeous notice.
- [31] In *Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria*,³ the Court concluded that while “delay is not, by itself, waiver” and even where waiver is not claimed or does not apply, “fairness, however, dictates that disciplinary steps must be taken promptly.”⁴ The passages quoted below are relevant:

‘The reason for the enquiry to be held promptly is discussed by E Cameron ‘The Right to a Hearing before Dismissal – Part One’ (1986) 7 ILJ 183 at 200:

‘But promptness, even short of the waiver or deemed waiver by the employer, is essential to ensure that the employee can present his case effectively since delay can lead to inadequate recall on the part of the employee or to the unavailability of his witnesses. Moreover, undue delay between the occurrence of

²(1999) 20 ILJ 2531 (LAC) at para 36.

³(1992) 13 ILJ 1563 (IC)

⁴Ibid at 1568A and 1569A

the alleged misconduct in the employers' disciplinary response blurs the impact of corrective discipline. From the employer's point of view promptness is necessary for the additional reasons that dispatch of a disciplinary matter allows his enterprise to move forward unhampered by the anxieties, animosities and uncertainties which pending action may produce'.

- [32] The employee does not claim that waiver or estoppel or that the delay prejudiced him in that there was not adequate recollection of the evidence. It is merely asserted on behalf of the employee that prejudice is not the test for assessing whether a delay was unfair but a fundamental principle that disciplinary action ought to be taken promptly. I do not agree. In any case, that the delay in this matter from the time of some (not all) of the incidents was at most about eight months. The applicants do not address the fact that some of the acts of misconduct were continuous and not a single event. For instance, the employee was charged with not visiting the school for the whole of 2006.
- [33] The Commissioner records that the employee complained that the delay and the manner in which the sanction was worded (the employee was given the option of accepting demotion as an alternative to dismissal) denied him the right to appeal. The Commissioner correctly points out the fallacy of this argument by finding that the employee had indeed appealed and that the option of accepting demotion as an alternative to dismissal was for the benefit of the employee.
- [34] The Commissioner could not be faulted for his conclusion that the delay was not excessive. This is definitely a conclusion that a reasonable decision-maker could make.

Failure to take cognisance of section 17 and 18 of the EEA

- [35] The applicants argue that the Commissioner did not consider the EEA even though one brief mention was made of this act in the arbitration proceedings. More particularly, they argue that section 18(5) of the EEA describes acts of misconduct for which an employee may be dismissed.

However, the employee was not found guilty of any of those acts or acts resembling any of those acts, dismissal was inappropriate.

- [36] This ground of review must be dismissed for at least two reasons: first, an award cannot be reviewable simply because an arbitrator fails to address a brief reference to a section of legislation. The applicants would have to show that the failure to address the reference was irregular or led the arbitrator to make conclusions that were unreasonable. Second, the relevant section of the EEA does not assist the employee. Section 18(3) of the same act sets out a list of possible sanctions that could be applied to employees who commit misconduct. It states, *inter alia*, that the employer may impose a sanction of “dismissal, if the nature or extent of the misconduct warrants dismissal”.
- [37] The Commissioner clearly was of the view that the nature and extent of the misconduct clearly warranted dismissal. I agree with his view and cannot fault his conclusion as one that a reasonable decision-maker could not make.

Conclusion

- [38] An arbitration award stands to be set aside only if the award is unsupported by any evidence, is based on speculation, is disconnected from the evidence or is made without appropriate consideration of evidence that may be considered unreasonable.⁵
- [39] This Court is entitled to set aside an arbitration award if the commissioner’s decision falls outside a band of decisions to which a reasonable person could make on the available evidence.⁶ It is not the correctness of the commissioner’s decision that is relevant but whether the result of the arbitration proceedings is reasonable.

⁵ See A Myburgh ‘*Sidumo v Rusplats: How Have The Courts Dealt With It?*’ (2009) 30 ILJ 1.

⁶ See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

- [40] The LAC in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*⁷ very aptly set out the test for review when it said that

‘...It seems to me that even if there may have been a debate under ... on whether a commissioner’s decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner’s decision does not depend- at least not solely - upon the reasons that the commissioner gives for the decision. In many cases, the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision’.”

- [41] In the circumstances, I find that the conclusion reached by the Commissioner was justifiable in relation to the evidence before him and that the arbitration award falls within the band of decisions which a reasonable decision-maker could make on the available evidence. The application to review and set aside the arbitration award, accordingly, fails.

Order

- [42] Accordingly, I make the following order:

⁷ [2008] 3 BLLR 197 (LAC)

1. The application to review and set aside the arbitration award made by the second respondent under the auspices of the first respondent under case number PSES 426 – 07/08 NW dated 30 July 2010 is dismissed.
2. There is no order as to costs.

Haffegée AJ

Acting Judge of the Labour Court of South Africa.

APPEARANCES

For the Applicant: Advocate F van der Merwe

Instructed by: Bouwers Inc. Attorneys

For the Third Respondent: Advocate M Hitge

Instructed by: State Attorney