



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO JR 33/13

In the matter between:

SOUTH AFRICAN REVENUE SERVICE

APPLICANT

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

1ST RESPONDENT

COMMISSIONER KD MATJI NO

2ND RESPONDENT

RAVI ANAND RAJAH

3RD RESPONDENT

Date heard: 24 April 2014

Judgment delivered: 5 May 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award made by the second respondent (the commissioner). In his award, the commissioner held that the third respondent (Rajah) had been unfairly dismissed, and ordered his reinstatement into the applicant's employ.

Material facts

- [2] The material facts are not in dispute. They are recorded in the commissioner's award and in the papers before the court, and I do not intend to repeat them here. It is sufficient to note that Rajah was employed in January 2008 as a senior specialist in information technology. He was dismissed on 28 October 2011 after having been found to have committed two acts of gross negligence. These related to events in August 2011, when the applicant alleged that Rajah had failed to exercise due care in relation to a scheduled data migration resulting in a database being corrupted, and the negligent use of an incorrect IP address which caused a shut down. After an unsuccessful appeal against his dismissal, Rajah referred a dispute to the CCMA, which resulted in the award under review.

The award

- [3] The commissioner's reasoning in relation to the two charges brought against Rajah is reflected respectively in paragraphs [52] and [58] of his award. In regard to the first charge, the commissioner took the view that the applicant had failed to establish any causal nexus between Rajah's omission to perform the data storage migration at 14h00 and the outage. (The basis of the charge against Rajah was that he had performed the data migration at 14h00 and not at 17h00 as scheduled). The commissioner also expressed the view that Rajah had not acted alone in deciding to perform the data storage migration earlier than the approved time, and that other parties to the decision had not been dismissed. In relation to the second charge, the commissioner found that the applicant had

failed to prove that Rajah had been negligent in using an incorrect IP address. Here, the commissioner appears to have found that a reasonable specialist in Rajah's position would have acted as Rajah did where one of the IP addresses furnished to him was not working correctly.

Applicable principles

- [4] The test to be applied in an application for review brought under s145 of the LRA is now well established. That section does not afford an applicant any right of appeal and this court is not entitled to set aside an award simply because it would have come to a different conclusion on the same facts. In other words, it is not the function of this court to decide whether or not the commissioner's decision was wrong. Commissioners are allowed to be wrong. The applicable test is much narrower. This court may set aside an arbitration award if and only if it represents a decision that is so unreasonable that no reasonable decision-maker could come to. Process-related conduct by an arbitrator (for example, failing to attach sufficient weight to a particular evidence, or ignoring evidence that is relevant) is no longer in itself a basis for review - an applicant must show that the arbitrator's conduct resulted in an unreasonable decision.
- [5] In *Goldfields Mining South Africa (Pty) Ltd v CCMA* (JA 2/2012, 4 November 2013) the Labour Appeal Court confirmed that the applicable test does not admit what has been referred to as a "process-related review", at least in the sense that it is no longer open to a reviewing court to set aside an arbitration award only on account of a process-related irregularity on the part of the arbitrator. This has the consequence that the failure by an arbitrator to mention a material fact in the award, or to deal with any issue that has a bearing on the issue in dispute, or any error in regard to the evaluation of the facts presented at the arbitration hearing, is of no consequence, unless it renders the outcome unreasonable. Provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the

arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material. In short, conduct by an arbitrator is not irrelevant, but it must be scrutinised in the context of the outcome of the proceedings under review. More particularly, the court must determine whether the conduct called into question had the result of an outcome that falls outside the band of decisions to which reasonable decision makers could come on the available material.

Analysis

- [6] In the present instance, the applicant's primary ground for review is that in by concluding that the applicant had 'dismally failed' to establish the element of causation necessary to prove that Rajah had been negligent, the commissioner failed to have regard to the pre-arbitration minute and in particular, the parties' agreement that causation was not an issue in dispute. The pre-arbitration minute concluded on 14 March 2012 records those facts that have been agreed between the parties. Clause B17 of the minute reads as follows:

'17. That the applicant performed [**inserted by hand** 'as part of the value chain'] the change at 14:00 on the 26th August 2011 before the scheduled time which resulted in (own emphasis) the ATP database DB2 being corrupted and the EDW environment couldn't be brought back causing production outage'

- [7] The effect of this paragraph is to remove the issue of causation from the equation. For the commissioner to decide, as he did, on the basis that the applicant 'failed dismally' to establish a causal connection between Rajah's actions and the production outage, was to find against the applicant on the basis of an issue that was never in dispute. It was not incumbent on the applicant to establish causation in the arbitration hearing – causation had been admitted, and the applicant relieved of any burden to adduce evidence to establish it. In these circumstances, on this basis alone, the commissioner's award in respect of the first charge of negligence had the result of an unreasonable outcome and stands to be reviewed and set aside.

- [8] In relation to the second charge, the commissioner appears to have based his finding on the absence of any negligence on Rajah's part. He finds specifically that *"It was not proven in what respect was the applicant negligent for using an incorrect IP address where one of the two IP addresses given to him was not working correctly"*.
- [9] The pre-trial minute records the following:
- '20. The applicant admitted that he used the incorrect IP addresses which he assumed they were free.
21. That his conduct caused duplication of the IP addresses on the production network causing e@syfile SQL cluster to shut down and not being accessible to SARS clientele.'
- [10] This amounts to an admission by Rajah of the conduct alleged by the applicant and of its consequences. In these circumstances, it was incumbent on Rajah to furnish an explanation as to why he should not be found to have been negligent in making the assumption he did. The commissioner's finding, in effect that a reasonable person would have acted as Rajah did, is speculative and has no basis in the evidence adduced at the hearing. The commissioner's conduct in ignoring the terms of the pre-arbitration minute had the result that the conclusion to which he came was unreasonable.
- [11] In short, the commissioner predicated his conclusion on what he considered to be a failure by the applicant to adduce sufficient evidence to establish the existence of misconduct. The terms of the pre-trial minute, to which the commissioner clearly did not have sufficient regard, and especially the agreed facts reflected in the minute, relieved the applicant of the obligation to adduce the evidence concerned. Any failure by the applicant to adduce that evidence cannot logically or otherwise be a basis for a finding against it. In these circumstances, the commissioner's reasoning had the result of an outcome that falls outside of the band of decisions to which reasonable decision makers could come on the available material. It is not necessary for me in these circumstances to consider

the further grounds for review proffered by the applicant. The commissioner's award stands to be reviewed and set aside for the reasons recorded above.

[12] Little purpose would be served in remitting the matter to the CCMA for rehearing. The record is complete, and the court is in a position to make an order of substitution. In my view, having regard to the serious nature of Rajah's conduct and its consequences, as well as his disciplinary record, the sanction of dismissal ought to have been upheld.

[13] In relation to costs, this court has a broad discretion but is customarily reluctant to make orders for costs in matters where individual employees assert or defend their rights in good faith. This case falls into that category and I do not intend to make any order as to costs.

I make the following order:

1. The arbitration award issued by the second respondent under case number GATW14788-11 on 19 December 2012 is reviewed and set aside.
2. The award is substituted by the following:

'The applicant's dismissal was substantively and procedurally fair.'

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv. Wilhelm P Bekker instructed by Gildenhuys Malatji Inc.

For the Respondent: Adv. H Bucksteg instructed by Carel J Schoeman Attorneys