



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P15/13

In the matter between:

SIMPHIWO TOM

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER THEODORUS POTGIETER N.O

Second Respondent

NELSON MANDELA METROPOLITAN UNIVERSITY

Third Respondent

Heard: 10 October 2013

Delivered: 6 June 2014

Summary: The commissioner's omission to assist an unrepresented litigant deal with a material issue which impacts on the reasonableness of his or her award may render the award reviewable.

Review in terms of section 145 of the LRA- dismissal for misconduct.

JUDGMENT

LALLIE, J

Introduction

- [1] The applicant launched this application in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) for an order reviewing and setting aside an arbitration award of the second respondent (the commissioner). It is opposed by the third respondent.

Factual background

- [2] The third respondent employed the applicant as an exam process administrator. Owing to the applicant's absence from work between 9 and 19 July 2012, he was charged with and dismissed for unauthorised and/or uncommunicated absence from work for a period of more than one week (AWOL). Aggrieved by his dismissal, the applicant referred an unfair dismissal dispute to the first respondent where the commissioner issued an arbitration award in which he found the applicant's dismissal both substantively and procedurally fair. It is that award which forms the subject matter of this application.

The award

- [3] Giving reasons for his decision, the commissioner found that the applicant based the attack on the substantive fairness of his dismissal on phone calls that he made stating that he would be absent from work. He found that proving the above effort cannot be considered as an application for leave as the policies are clear. They require an application to be made in terms of the rules. The applicant was aware of the rules as he had applied for leave on previous occasions. The commissioner found that the third respondent had proved on a balance of probabilities that the applicant was absent from work without authorisation from 9 to 19 July 2012. He further found that there was uncontested evidence that the applicant had a track record of absenteeism.

The commissioner accepted the third respondent's uncontested evidence that the applicant could not be trusted. He found that the misconduct went to the root of the employment relationship.

Grounds for review

- [4] The applicant sought to rely on a myriad of grounds, some of which are summarised below. He submitted that the commissioner committed a gross irregularity by failing to consider relevant and material evidence in his favour. He failed to attach weight to his evidence in respect of the interpretation of the absence policy which favoured him and ignored the third respondent's failure to apply progressive discipline. The commissioner based his decision partly on the applicant's history of unauthorised absence after expressing his lack of interest in absence which had occurred in the past. The commissioner's approach denied him of the right to cross-examine witness on his history of absence from work. He ignored that it was impossible for the applicant to apply for leave on line as he was not at work. He disregarded his evidence that in the past, he had communicated his intended absence over the phone and via sms with impunity. When he followed the same procedure in July 2012, no one told him that his absence was authorised.

- [5] The applicant submitted that the commissioner committed a gross irregularity by ignoring evidence which proved that probabilities favoured his version. The commissioner incorrectly and unreasonably stated that Ms Van Heerden (Van Heerden) denied that he phoned on 19 July 2012 when she had testified that she could not remember the phone call being made. Had the commissioner applied his mind to the evidence, he could have reached a different conclusion on his guilt. The applicant sought to rely on the commissioner's failure to lend a helping hand to him in his capacity as an unrepresented litigant.

- [6] The third respondent argued that the record is replete with instance in which the commissioner assisted the applicant. The applicant committed the misconduct which led to his dismissal and the applicant did not raise the inappropriateness of the sanction of dismissal at the arbitration. The commissioner reached a reasonable decision based on the evidence before

him and not on the issues which the applicant sought to raise for the first time on review, so went the argument.

- [7] *In Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*,¹ the application of the test for review is stated as follows:

[18] In a review conducted under section 145 (2) (a)(c)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

- [8] An assessment of the evidence before the commissioner proves that the commissioner considered the principal issue before him. In evaluating the evidence, he found that the applicant had a track record of unauthorised absence. When the arbitrator realised the applicant's history of unauthorised absence, there was a duty on him to afford both parties an opportunity to lead evidence on the steps taken by the third respondent in the past to address the misconduct because it is an issue which had an impact on the appropriateness of the dismissal. The applicant was unrepresented, he could not have known that the third respondent's failure to apply progressive discipline could influence the commissioner's decision. The third respondent had condoned the applicant's unauthorised absence in the past. It, therefore, had a duty to warn the applicant that it would issue the sanction of dismissal in the event of the recurrence of the misconduct. By not dealing with the issue of the third respondent's reaction to the applicant's unauthorised absence in the past, the commissioner omitted to deal with an essential part of the substantial merits of the case before him. The omission had an impact on his decision. A reasonable decision maker could not have reached the decision the

¹ [2014] 1 BLLR 20 (LAC).

commissioner reached after considering the manner in which the third respondent dealt with the applicant's past unauthorised absence.

[9] In the premises, the following order is made:

9.1 The arbitration award issued by the second respondent under case number ECPE4479-12 and dated 10 December 2012 is reviewed and set aside.

9.2 The matter is remitted to the first respondent to be arbitrated *de novo* by a commissioner other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mrs Van Staden of the Justice Centre

For the Third Respondent: Advocate Patington

Instructed by: Chris Baker and Associates