



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2841/11

In the matter between:

AFRICAN EXPLOSIVES LTD

Applicant

And

PANELIST B MBOVANE N.O

First Respondent

NATIONAL BARGAINING COUNCIL

FOR THE CHEMICAL INDUSTRY

Second Respondent

SACWU

Third Respondent

SELLO MBONGO

Fourth Respondent

Heard: 29 October 2014

Delivered: 31 July 2015

Summary: When a commissioner disregards the factors which distinguish the case before him or her and those of comparators in determining whether the applicant applied discipline inconsistently, he or she commits a gross irregularity which will render his or her arbitration

award reviewable if it leads the commissioner to reach an unreasonable decision.

JUDGMENT

LALLIE J

- [1] This is an application to review and set aside an arbitration award of the first respondent, who I will refer to in this judgement as the arbitrator. It is opposed by the third respondent who acts on behalf of the fourth respondent. The facts of this matter are mainly common cause. They are that the fourth respondent was employed by the applicant as a Technical Operator in its ISAP Automated Machines Plant. The applicant manufactures explosives which are used to break rocks in the mining industry. By virtue of his position, the applicant handled inflammable substances in the performance of his duties.
- [2] On 1 June 2011, while performing his duties at the Bernice 230 machine, the fourth respondent dropped a spacer causing a fire to be ignited and the machine to catch fire. He extinguished the fire and swiped the burning waste into a bucket which contained water and placed it next with the machine. As the water was contaminated with ethanol, a second fire was ignited and the applicant extinguished it. The fourth respondent's attempts to extinguish the fires caused damage to the machine and cost the applicant lost production.
- [3] After investigating the incident, the applicant preferred the following charge against the fourth respondent:

'Gross negligence in that on the 01/06/2011 at about 2H30, your actions after the fire had initiated in the Bernice 230 machine, put your safety at risk and led to more damage on the machine'.

The applicant was subjected to a disciplinary enquiry which found him guilty of the charge and dismissed him. He referred an unfair dismissal dispute to the second respondent where the arbitrator found his dismissal both procedurally and substantively unfair and ordered the applicant to reinstate him. The arbitrator further substituted the sanction of dismissal with a final written warning with effect from the date of dismissal and ordered the applicant to

report for duty on 24 October 2011. In addition, she stated that the applicant was not required to pay the fourth respondent remuneration for the period he was unemployed owing to his dismissal.

- [4] The arbitrator found the fourth respondent's dismissal procedurally unfair owing to the presiding officer's failure to listen to evidence in mitigation and aggravation of sanction. She expressed the view that had he listened to the evidence he would have been aware that other employees used water to extinguish fires in similar circumstances and realised that the only difference between those employees and the fourth respondent was that the latter used contaminated water to extinguish the fires instead of a hosepipe. She expressed the view that had the presiding officer been aware of the evidence he denied the parties before him an opportunity to lead, it is possible that he would have issued a different sanction. Giving reasons for finding the dismissal substantively unfair, the arbitrator stated that the applicant should have extended the same lenience it treated employees who extinguished fires using a hosepipe to the fourth respondent as they all did not walk away from the fires but attempted to extinguish them. She found that the applicant had exercised discipline inconsistently and the sanction of dismissal harsh. She concluded that the loss of production and damage to the machine were unfortunate results of the incident.
- [5] The applicant raised a number of grounds for review based on gross irregularities committed by the arbitrator in the conduct of the arbitration proceedings. It submitted that the arbitrator committed a gross irregularity in finding that it was evident from the evidence of Mr Dikobe ("Dikobe") that the fourth respondent had been denied the right to present mitigating factors as he had testified that the chairperson had invited the fourth respondent to address him on anything further which he wanted him to take into consideration given the seriousness of the charge. Submitting mitigating circumstances was implicit in the invitation. Opposing the attack on the procedural fairness of the fourth respondent's dismissal, the third respondent submitted that the chairperson postponed the disciplinary hearing for purposes of issuing his finding the following day. The third respondent could therefore not have mitigated before

the finding was issued. The applicant further submitted that failure to afford the fourth respondent an opportunity to lead evidence in mitigation did not render his dismissal procedurally unfair because in terms of the code of good practice, the applicant was required to give the fourth respondent an opportunity to make representations in response to the allegations against him, an obligation which the applicant fulfilled. It was under no obligation to afford the fourth respondent an opportunity to present mitigating factors.

- [6] The test for review is expressed thus in *Fidelity Cash Management Service v Commission for Conciliation Mediation and Arbitration and Others*¹:

'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,... 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 circumstances of the case...'

- [7] There is merit in the applicant's argument that in terms of item 4 of schedule 8 to the Labour Relations Act 66 of 1995 ("the LRA"), the code of good practice for dismissal cases, it was required to afford the fourth respondent an opportunity to state a case in response to the allegations of misconduct against him. It is also trite that the LRA does not require disciplinary enquiries to be treated like criminal cases. However, the applicant did not dispute the third respondent's allegation that when the disciplinary enquiry was adjourned on 21 June 2011 to the following day, its chairperson indicated that the purpose of the adjournment was for the finding. The necessity to make submissions on mitigation depends on the nature of the findings. Had the chairperson decided that the fourth respondent had not made himself guilty of the charge against him, the need for mitigation would not have arisen. The evidence on behalf of the applicant to the effect that the chairperson gave the fourth respondent an opportunity to lead any evidence he wished to lead does not assist the applicant because by indicating that the purpose of the adjournment was for the pronouncement on his finding, the chairperson conveyed the message that

¹ (2008) 29 ILJ 964 (LAC) at para 100

making submissions in mitigation was premature. He therefore created a reasonable expectation to the fourth respondent that he would afford him an opportunity to make representations on mitigation before taking the decision on the sanction. Having created the expectation, the chairperson could not unilaterally deny the fourth respondent the opportunity to make submissions in mitigation. The arbitrator's decision that the fourth respondent's dismissal was procedurally unfair is reasonable and there are therefore no grounds to interfere with it.

- [8] The only reason the arbitrator found the fourth respondent's dismissal substantively unfair was that the sanction of dismissal was harsh and that the applicant had applied discipline inconsistently in dismissing him. The parity principle requires employers to exercise discipline consistently by ensuring that employees who commit the same or similar misconduct are not treated differently by the employer. However, different circumstances may justify different outcomes. In this regard see *NUM v Amcoal Collieries & Industrial Operations Ltd*². The parity principle should not be applied rigidly as inconsistency is not *per se* unfair. See *SACCAWU and Others v Irvin & Johnson (Pty) Ltd*³. The application of the principle of inconsistency is expressed as follows in *Cape Town City Council v Masitho and Others*⁴:

'...Fairness, of course, is a value judgement, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary...'

- [9] In *Mabinda and Others v Baldwins Steel*⁵ the court found that for inconsistency to be unfair, the employer must apply it arbitrarily.

² (1992) 13 ILJ 1449 (LAC)

³ (1999) 20 ILJ 2302 (LAC)

⁴ (2000) 21 ILJ 1957 (LAC) at para 14

⁵ [1999] 5 BLLR 453 (LAC)

- [10] The applicant explained that the difference in sanctions meted out to employees who extinguished fires was based on available evidence. Dikobe testified that if they had cameras in the compartments where fires were extinguished there was a very good chance that the applicant would have meted out severe sentences. It is with the assistance of cameras that the applicant got more evidence which enabled it to go further. He added that in the fourth respondent's case damage was not caused by his conduct of fighting the fire but actions leading to fighting it. Dikobe also explained that in terms of the applicant's code of conduct, employees could do exactly the same thing but would not necessarily be punished the same way depending on the seriousness of the consequences. Of importance, Dikobe clarified that the fourth respondent was not charged with fighting the fire but for the series of actions which took place on the day in question.
- [11] In evaluating evidence the arbitrator stated that the charge against the fourth respondent was that he exposed himself to danger by extinguishing the fire instead of walking away and based her decision on how she perceived the charge to be. Her perception of the charge led her to conclude that the applicant treated the fourth respondent differently in that it did not dismiss but issued warnings to employees who extinguished fires using a hosepipe. The arbitrator did not evaluate damage to the machine which was part of the charge in coming to the decision that the applicant had applied discipline inconsistently and imposed a harsh sanction. She merely mentioned after she had taken her decision based on her incorrect perception of the charge that loss of production and damage to the machine were an unfortunate result of the incident. The arbitrator concluded that the applicant acted inconsistently without taking into account the evidence which distinguished the fourth respondent's case from the cases of his comparators. Treating employees who have committed the same misconduct differently constitutes inconsistency when there are no distinguishing factors in the cases of those employees. No evidence was presented to prove that the applicant acted arbitrarily in treating the fourth respondent differently from his comparators. By not taking into account the distinguishing features of the fourth respondent's case to those of his comparators, the arbitrator conducted the enquiry whether the applicant applied

discipline inconsistently and therefore the enquiry into the substantive fairness of the fourth respondent's dismissal in the incorrect manner. By so doing he committed a gross irregularity which influenced the reasonableness of her decision in a manner which rendered it unreasonable.

[12] The totality of the evidence proves that the fourth respondent contravened the rule regulating conduct after fires have broken out at the applicant. The rule was valid and the fourth respondent was aware of it. The rule was applied by the applicant consistently. Evidence was tendered on behalf of the applicant to prove that the fourth respondent's case could be distinguished from those of his comparators in that each case was based on available evidence. Evidence that the fourth respondent had breached the rule was conclusive and justified dismissal. The gravity of the misconduct committed by the fourth respondent was proved. However, no evidence was led to prove that the applicant treated the fourth respondent differently from his comparators arbitrarily. The fourth respondent made himself guilty of dismissible misconduct. His dismissal was therefore substantively fair. For the reasons already given, the fourth respondent's dismissal was procedurally unfair. Having considered the circumstances of this matter including the nature of the procedural fairness, it is just and equitable in all the circumstances of this case to award the fourth respondent compensation in the amount of R 72, 208.95 which is equivalent to remuneration he would have earned over a period of three months based on his rate of remuneration on dismissal.

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

13.1 The arbitration award issued by the first respondent under case number GPCHEM 535 – 10/11 and dated 14 October 2011 is reviewed and set aside and substituted with the following:

13.2 The dismissal of the fourth respondent by the applicant was substantively fair but procedurally unfair.

13.3 The applicant is ordered to pay the fourth respondent compensation in the amount of R 72, 208.95.

Lallie J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

For the Applicant: Mr Masuku

Instructed by: Marvyn Taback Inc.

For the Third and Fourth Respondents: Mr Ramalatso

Instructed by: Matsobane Ramalatso Attorneys.

LABOUR COURT