



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number: C208/14

In the matter between:

WOOLWORTHS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER M VAN ROOYEN

Second Respondent

MLUNGISELI SOMPONDO

Third Respondent

Date heard: 12 May 2014

Delivered: 8 October 2015

JUDGMENT

RABKIN-NAICKER J

- [1] This is an unopposed application to review an award under case number WECT19388/13. The second respondent (the Commissioner) found the third respondent's dismissal to be procedurally and substantively unfair. She reinstated him retrospectively to the date of his dismissal on 18 December 2013.
- [2] The third respondent (Sompondo) started working for the applicant company on 1 October 2002. He had been a manager for five years prior to his dismissal.
- [3] It was common cause at the arbitration, that Sompondo had worked at applicant's Paarl store at which time he travelled a total of 118 kilometres from his home to work and back. This entitled him to claim 48 kilometres per day in terms of the Applicant's Travel Policy, as the first 35 kilometres of each trip were deemed by the policy to constitute private traveling which is unpaid.
- [4] In July 2012, Sompondo was transferred to the Tiger Valley store at which time he travelled 94 kilometres to and from work allowing him to claim 24 kilometres per day in terms of the policy. Prior to May 2012, claiming employees submitted their kilometres only once, when they started working at a specific store. The policy was then changed to require employees to submit their claim when starting at a new store and thereafter to submit their claims every six months.
- [5] The way in which claims were processed every six months was as follows: an employee sends an email to the Store Administrator with the number of kilometres travelled to and from work and the Store Administrator then completes a reimbursive travel claim form and presents it to the employee for signature. Once the employee has signed it, the Store Administrator presents it to the employee's line manager and the Human Resources Business Partner for signature. It is then sent to head office for payroll processing.
- [6] In January 2013, the Store Administrator asked Sompondo to resubmit his kilometres travelled to and from work. He responded that he had done so when he started working at the store six months before. He was then informed of the change in policy requiring employees to resubmit their claims every six months. At the time of this conversation, according to Sompondo, he was in the HR office for other purposes and was in a hurry and he said he travelled 59 kilometres each

way. He was asked to put this in an email and he wrote it there and then using the Store Administrator's p.c.. Mompondo testified he made the mistake of confusing his travelling to Paarl with his travelling distance to Tygervally.

- [7] On 1 February 2013 tSompondo was presented with a completed reimbursive travel claim form which he signed. The kilometres on the form are stipulated as "20 x 2". According to the (incorrect) information he provided to the Store Administrator in January 2013, the kilometres should have been "24x2". Sompondo testified he did not notice the (double) mistake on the form when he signed it.
- [8] On 22 July 2013 , he wrote an email to the Store Administrator stating his kilometres travelled to and from work are 59 each way. He testified he was very confident about the fact that he declared the kilometres to be 59 in his January 2013 e-mail as he had copied the information on his July e-mail from his e-mail of January 2013. On 23 July 2013 he was presented with a completed reinbursive travel claim form which he signed. The kilometres on the form are indicated as "24x2=48km"
- [9] The Store Administrator testified at the arbitration. She was on leave from 9 to 28 September 2013. When she came back she checked her expense listings and noticed one of the overspent accounts was travelling. She made a list of the employees claiming travelling and asked them what their traveling was. She noticed that the claims of Quinton and Sompondo differed although she understood they lived in the same area.
- [10] Somphondo testified that the Store Aministrator contacted him and asked whether he is certain that he claims the correct kilometres and he answered in the affirmative. On Sunday 12 October 2013 she again contacted him asking the same question. He testified he found it strange that she had asked him the same question twice. At the time he was on his way home from the store and decided to measure the distance. He then realised, he testified, that he had been claiming the distance to Paarl Mall and not to Tygervally Store. On the same day he wrote an email to his two superiors informing them of his 'mistake'. In the e-mail he states

that he realises the seriousness of the negligence, he did not do it intentionally and he apologises and undertakes to repay the monies.

[11] Essentially the applicant submits that in finding that Sompondo made an honest mistake, the Commissioner made an award that a reasonable decision maker could not make, and that she appears to have ignored the evidence of the applicant's five witnesses because this is not recorded in the award. Her finding that Sompondo made an honest mistake was in circumstances where on three separate occasions he declared the wrong amount; when he would have realised he was travelling some 24 kilometres less a day both in time and kilometres; and when he would have been aware from his pay slip (over a period of 12 months) in addition to what he was receiving in his bank account was the same as before; and he would have realised from the fact that he was using less petrol but being paid the same, that he was being overpaid.

[12] The Commissioner found as follows:

"21. The Respondent argued that the Applicant should have noticed the over payment on his salary advices. In response the Applicant said he did not study his salary advices closely. It is common cause that the Applicant does not receive hard copies of his salary advices, but that these are available to him on the company intranet. The actual fixed amount that the Applicant should have received for travelling was R1056 per month. Since February 2013 he received R1 760 and since July 2013 R2 112. Taking into consideration that the Applicant is an employee that earns just over R25,000 per month, that certain bonuses and increases were paid in the relevant period that he also had claims for ad hoc travel from to time as is reflected in the documents presented at the arbitration proceedings, I am of the view that the Respondent did not prove on a balance of probabilities that the Applicant had been dishonest in saying he did not notice the overpayments.....

24 The Applicant has been in the Respondent's employ for eleven years, five of which he was a manager. He has no disciplinary history of any wrongdoing. The Applicant informed his superiors of the mistake immediately when it came to his

notice and he offered to reimburse the monies he had received in excess to what he was entitled to. These factors, together with the absence of dishonesty, render the sanction of dismissal unfair. In coming to this conclusion I have been mindful of and have carefully considered the nature of the Respondent's operations being retail, the seniority of the Applicant and the trust the Respondent must be able to place in him."

Evaluation

[12] The charge against Sompondo was as follows: "Gross misconduct in that during the period from July 2012 to date you breached company policies and procedures when you incorrectly claimed you mileage as per the travel reimbursement policy and inflated such a claim. This resulted in you claiming wages to which you are not entitled to." The company rule in question was: "claiming wages not due or signing for or accepting wages for which you are not entitled is dismissable".

[13] Sompondo had worked at the Paarl store for 12 months. At the arbitration it was put to Sompondo :

"MS SLABBERT: Ja. So let me ask you, why would the 59 km stick in your mind when you were only there for 12 months versus the 18 months in Tygervalley?

MR SOMPONDO: The 59 km would stick in my mind because I worked more with it, as I said, than the 47 km. What I also painted the picture of was, in Paarl Mall I did so much call outs, fridge failure callouts in that store than any other store. In Paarl Mall, that's a store that is on the outskirts of the Western Cape. In terms of attending training, I would have to work with this 59 km, whereas in Tygervalley the only time that I ever, ever had to look at 47 and think of 47 was the first day that I was in Tygervalley; never, ever for six months."

[14] The record shows that on transfer to Tygervalley on the 17 July 2012 Sompondo correctly signed the travel claim form i.e. for the 12x2= 24 kilometres he was entitled to. This would have meant that for the six months after this date he would have received the correct, lesser amount in terms of his travel allowance. Further claims increase this amount by R704.00 and then by another R352.00 i.e. from

R1056 to R2112 for travel. According to the evidence recorded in paragraph 12 above, in the first six months at Tygervally (except for a one off claim for a training course) he never had to work with the figure of '47' because he was no longer doing callouts. The Commissioner failed to consider that the claims for ad hoc travel she referred to in her finding that Somphondo may not have noticed the discrepancies in his salary, were claims on Somphondo's own evidence relating to his time at Paarl. This is borne out by the documentary record before her.

- [15] It is submitted on behalf of the applicant that the Commissioner should have applied her mind to the issue of whether Somphondo was guilty of gross negligence in assessing whether his dismissal was fair. Somphondo agreed that the offence with which he was charged could lead to dismissal under the company's disciplinary code, but he stated that the "company should also note that a mistake is possible." The Commissioner's failure to consider the enquiry as to whether the misconduct amounted to gross negligence and to focus only on the issue of dishonesty per se, does in my view render her award reviewable in respect of the issue of substantive fairness. This is on the grounds that she misconceived the nature of the enquiry before her, and in so doing reached an unreasonable result.¹ The evidence before her revealed that Somphondo, who served in a managerial position, had been at the very least guilty of gross negligence for an offence he agreed could result in dismissal of the applicant's employees.
- [16] In as far as the finding on procedural unfairness is concerned, I do not find a basis to set aside the Commissioner's finding. The chairperson *mero moto* postponed the first hearing because the initiator of the disciplinary charges was unprepared and secondly he instructed the initiator to submit certain documents into evidence after the conclusion of the hearing without giving Somphondo an opportunity to respond to these. Taking into account that this is not a small employer, these failures in natural justice require that a solatium be paid to the affected employee.

¹ Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA) at paragraph 25.

[17] Given the record before me, I see no purpose in remitting this matter for re-hearing and make the following order:

Order

1. The Award under case number WECT 19388-13 is reviewed and set aside and substituted as follows:

“1.1 The dismissal of Mlungiseleli Sompondo was substantively fair but procedurally unfair.

1.2 Woolworths (Pty) Ltd is to pay him compensation for the procedurally unfair dismissal in an amount equivalent to two months' salary i.e. $R25\,258.79 \times 2 = R50,517.58$ within 15 days of this order.”

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

For the Applicant: Macgregor Erasmus Attorneys

LABOUR COURT