



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P467/12

In the matter between:

LUNGELWA CLEOPATRA NOHOYEKA

Applicant

~~and~~ And

MOTOR INDUSTRY BARGAINING COUNCIL

First Respondent

COMMISSIONER BULELANI BUSAKWE

Second Respondent

GRUPO ANTOLIN

Third Respondent

Heard: 30 January 2014

Delivered: 13 February 2015

Summary: A piecemeal approach in determining the reasonableness of an award is impermissible. The correct approach is to determine the evidence before the commissioner in its totality.

JUDGMENT

LALLIE J:

- [1] In this application, the applicant seeks an order reviewing and setting aside or correcting an arbitration of the second respondent (the arbitrator) in which he

found the applicant's dismissal substantively fair. It is opposed by the third respondent.

Factual background

- [2] The applicant was employed by the third respondent in 2004. In 2011, she was a Quality Inspector at the headliners department where her main duty was to ensure that headliners had been manufactured properly by affixing her stamp. In addition, she had to ensure that the correct number of headliners was packed in containers which she had to seal with a green sticker bearing his signature. The respondent received a complaint from the VW, one of its clients, that one of the containers it received from the third respondent contained defective headliners. Having investigated the matter, the third respondent preferred the following charge against the applicant:

‘Gross negligence in that on 26 November 2011 you signed off a metro hatch headliner container with more 30 parts without frames this after you were issued with a final written warning for the same or similar offence.’

A disciplinary enquiry was instituted against the applicant. It found her guilty of the charge and dismissed her. She referred an unfair dismissal dispute to the first respondent where the arbitrator issued the arbitration award which the applicant seeks this court to review, correct or set aside.

The arbitration award

- [3] The arbitrator observed that the applicant was the last port of call in that her duty involved ensuring that parts forwarded to the third respondent's customers were of the required standard. The container found at VW with defective parts bore the applicant's quality label. He noted that the applicant's explanation for the presence of defective parts in a container sealed with her quality label was threefold. Firstly, there was a possibility that Desmond, a fork lift driver, had affixed her quality label on the incorrect container which had defective parts. Secondly, there is no proper system of sending and receiving parts at Schnellecke, where the defective headliners were discovered. When parts are checked at VW they are sorted and put in any

container and not necessarily in the containers they were received in. Thirdly, the defective parts could not have been from her container as they were not stamped. The commissioner considered each explanation. He made a finding that the evidence pertaining to the first explanation was not disputed. He, however, rejected it and found the applicant guilty of negligence because at the time of the incident, the applicant and other inspectors had been informed that quality labels were for their exclusive use. Her conduct of giving the quality label to Desmond to affix to the container amounted to carelessness and serious negligence for which she had been given warnings, including a final written warning. The arbitrator rejected the second explanation on the grounds that it was not the most probable version. The arbitrator rejected the third explanation as well on the grounds that the applicant had not verified that a quality label had been attached to the correct container with parts the quality of which she had verified. He concluded that the applicant's dismissal was fair as her conduct warranted dismissal, particularly, because at the time of the commission of the misconduct, she was on a valid final written warning.

Grounds for review

- [4] The applicant submitted that the arbitration award stands to be reviewed and set aside on the grounds that the arbitrator committed gross irregularities, gross misconduct or acted unreasonably/and unjustifiably in that he failed to attach due weight to the relevant and material aspects of the evidence before him. He failed to resolve factual disputes and misconstrued evidence. Having found the applicant guilty of negligence and not guilty as charged, he disregarded his finding when deciding sanction. He contradicted himself by finding that a "mix up" at Schnellecke was not impossible but concluded that it was not the most probable version when there was no evidence to support his finding. The applicant further submitted that the arbitrator misconstrued evidence in finding that the applicant gave Desmond her quality label when evidence before him was that Desmond took the quality label from the applicant. The award is attacked also on the basis that the arbitrator failed to apply his mind to the issue of sanction. A further criticism levelled against the award is that the arbitrator committed a gross irregularity for his failure to

apply his mind to material and relevant aspects of the evidence which served before him. Those aspects include his failure to play an inquisitorial role in determining the reasons for the third respondent's failure to call Desmond to the disciplinary enquiry or dismiss him as his conduct constituted gross misconduct. The omission constituted an inconsistent application of discipline. The Commissioner's failure to determine whether the employment relationship had been irreparably damaged and to consider that the third respondent did not suffer any potential or actual financial loss constituted, according to the applicant, further gross misconduct. The applicant attacked the arbitrator for not making credibility findings in respect of witness and failure to take into account evidence which favoured her.

- [5] In her supplementary affidavit, the applicant added further grounds for review in which she elaborated on some of her initial grounds. They include the arbitrator's gross irregularity of accepting evidence of the instruction issued to quality inspectors and the final written warning in the absence of the evidence of the authors of those documents.
- [6] The third respondent opposed the application mainly on the grounds that the applicant was aware of the procedures which she should have followed to avoid the misconduct which led to her dismissal but elected not to follow them. As she abdicated responsibility for the delivery of the defective parts and imputed the fault on Desmond, she failed to call Desmond to corroborate her version. The applicant conceded that the handing of bins at Schellecke which could have created the impression that she was responsible for the delivery of defective parts did not involve her bins. With regard to the final written warning, the third respondent submitted that the arbitration which dealt with the applicant's dismissal was not the correct forum for challenging the final written warning. In addition, Du Preez, who participated in the disciplinary enquiry in which the final written warning was issued, testified about how it got issued. The third respondent denied that the sanction of dismissal was inappropriate because the applicant committed the misconduct which led her dismissal only 3 days after being issued with the final written warning. The third respondent further submitted that the arbitrator's decision to reject the

explanation adduced by the applicant and the reasons thereof were unassailable. The third respondent denied having applied discipline inconsistently by not taking disciplinary action against Desmond in that the two employees performed different functions and therefore the degree of their accountability differed. Contrary to the applicant's assertion, the arbitrator considered the evidence before him and reached a reasonable decision.

- [7] The approach to be adopted by review court is expressed thus in *Gold Fields Mining SA (Pty) Ltd v CCMA and Others*.¹

'A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion that is reasonable'.

- [8] The applicant adopted a piecemeal approach in that in her elaborate grounds for review, she sought to rely on every actual and perceive mistake the arbitrator made. This approach was discouraged as being wrong in *Bestel v Astral Operations Ltd and Others*.² The Labour Appeal Court further criticised it in *Gold Fields (supra)*³ when it held thus:

'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] When the evidence which served before the arbitrator is considered in its totality, it reflects that he dealt with the principal issue before him, evaluated the facts presented and came to a reasonable decision. He gave reasons for rejecting the explanation given by the applicant in her defence. His findings

¹ [2014] 1 BLLR 20 (LAC) at para 16.

² [2011] 12 BLLR 129 (LAC).

³ *Gold Fields (supra)* at para 18.

and reasons thereof were reasonable. The applicant sought to rely on the use of the words “negligence” and “carelessness” in explaining the applicant’s misconduct as opposed to gross negligence and submitted that they implied a diminution of the gravity of her misconduct. A reading of the entire award paints a different picture. It reflects that the arbitrator did not reduce the gravity of the misconduct which led to the applicant’s dismissal. In expressing the seriousness of allowing Desmond to affix the applicant’s quality label the arbitrator could not understand how the third respondent ever allowed an employee other than the quality inspector to affix the quality label on bins. The arbitrator cannot be criticised for finding the dismissal appropriate when the applicant decided to repeat the misconduct only three days after she had been issued with a final written warning for similar misconduct. The applicant did not prove that the arbitrator committed an error which led him to reach an unreasonable decision.

[9] The test for review is whether the decision taken by the arbitrator is one which a reasonable decision-maker could not reach. It is a stringent test that will ensure that awards are not lightly interfered with *Fidelity Cash Management Services v Commission for Conciliation Mediation and Arbitration and others*.⁴ I am convinced that the award the applicant seeks this court to review falls within the band of reasonableness. This application can, therefore, not succeed.

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

10.1 The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

⁴ (2008) 29 ILJ 964 (LAC)

Appearances

For the Applicant: Mrs Van Staden of the Justice Centre

For the Third Respondent: Ms Kok of Van Zyl Incorporate

LABOUR COURT