REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: PR 232/2014

In the matter between:

FORD MOTOR COMPANY (PTY) LTD	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER F FATAAR *N.O*	Second Respondent
THOMAS RALTON SHAW	Third respondent

Heard: **13 October 2015**

Delivered: **16 October 2015**

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner held that the third respondent (the employee) had been unfairly dismissed by the applicant, and ordered that the employee be reinstated.

[2] The material facts are not in dispute; they are referred to in detail in the award under review and I do not intend to repeat them here. It is sufficient to note that the employee was employed by the applicant as what was referred to as a release and follow-up analyst. In this capacity, the employee was required to facilitate the uninterrupted supply of components to the production line at the applicant's operation. In particular, he was required to ensure that the services of certain of the applicant's service providers were timeously secured by way of prescribed requisitions (referred to as 'RQ's) and purchase orders (PO's). After a disciplinary hearing convened in November 2013 at which the employee was charged with gross negligence and what was referred to as pre-commitment, he entered a plea of guilty to the charge of negligence. He was found guilty on that charge and dismissed. For present purposes, the employee's disciplinary record assumes some importance. At the time of his dismissal, the employee's record evidenced a written warning valid for six months for negligence issued on 8 February 2008, a written warning valid for six months for negligence issued on 3 June 2009, a final written warning valid for 12 months for gross negligence/pre-commitment issued on 7 September 2011 and a final written warning valid for 12 months for gross negligence issued on 9 October 2012. It is not disputed that at the relevant time, the latter warning remained valid nor was disputed that during

the course of 2013, the applicant made its employees aware, via email, of the need to avoid exposing the applicant to unauthorised commitments and warning of the consequences (which included the prospect of dismissal) of doing so.

[3] It is also not disputed that the applicant's disciplinary code procedure draws a distinction between negligence and gross negligence, a distinction drawn in the following terms:

> The degree of negligence is measureable in terms of cause (viz oversight, carelessness, disregard, recklessness, forgetfulness, etc.) and effect (viz injury, damage, loss, etc.), on which basis one can distinguish between 'negligence' and 'gross negligence'.
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> 'Gross negligence' would be determined should the cause be blatant, flagrant, obviously wrong and outside of the norm, and\or the effect to be long-lasting, great, significant or of such great magnitude (i.e. severity of injury, extent of damage, amount of financial loss, etc.).

The disciplinary code and procedure further provides the following:

> Where, at the Company's discretion, the circumstances warrant this, a more severe penalty than that indicated may be imposed. The penalties listed in the different categories serve as a guide only. It is not intention to prescribe rigid rules, but to indicate the form of sanction that might be imposed.

[4] The employee disputed the fairness of his dismissal, a dispute that was ultimately referred to arbitration. The arbitration was conducted by the commissioner, who (correctly) recorded that the only issue in dispute was whether the sanction of dismissal was fair (see paragraph 17 of the award).

[5] The commissioner's reasoning in support of his decision that the employee had been unfairly dismissed and ought to be reinstated (albeit without back pay), is apparent from paragraph 23 of his award. The commissioner says the following:

> I have heard the evidence presented by the parties and have read their respective arguments on this point. It is my view that the respondent, on its own,

> have (sic) created two separate and distinct offences relating to gross negligence and negligence. This is clearly borne out by the fact that the Code they are listed separately (sic), and they are differentiated on the basis of severity. Besides the respondent's Code, it also has written Guidelines wherein the differentiation and distinction is clearly highlighted and explained. Added to this, in practice, the respondent has applied this distinction between the two when charging and sanctioning employees. Take the example of the applicant. He had previously been in two cases charged with negligence only and the respondent had, in terms of its Code, given him a written warning.

And in paragraph 24:

> In my view, when an employer treats cases of disciplinary offences of the same character as separate offences in terms of distinction and sanction, then they are bound to be held accountable to such policies and practice. My view is based on the interest principle of legality (applied to companies) that the rules must be clear to everyone. It also adds credence to the principles of consistency in the application of the rules.

[6] Insofar as the applicant's disciplinary code provided that the sanctions recorded in respect of specific offences were a guideline, the commissioner noted that what the code provided was that harsher penalties than those recommended may be imposed. In his view, this had the consequence that if an employee committed a lesser offence, it was not competent for the employer to impose a more serious penalty. In short, the commissioner's reason for his finding of unfair dismissal was that the employee's disciplinary record disclosed a valid final written warning for gross negligence, in circumstances where the employee had been found guilty and dismissed on the lesser charge of negligence. In his view, the employee's admitted misconduct ought therefore to have attracted the lesser sanction of a written warning.

[7] The commissioner did not consider any other factors which may have determined the appropriateness or otherwise of dismissal as a sanction for the misconduct committed by the third respondent. Indeed, the commissioner records in

paragraph 29 of his award that his conclusion that the sanction of dismissal was unfair is reached 'solely' on the basis of the reasons recorded by him, i.e. his analysis of the applicant's disciplinary code and procedure which required the sanction of a written warning given the 'lesser' form of negligence committed by the employee.

[8] The applicable legal principles are well-established. In *Sidumo v Rustenburg Platinum Mines & another*, the Constitutional Court described the functions of a commissioner in determining the appropriate sanction for misconduct in the following terms:

> [78] In approaching the dismissal dispute impartially commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed a sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, with additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long service record. This is not an exhaustive list.
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> [79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. The commissioner is not given the power to consider afresh what he was she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.

[9] In regard to the threshold applicable in review applications brought under s 145 of the LRA, the prevailing authorities support a two-stage enquiry. It is not sufficient for an applicant to establish that the commissioner or arbitrator committed a material error or irregularity in relation to the evidence that served before him or her; it must also be established that notwithstanding the conduct complained of, the result or outcome of the proceedings falls outside of a band of

decisions to which a reasonable decision-maker could come on the basis of the evidence. In *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) at 1084, the Supreme Court of Appeal made the point in the following way:

> [25] In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome and reasonable.

[10] This test was recently elaborated upon by Murphy AJA in *Head of the Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), where the court emphasised that errors or irregularities in relation to facts or issues may or may not produce an unreasonable outcome; what matters is the materiality of the error or irregularity and its relation to the result. The court said the following:

> Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA.

[11] As Myburgh AJ pointed out in *Shoprite Checkers v CCMA and others* (unreported JR 2471\13, 31 July 2015), what this amounts to is the following: 'Where a commissioner misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable' (at paragraph 10)

[12] In essence, this is the applicant's case in the present proceedings – it contends that by making a finding in isolation (that relating to the applicant's disciplinary code), the commissioner ignored a host of material facts, which had the effect of causing an unreasonable result.

[13] In my view, there is merit in the review application. In the first instance, it is clear that the commissioner made a decision on sanction solely on the basis of the view that he took of the provisions of the applicant's disciplinary code and procedure. Indeed, as I have indicated above, the commissioner acknowledges as much. Having decided that the final written warning for gross negligence was to be disregarded for the purposes of applying corrective discipline in terms of the applicant's disciplinary code, that was not the end of the enquiry. It was incumbent on the commissioner to have applied the analysis set out in *Sidumo*, and to have considered the relevant circumstances as a whole. To the extent the that the commissioner failed to have regard to the totality of circumstances (or, put another way, to the extent that he considered only the provisions of the disciplinary code and in particular, the distinction it draws between negligence and gross negligence and the respective recommended penalties) the commissioner made a finding without having regard to all of the relevant facts and circumstances.

[14] In consequence of his failure to undertake a proper enquiry into sanction, the commissioner failed to have regard to a number of relevant facts, all of which had a direct bearing on sanction. In particular, there are the provisions of the applicant's disciplinary code itself. The code does not operate so as to create an impermeable divide between a charge of gross negligence as opposed to one based only on negligence. The code contains a list of certain defined misconduct,

without that list being intended to be a complete list of all possible offences. The code further records that, at the applicant's discretion, a more severe penalty than that indicated by the code may be imposed, and records further that the penalties listed in the different categories of misconduct described serve as a guideline only, and not as a set of rigid rules. Gross negligence and negligence are grouped together as part of a single item, with a note indicating that the severity and nature of the negligence will determine the appropriateness of the penalty. The wording of the code does not suggest, as the commissioner held, that any flexibility in the application of the code is limited to circumstances where the applicant seeks a harsher sanction than that recommended. What the code (sensibly) suggests is that the code enjoys the status of a set of guidelines and that by definition, it is not intended to be rigidly applied.

[15] To the extent that certain tasks were removed from the employee with effect from 1 October 2013 (i.e. shortly prior to his dismissal), this does not in itself assist the employee. What is at issue is the employee's conduct viewed holistically. In 2011 and 2013, his negligence related to RQ's and purchase orders. In 2012, he was disciplined for his failure to deal appropriately with critical indicators. The applicant's conduct, whatever its manifestation, was the subject of five charges of negligence in 2008, 2009, 2011 2012 and 2013.

[16] To the extent that it might be suggested that another act of gross negligence was required to justify the employee's dismissal, this cannot be so. There can be no misconduct in the form of gross negligence without negligence also being present. Gross negligence inevitably has the same core content as the concept of 'ordinary' negligence; in other words, the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person. In this sense, the employee repeated the same form of misconduct when he failed to raise RQ's and brought about pre-commitments. The difference between negligence and gross negligence, as the applicant's disciplinary code suggests, is a matter of degree. The commissioner's reasoning and finding has the absurd

result that if the employee had previously been issued with a final written warning for negligence, his dismissal would have been justified.

[17] The commissioner's omission had the consequence to that the concept of progressive discipline was ignored. In *National Union of Mineworkers & another v and Amcoal Colliery t/a Arnot Colliery & another* [2000] 8 BLLR 869 (LAC), the Labour Appeal court suggested that even where present offences were unrelated to prior misconduct, an employee's disciplinary record should not be disregarded in the assessment of a fair sanction. Where a code provides (as it does in the present instance) for a progression of penalties, the rationale is that there would come a stage beyond which the accumulated penalties cannot be allowed to progress further, and where the cumulative effect provides clear evidence of indiscipline which would render a continued employment relationship intolerable. In the present instance, it is clear that the approach of progressive discipline adopted by the applicant was not having the desired effect. Insofar as the tolerability or otherwise of continued employment is concerned, one of the reasons for the imposition of the sanction of dismissal was quite obviously that the applicant felt that it could not leave the employee in charge of any of its affairs, given that he could not be trusted to conduct himself in compliance with his fundamental duties. Further, evidence was led that this failure had the potential of causing significant harm to the applicant, running into hundreds of thousands of Rands in the event of a line stoppage. The commissioner notes, in paragraph 10 of his award, that three of the applicant's witnesses testified that they could no longer trust the employee to work at the applicant's plant, in the sense that they had no confidence in his ability to discharge his duties, given his prior conduct. That evidence cannot be ignored.

[18] Insofar as the employee's long service is concerned, while it is correct that he has long service (nearly 23 years), that is not the end of the enquiry. The weight attached to long service is to be determined from the circumstances. As the Labour Appeal Court pointed out in *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 9 BLLR 995 (LAC), long service is not be equated with reliability.

Long service may be relevant where it shows that an employee has little propensity for offending. But where the required degree of trust and the employee's commitment to reform are absent, the employer's assessment that the continued employment of a long-serving employee will prove operationally risky will trump (see paragraph 24).

[19] That can be no doubt that had all of the material facts been considered by the commissioner, he would, on the probabilities, have come to a different conclusion on sanction. In this sense, in terms of the principle established in the *Mofokeng* judgment, the award is *prima facie* unreasonable. In relation to the second enquiry, i.e. as to the existence of a basis in the evidence overall to displace the *prima facie* case of unreasonableness, the considerations recorded above establish that there is no such basis in the present instance. The result is that the award is unreasonable and that it stands to be reviewed and set aside.

[20] Finally, in relation to costs, the applicant charitably did not press for a costs order. The parties were also agreed that in the event that the application was successful, the court ought to substitute the commissioner's order for one reflecting a finding of fair dismissal.

I make the following order:

1. The arbitration award issued by the second respondent on 10 September 2014 under case number ECPE 5622-13 is reviewed and set aside.
2. The arbitration award is substituted with an order that the third respondent's dismissal was fair
3. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. F le Roux, instructed by Chris Baker & Associates

For the third respondent: Adv. B Dyke, instructed by Brown Braude & Vlok Inc.