

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not reportable

Case no: JR 66/2014

J 93/14

In the matter between:

IBM SOUTH AFRICA (PTY) LTD**Applicant**

and

COMMISSION FOR CONCILIATION,**MEDIATION AND ARBITRATION****First Respondent****MBONGENI MOTSOENENG N.O****Second Respondent****FREDERICK SAMUEL MOSS****Third Respondent****Heard: 27 January 2016****Delivered: 26 February 2016**

Summary: Review application. Arbitrator failed to consider factors he was required to and ignored relevant and material evidence. Award is reviewed and set aside.

JUDGMENT

PRINSLOO J.

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued by the Second Respondent ('arbitrator') on 9 December 2013 under case number GAJB6804-13. The arbitrator found the Third Respondent's ('Moss') dismissal procedurally fair but substantively unfair and ordered the Applicant to reinstate him on the same terms and conditions of employment that existed prior to his dismissal.
- [2] The Third Respondent opposed the application.
- [3] Moss also filed an application in terms of the provisions of section 158(1)(c) of the Labour Relations Act¹ for the arbitration award issued on 9 December 2013 to be made an order of court.
- [4] I will first deal with the application for review. If the application for review succeeds, there will be no need to consider the section 158(1)(c) application.

Background facts

- [5] The background facts are herewith summarised as follows:
- [6] The Applicant employed Moss during July 2006 and he was stationed at the Applicant's offices at IBM Park, Sandown. On 5 October 2011 Moss addressed a letter to Mr Castle wherein he requested assistance from his employer regarding a crisis situation he found himself in. His situation was described as that his life partner was hospitalised and he had to take care of their two-year old daughter. Moss explained that he explored alternative options for someone else to take care of the child but that he could not find any viable alternatives and that his life partner might have been hospitalised for an indefinite period. Moss appealed to his employer to allow him to work from his home in Kimberley during this time or to bring his daughter to work. The Applicant does not have offices in Kimberley.
- [7] On 20 October 2011 the Applicant granted Moss permission to work from home for a period of two weeks commencing on 20 October 2011. The

¹ Act 66 of 1995.

Applicant confirmed the arrangement and activated the remote access procedures to enable Moss to work from home. Although Moss was granted permission to work from his home in Kimberley for a period of two weeks, commencing on 20 October 2011, this arrangement endured uninterrupted for a period of eight months.

- [8] In the period of eight months Moss' manager, Mr Narsai, identified certain work performance issues that required the initiation of a performance improvement plan (PIP). During June 2012 Mr Bhaga replaced Mr Narsai as Moss' manager and the performance issues identified by Mr Narsai were communicated to Mr Bhaga. On 3 July 2012 Mr Bhaga contacted Moss and informed him that he had to report at the Applicant's office.
- [9] On 12 July 2012 Mr Bhaga sent an electronic mail to Moss setting out that although the Applicant understood Moss' personal situation, those were not acceptable reasons for failing to physically report for duty as the Applicant required him to be present at the office to perform duties. Moss was also informed that the PIP should be held on a face to face and should be done weekly. It was made clear to Moss that he was required to be back in the office and report for duty by 9h00 on 30 July 2012. The date Moss was required to report for duty was 18 days from the date of the electronic mail.
- [10] On 30 July 2012 Moss did not report for work as he was instructed to do on 12 July 2012 but reported that he was sick from 30 July 2012 until 1 August 2012. A meeting was however held on 2 August 2012 at the Applicant's offices during which meeting Moss proposed that he work three weeks from his home in Kimberley and one week at the Applicant's offices. The Applicant on the other hand indicated that it was willing to accommodate Moss' circumstances, as it had done in the past, but that was subject to the Applicant's business requirements. The Applicant offered Moss six months unpaid leave to allow him an opportunity to address personal problems. The Applicant reiterated during this meeting that it had been more than understanding and that Moss needed to be present at the Applicant's offices. Moss was given four days to make the necessary arrangements and he was expected to be present at the Applicant's offices on 7 August 2012.
- [11] At some point the Applicant received a letter from FAMSA Kimberley wherein it was stated that Moss was receiving marriage counselling and that his life

partner would join future sessions during July 2012. The letter was dated 9 July 2012 and requested the Applicant transfer Moss to Kimberley for a period of six months so that the couple could receive the necessary intervention to rebuild their relationship.

- [12] On 7 August 2012 Moss did not report for duty at the Applicant's office and instead he sent an electronic mail to the Applicant wherein he rejected the option of taking six months unpaid leave and reporting for work at the Applicant's offices. He explained that the situation at home didn't change and that he did not have adequate time for adjustment and requested leave until 17 August 2012. The Applicant granted Moss annual leave for the period 8 – 17 August 2012. Moss was however advised that he was expected to report for duty at the Applicant's offices on 20 August 2012. Moss accepted this arrangement.
- [13] On 20 August 2012 Moss did not report for duty but instead took sick leave until 13 September 2012. On 14 September 2012 Moss did not report for duty as the Applicant expected he would do after his sick leave. Moss said that the reason why he failed to report for duty was because his car's licence expired and he undertook to report for duty at the Applicant's offices on 17 September 2012.
- [14] On 17 September 2012 Moss once again failed to report for duty and advised the Applicant that he would report for duty on 18 September 2012. On 18 September 2012 Moss reported for duty and he met with Mr Bhaga. During this meeting Moss confirmed that he would report for duty at the Applicant's offices in future, Mr Bhaga advised him that the PIP would commence on 25 September 2012 and that the Applicant would consider the feasibility of allowing Moss to return to Kimberley on a bi-monthly basis for purposes of attending counselling sessions in Kimberley.
- [15] From 1 to 17 October 2012 Moss did not report for duty and on 18 October 2012 a registered letter was sent to Moss requesting him to report for duty on 22 October 2012.
- [16] On 22 October 2012 Moss once again failed to report for duty and on 23 October 2012 he was issued with an ultimatum giving him until 25 October 2012 to report for duty failing which he would be deemed to have absconded. On 25 October 2012 Moss reported for duty at the Applicant's offices and a

meeting was held to discuss Moss' unauthorised absenteeism. Moss explained that he was absent from 1 to 24 October 2012 as a result of car trouble. The Applicant made it clear that the period 1 - 24 October 2012 constituted unauthorised absenteeism as no leave request was submitted or approved.

- [17] On 8 November 2012 the Applicant issued Moss with a final written warning for unauthorised absenteeism and it was made clear that Moss was to report for duty daily and that he was not to work from home unless prior approval was obtained from his superiors. The final written warning was valid for a period of 12 months and stated expressly if the same or similar misconduct is committed during the period of the warning, more severe disciplinary action, which may include dismissal, would be taken.
- [18] Moss failed to report for duty from 7- 23 January 2013 and also on 28 January 2013. On 1 February 2014 Moss was issued with a notice to attend a disciplinary hearing and the charge levelled against Moss related to unauthorised absenteeism for the period 7-23 January and 28 January 2013. The disciplinary enquiry was scheduled for 8 February 2013.
- [19] Moss was dismissed on 12 February 2013 after he was found guilty of unauthorised absenteeism.
- [20] Moss subsequently referred an unfair dismissal dispute to the First Respondent (CCMA), claiming that his dismissal was both substantively and procedurally unfair. The issue that was to be decided was whether the dismissal was indeed fair.
- [21] The background facts are common cause between the parties.

The arbitration proceedings:

- [22] It is evident from the transcribed record that at the commencement of the arbitration proceedings the arbitrator dealt with the challenges to the fairness of Moss' dismissal effectively and he limited the issues significantly. On procedural fairness the only issue that remained was that the chairperson of the disciplinary hearing was biased. On substantive fairness Moss conceded that the charge was that he was on unauthorised leave, that there is a rule that leave must be granted before an employee may take leave, that the rule is reasonable and that it is consistently applied. Moss disputed that he breached the rule in that he was not on unauthorised leave and that dismissal

was an appropriate sanction. The issues to be decided were limited to whether Moss was indeed absent without permission from 7 – 23 January and 28 January 2013 and the appropriateness of the sanction of dismissal.

- [23] The arbitrator found Moss' dismissal procedurally fair and that finding is not challenged. It is therefore not necessary to consider the evidence and findings on procedural fairness.
- [24] Mr Bhaga testified that Moss reported to him and his evidence reflected the background already set out *supra* and does not need to be repeated.
- [25] His evidence was that the Applicant has a 'Flexible Working Policy' in place that allows employees flexible working conditions, including to work from home, subject to a specified process. The process included a discussion between the employee and manager to decide the feasibility of a flexible working environment. The approval of management was always required. The Applicant's case is that although other employees were permitted to work from home, they did not have poor performance issues.
- [26] On 20 October 2011 Moss was granted two weeks to work from home and in July 2012 it was communicated to Moss that despite the previous arrangement, he had to report for work at the Applicant's offices. He testified that the performance of Moss had been below the required standard and that he had to be subjected to a performance improvement plan which could not be done remotely. The reason was that there had to be weekly meetings, daily forecasts and tracking of how the employee on the PIP was doing and this could not be done remotely. The fact that Moss had to be on a PIP required of him to be in the office.
- [27] Mr Bhaga testified that Moss agreed to make arrangements for accommodation in Johannesburg and that he would be available at the Johannesburg office going forward as he agreed that his PIP would start on 25 September 2012.
- [28] The transcribed record shows that in cross-examination Mr Bhaga was challenged on almost everything but the reason why Moss was dismissed. Not a single question or proposition was posed relating to his absence in January 2013 and the fairness of his dismissal.
- [29] Moss testified that he was employed in July 2006 as a computer operator and at the time of his dismissal he held the position of database administrator. He

confirmed that he had personal problems and that he requested leave to attend to his problems. Mr Castle granted him two weeks and when his problems were not resolved, he took a further eight months. As from July 2012 Mr Bhaga became his line manager and started to reprimand him and to raise performance issues with him. He testified that his problems were not resolved and he requested to work from home for a further period, which was refused. Moss' case is that he was the only one in his department that was refused to work from home. He agreed that a manager has a discretion to allow an employee to work from home but he insisted that in his case the discretion was not fairly exercised. Despite the fact that the Applicant granted him the opportunity to work from home for a period of eight months, he was of the view that he was not accommodated. He knew that Mr Bhaga wanted him to report for duty at the office and that he wanted to initiate a performance improvement plan but he insisted that there was no provision in the policy that required a performance improvement plan to be done in the office.

Analysis of the arbitrator's findings and the grounds for review

- [30] The arbitrator found Moss' dismissal procedurally fair but substantively unfair and ordered his retrospective reinstatement. As already stated for purposes of this review application it is not necessary to consider the findings on procedural fairness.
- [31] In respect of substantive fairness the arbitrator set out that he had to decide whether or not it was a breach of the rule when Moss was absent from work without permission from 7 – 23 to 23 January 2013 and whether such dismissal was appropriate in the circumstances. The arbitrator accepted that Moss was not at work for that period and that such non-reporting was unauthorised and he accepted that Moss indeed breached the rule. Having found that, the arbitrator was left to decide whether or not dismissal was an appropriate sanction.
- [32] The arbitrator observed that much of the evidence led during the arbitration related to dates prior to the dates of the misconduct. This observation is indeed correct.
- [33] The arbitrator further considered that Moss was issued a final written warning for unauthorised absence prior to 7 January 2013 and that such warning was still valid at the time the decision was taken to dismiss Moss.

- [34] The arbitrator accepted that Moss was initially granted two weeks to work from home to resolve his personal problems and that the applicant has tacitly agreed and condoned the period to extend to 8 months. The position only changed when Mr Bhaga assumed managerial responsibility over Moss and within two months of managing Moss, Mr Bhaga issued him with a final written warning, despite the fact that the Applicant allowed and agreed to Moss working remotely from home. The arbitrator accepted that Moss was not required to be at work physically and that his duties could be performed remotely and that his labour potential was always at the Applicant's disposal. The arbitrator rejected the notion that Moss was accommodated because he had always been rendering his services save when Mr Bhaga issued an instruction that he should not be allocated any work. The only basis the arbitrator would accept that Moss was accommodated, would have been if he did not render any services to the Applicant for a long period and despite that, the Applicant kept his position available and paid him a salary and he found that the Applicant, without justification, rejected Moss' proposal to work three weeks from home and one week in the office and the only accommodation was a proposal of six months unpaid leave.
- [35] The arbitrator was not called upon to determine a performance dispute and well aware of that, he nonetheless dealt with the issue and found that there were no real issues of poor performance.
- [36] The arbitrator found that the Applicant has not discharged its onus in terms of section 192(2) of the Act and that the dismissal was unfair and the sanction of dismissal too harsh. In considering the appropriateness of the sanction, the arbitrator considered the following factors: how the warning came about, the fact that Mr Bhaga had not established if Moss' circumstances changed at the time the charges were formulated, the option of six months unpaid leave would have compounded Moss' problems rather than solve them, the eight months granted to Moss was not accommodating Moss as he had been working and the Applicant was not prejudiced, the proposal Moss put forward to work three weeks from home and one week in the office was rejected unreasonably as performance management could still be done online and face to face in the week Moss would be in the office, other employees who

work remotely are performance managed and the Applicant agreed to remote working in the preceding eight months.

[37] It is these findings the Applicant seeks to review. The Applicant's case is that the decision reached is neither rational nor reasonable.

[38] The Applicant raised four grounds for review. Those are:

- a. The arbitrator's finding that there was a tacit agreement that Moss could work remotely from his home in Kimberley was not supported by evidence and demonstrates a failure to consider relevant evidence;
- b. The arbitrator's finding that Moss was substantively unfairly dismissed on the basis that Mr Bhaga had not established if Moss' circumstances changed at the time the charges were formulated, the option of six months unpaid leave would have compounded Moss' problems and the eight months granted to Moss was not accommodating Moss as he had been working and the Applicant was not prejudiced, placed too onerous an obligation on an employer to accommodate an employee and failed to take cognisance of an employer's right to determine how best to manage its business and the evidence led;
- c. The arbitrator's finding that Moss' proposal to work three weeks from home and one week in the office was rejected unreasonably as performance management could still be done online and face to face in the week Moss would be in the office demonstrates that the arbitrator found the only relevant consideration regarding Moss working from home was the manner in which the PIP could possibly be conducted and this demonstrates the failure to consider evidence;
- d. The arbitrator's finding that other employees who work remotely are performance managed on line and in finding as aforesaid, the arbitrator misconstrued the evidence that was before him and made assumptions not supported by evidence.

[39] In my view there are two main grounds for review. The first main ground for review relates to the manner in which the arbitrator dealt with the evidence that was before him, how he assessed and understood the evidence and the findings he made based on the evidence. The second main ground for review relates to the arbitrator's assessment of the appropriateness of the sanction of dismissal.

The test on review

- [40] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² as whether the decision reached by the arbitrator is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.
- [41] In *Goldfields Mining South Africa v Moreki*³ the Labour Appeal Court held that: "In short: 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."
- [42] Following the Supreme Court of Appeal judgment in *Herholdt*⁴ and the Labour Appeal Court's judgment in *Gold Fields*,⁵ the Labour Appeal Court handed down another important judgment in *Head of the Department of Education v Mofokeng*.⁶ In this judgment the Court provided the following exposition of the review test:

"Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. 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 inquiry, 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.

² (2007) 28 ILJ 2405 (CC) at para 110.

³ (2014) 35 ILJ 943 (LAC).

⁴ [2013] 11 BLLR 1074 (SCA).

⁵ [2014] 1 BLLR 20 (LAC).

⁶ [2015] 1 BLLR 50 (LAC), paragraph 33.

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. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination".

[43] This *dictum* in *Mofokeng* was further interpreted and in *Shoprite Checkers v CCMA and others*⁷ this Court considered the guidance *Mofokeng* provides for determining when the failure by an arbitrator to consider facts will be reviewable. The Court accepted the following mode of analysis:

- a. the first enquiry is whether the facts ignored were *material*, which will be the case if a consideration of them would (on the probabilities) have caused the commissioner to come to a different result;
- b. if this is established, the (objectively wrong) result arrived at by the commissioner is *prima facie* unreasonable;
- c. a second enquiry must then be embarked upon – it being whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness; and
- b. if the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and *vice versa*).

[44] In summary: Where it is alleged in review proceedings that an arbitrator ignored certain material facts, the enquiry is whether indeed this was the case, and if so, whether these facts were material. If it is found that they were indeed ignored as alleged, and were material, it follows that the arbitrator would have come to a different conclusion had he taken them into account, and therefore the result arrived at would *prima facie* be unreasonable⁸.

⁷ (2015) 36 ILJ 2908 (LC).

⁸ [2015] 1 BLLR 50 (LAC). See also *Shoprite Checkers v CCMA and others* (at paragraph [10] where it was held that; "The shorthand for all of this is the following: where a commissioner misdirects him or

- [45] Essentially the Applicant's case is that the arbitrator failed to take all the evidence before him into consideration; he misconstrued the evidence and disregarded relevant evidence.

Appropriateness of the sanction

- [46] As I already stated there are two main grounds for review. I will first deal with the ground for review relating the decision on the appropriateness of the sanction. In *Sidumo* the Constitutional Court held that persons considering the fairness of dismissal as a sanction must consider the following:

"In approaching the dismissal dispute impartially a 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 the 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, whether 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".

- [47] The Applicant submitted that the sole issue in dispute was whether Moss' absence in 2013 was sufficient to warrant dismissal in light of the existing final written warning. It is evident from the arbitration award that in considering the appropriateness of the sanction of dismissal the arbitrator considered how the warning came about, the fact that Mr Bhaga had not established if Moss' circumstances had changed at the time the charges were formulated, the option of six months unpaid leave would have compounded Moss' problems rather than solve them, the eight months granted to Moss was not accommodating Moss as he had been working and the Applicant was not prejudiced, the proposal Moss put forward to work three weeks from home and one week in the office was rejected unreasonably as performance management could still be done online and face to face in the week Moss would be in the office, other employees who work remotely are performance

managed and the applicant agreed to remote working in the preceding eight months.

- [48] The Applicant's case in this regard is that the arbitrator firstly took into account irrelevant evidence and ignored relevant evidence and secondly he determined issues that was not in dispute.
- [49] The arbitrator found the sanction too harsh and one of the factors he considered was how the final written warning came about. The arbitrator accepted that Moss was issued with a final written warning for unauthorised absence and that the warning had not been challenged and as such the warning was valid at the time of dismissal and could have been considered by the chairperson of the disciplinary enquiry. The arbitrator however, when deciding the appropriateness of the sanction, took into consideration how the warning came about. Having accepted that the final written warning was valid at the time of dismissal and that it related to the same or similar misconduct Moss was dismissed for, it was not open for the arbitrator to base his decision on the manner of arriving at the final written warning and to ignore the fact that a valid final written warning was in existence.
- [50] It is further evident from the factors the arbitrator considered that he either considered issues not relevant to the question he had to decide or that he made finding not supported by the evidence adduced and his findings were based on nothing but his own assumptions or speculation. The arbitrator was not expected and is not required to consider what he would do but is required to determine whether what the employer did was fair and in determining that he had to consider factors such as length of service, disciplinary record, severity of the misconduct, remorse and the possibility of rehabilitation.
- [51] Glaringly absent is a consideration of the factors set out in *Sidumo* or Schedule 8 of the Act and it cannot be said that the arbitrator did not ignore relevant evidence or did not consider irrelevant factors.

The manner in which the arbitrator dealt with evidence.

- [52] The second main ground for review relates to the evidence adduced and the arbitrator's findings. The Applicant takes issue firstly with the finding that there was a tacit agreement that Moss could work remotely from his home in Kimberley. It is evident from the case Moss presented that he felt the Applicant was not accommodating of his personal circumstances when

exercising the discretion not to allow him to work from home and that the discretion was exercised unfairly as other employees were allowed to work remotely from home. It was undisputed that the Applicant has a discretion to allow or refuse any employee permission to work from home.

- [53] Moss testified that he was granted permission to work from home in order to sort out his personal problems and when the problems were not resolved after two weeks, the arbitrator recorded that Moss was granted a further eight months. Moss never testified and did not rely on the fact that there was a tacit agreement that he could work remotely from home indefinitely. In my view even if such a tacit agreement existed, it came to an end during July 2012 when Moss was instructed to report for duty at the Applicant's offices and when Moss agreed to report at the Applicant's offices and in fact did so at some stage in 2012. The evidence before the arbitrator shows that from August 2012 onwards Moss was aware and agreed to make arrangements to present himself and to report for duty at the Applicant's offices and there can be little doubt that he understood that he had to report for duty at the Applicant's offices and that there was no agreement or permission for him to render his services remotely from his home in Kimberley.
- [54] The finding that there was a tacit agreement between the Applicant and Moss that he could render his services remotely was not supported by evidence.
- [55] The Applicant further takes issue with the finding that Moss' proposal to work three weeks from home and one week in the office was rejected unreasonably as performance management could still be done online and face to face in the week Moss would be in the office. This finding demonstrates that the arbitrator found the only relevant consideration regarding Moss working from home was the manner in which the PIP could possibly be conducted. In this instance the arbitrator failed to consider the undisputed evidence that working from home was within the discretion of the Applicant and always required management's permission and that the policy required a discussion to be held to determine the feasibility of such an arrangement. The testimony further was that the discretion was based on an employee's performance and Moss had a performance rating below the required standard. The Applicant further submitted that the other employees who work remotely did not have poor performance issues.

- [56] The evidence adduced by the Applicant does not support a finding that the proposal that Moss works three weeks from his home in Kimberley and one week at the applicant's offices was unreasonably rejected, if the evidence was considered holistically considering that it was a discretion to be exercised with due consideration of performance and Moss had performance issues.
- [57] The Applicant lastly takes issue with arbitrator's finding that other employees who work remotely are performance managed online. The Applicant's case is that the arbitrator assumed that the performance of other employees who work remotely referred to poor performance and not day to day performance.
- [58] There was no evidence adduced in respect of other poor performing employees who had been subjected to a PIP online. The Applicant's evidence was that its culture was to conduct the PIP in person to assist and support the employee.
- [59] It is evident that the arbitrator ignored a host of relevant facts and having found that relevant effects were ignored, the *Mofokeng* analysis should be undertaken. To begin with the first enquiry, the relevant facts that were ignored by the arbitrator constitute material facts, because if they had been considered by the arbitrator, he would on the probabilities have come to a different conclusion. In the result, the award is *prima facie* unreasonable.
- [60] Turning to the second enquiry, the question is whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness. To my mind, no such basis exists in this case, with the result that the award is unreasonable and there is merit in the grounds for review as raised by the Applicant.
- [61] The arbitrator's finding that there was a tacit agreement between the Applicant and Moss that he could work from home and his finding that other employees were performance managed online and that the same could have been done for Moss, informed the outcome of the arbitration proceedings and directly impacted on the findings in respect of substantive fairness. Equally so did the failure to consider that at the time of his dismissal Moss had a valid final written warning for unauthorised absence and by ignoring this fact, the arbitrator ignored the purpose of a final written warning. A final written warning is exactly what it says namely a 'final' warning and to ignore the existence of

such a warning would be to make a mockery of the process of progressive discipline.

- [62] It is evident from the arbitration award that the arbitrator in certain respects misconstrued the nature of the enquiry. This is so where the arbitrator had to decide the fairness of Moss' dismissal for reasons related to misconduct but where he concerned himself with questions relating to the Applicant's failure to accommodate Moss and the rejection of the proposal that he works remotely for three weeks a month and reports for duty at the Applicant's offices one week per month. The findings made in this regard are concerning firstly because the failure to accommodate Moss to work remotely was not relevant to the enquiry dealing with the fairness of his dismissal for reasons related to misconduct. There is no *nexus* between the ability to conduct the PIP remotely and the question whether dismissal was an appropriate sanction. Secondly, the arbitrator further delved deeply into issues that are reserved for managerial prerogative and he attempted to dictate the manner in which the PIP had to be conducted. The arbitrator ignored the fact that the Applicant as an employer has a discretion to run its affairs in the manner it deems fit.
- [63] I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable.
- [64] Viewed cumulatively, and in line with *Mofokeng*, the arbitrator's failure to apply his mind to issues and to consider evidence, which as demonstrated above, were material to the determination of the dispute, led him to misconceive the nature of the enquiry. The arbitrator found that there was a valid rule and that Moss contravened the rule, but he then failed to address the remaining issue he had to determine namely the appropriateness of the sanction of dismissal with due consideration of the evidence adduced and the applicable principles. The arbitrator made findings not supported by evidence, he ignored relevant evidence and he took into consideration issues and factors not relevant to the determination of the question. It cannot be said that the arbitrator's decision was one that a reasonable arbitrator could have reached on a full conspectus of all the facts before him.

[65] Based on the above, I am persuaded that this award cannot stand and should be interfered with on review. It follows that the application in terms of section 158(1)(c) of the Act to make the arbitration award and order of court fails.

[66] This is a case where the interests of justice would be best served by no cost order.

Order

[67] In the premises I make the following order:

67.1 The arbitration award issued on 9 December 2013 under case number GAJB6804-13 is reviewed and set aside;

67.2 The arbitration award is substituted with an order that the Third Respondent's dismissal was fair;

67.3 The application in terms of section 158(1)(c) of the Act to make the arbitration award an order of court case is dismissed;

67.4 There is no order as to costs.

C.Prinsloo

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate G Fourie
Instructed by: Webber Wentzel Attorneys

For the Third Respondent: Mr Goldberg of Goldberg Attorneys