IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PR63/14

MEC: DEPARTMENT OF HEALTH, ECP	**Applicant**
And	
PHSDSBC	**First Respondent**
SILAS RAMUSHOWANA, N.O.	**Second Respondent**
COLIN PETER BURTON	**Third Respondent**
NKULULEKO DOMINIC MANTANA	**Fourth Respondent**
MLINDELI MSENGANA	**Fifth Respondent**
VUYANI MSHESHE	**Sixth Respondent**
HEMSLEY TOTO KONTYO	**Seventh Respondent**

Heard: 26 October 2015

Delivered: 16 March 2016

Summary: Review - failure of arbitrator to discount arguments not a stand-alone ground of review – If arbitrator wrongly decides point has no merit by not taking it into account, this may constitute valid ground of review if decision had distorting effect on the outcome of award

Inconsistency - accomplice plea agreements serve valid purpose – misapplication of law on contemporaneous inconsistency to deny them

Sanction – not invariably necessary to lead evidence establishing breakdown in employment relationship in all dishonesty cases.

JUDGMENT

Whitcher J

Introduction and Background

[1] This is an application in terms of section 145 of the LRA to review and set aside an arbitration award issued by the PHSDSBC under case number PSHS447-10/11 wherein the arbitrator found the dismissal of the third to seventh respondents ('the employees') substantively unfair and reinstated them.

[2] The employees were all managers at the Eastern Cape department of health in the emergency medical services directorate ('EMS'). On 24 June 2009, the employees, except for Mheshe, travelled by air from East London to Bloemfontein to watch the Confederations Cup semi-final match between the USA and Spain. The following day, they returned home in the same aircraft. The aircraft belonged to Aerocare, a company subcontracted to provide aircraft to the department for medical emergency purposes. The trip to watch the soccer match was arranged by Aerocare which also paid for the employees' accommodation, meals, match tickets and road transfers in Bloemfontein.

[3] After the trip and following reports in the media, the provincial legislature directed questions to the MEC. The questions were forwarded to one Maharaj, the then senior manager in charge of EMS, for a response. In July / August 2009, Maharaj summoned the employees to a meeting in Bhisho where a formal reply to the parliamentary questions was discussed. Maharaj had already prepared a written reply, the contents of which he conveyed to the employees. This response falsely stated that the employees were on official

business to render medical assistance at the soccer match. Mheshe and all the employees who flew to Bloemfontein, save for one Gcolothela, attended this meeting with Maharaj. The written response was then conveyed to the Superintendent-General and MEC.

[4] None of the employees came clean about the trip or reported that Maharaj had prepared a false account about their trip for submission to the legislature. When the truth later emerged, the employees were charged with having undertaken an unauthorised trip by air to a soccer match irregularly sponsored by a supplier, and / or being complicit in lying to the MEC for Health about the matter in response to questions from the provincial legislature. The employees were subjected to a disciplinary hearing, found guilty and, on 8 July 2010, were dismissed on each of the two charges. Mheshe, was found guilty of an additional charge of misusing or conspiring to misuse the aircraft. Although he did not fly to Bloemfontein, the chairperson found that he played a substantial role in organizing the trip, second only to the role Maharaj played.

[5] A common complaint at the arbitration was that not all employees involved in aspects of the misconduct were afforded consistent disciplinary treatment: an issue at the heart of this matter.

[6] Indeed, not all employees involved in the misconduct suffered the same fate. Maharaj was suspended but resigned before he was charged. He exited the public service with his employer agreeing not to pursue further steps against him. Shockingly, in 2014, he was re-employed by the department, albeit at a lower level and the department’s attempts to address this abhorrent situation have been lethargic. In contrast to Maharaj, Mheshe’s request to be allowed to retire was refused. Gcolothela, who also flew to Bloemfontein but did not attend the meeting with Maharaj, was not dismissed but given a final written warning. One Mxesibe, who was charged alongside the other employees, was offered a plea agreement in terms of which he

pleaded guilty and accepted a final written warning coupled with a suspension without pay for two months conditional on him testifying against his colleagues in the internal hearing.

[7] The employees referred their dismissal to the PHSDSBC. On 12 February 2014, the arbitrator found the employees guilty of the charges. He however concluded that the sanction of dismissal was inappropriate and reinstated the employees with a final written warning and with 3 ½ years' back-pay, except for Mheshe, who was reinstated to his date of retirement.

The arbitration award

[8] The arbitrator concluded that the dismissal of the employees was substantively unfair principally on account of a finding that the discipline meted out to them was contemporaneously inconsistent with the treatment of similarly placed employees.

[9] In deciding penalty anew, the arbitrator also took certain mitigating factors into consideration and assessed that the charges were not so severe as to destroy the employment relationship.

[10] The following premises informed the arbitrator's reasoning on sanction:

(a) The employees had long service and were senior officials.

(b) They had 'let down the department' by failing to report Maharaj's activities especially during the meeting to discuss answers to parliament's questions.

(c) 'They were supposed to be given a lighter sanction like others not maximum sanctioning or dismissals.'

(d) 'In particular, Mr Mheshe tried to secure a settlement as he was due to retire and it was not acceptable.'

(e) 'The [employer] was inconsistent in applying the discipline whilst others were given final written warning or settlement agreement.'

(f) Progressive and corrective discipline was not implemented.

(g) The trust relationship was not damaged.

(h) The employees showed 'some sense of remorse by co-operating with the investigations.'

Grounds of Review

[11] The applicant submitted that the award suffers from various reviewable defects. It is not necessary in deciding this matter to adjudicate criticisms of the arbitrator's ancillary findings in any detail. The two main grounds are sufficient.

[12] The applicant's first ground of review is that the finding that the department acted inconsistently is bereft of any reasoning whatsoever. Although the question whether the comparators were distinguishable from the employees was a key issue at the arbitration, the arbitrator said nothing about this and did not reason his conclusion.

[13] The consequences of this are twofold, the applicant argues. First, the award is irrational, and thus reviewable;[1] and second, the court should

[1] *Boxer Superstores (Pty) Ltd v Zuma & others* [2008] 9 BLLR 823 (LAC) at para 11: 'The third respondent's award was manifestly irrational and, to that extent, the judgment of Pillay J is correct. It is irrational because the third respondent gave no reasons for awarding compensation after having found that the appellant had failed to discharge the onus in relation to substantive [fairness].'

conclude that the arbitrator did not apply himself to the matter and thus malfunctioned as an arbitrator, which constitutes misconduct in terms of section 145 of the LRA.

[14] The second ground of review is that the finding of inconsistency is unreasonable. The applicant contends that it had to guess at the identity of the comparator employees who the arbitrator felt were more favourably treated. Reading the award carefully, these appear to be:

(a) Maharaj, who resigned and who the arbitrator found was given a settlement agreement;

(b) Gcolothela, who was given a final written warning; and

(c) Mxesibe, who was given a final written warning and suspended without pay for two months.

[15] The employees also argued that evidence before the arbitrator suggested that the treatment of Bambiso established that their treatment on the first charge was inconsistent. Bambiso, a manager, was informed by a subordinate that he (the subordinate) had been invited on the Bloemfontein trip. Bambiso forbade her subordinate to take this trip as it seemed irregular to her. The employees submit that Bambiso thus also had prior knowledge that the Bloemfontein trip was irregular but failed to report it, yet she was not disciplined.

[16] The applicant makes the following relevant submissions in respect of each of the comparator employees.

Maharaj

[17] Documentary evidence before the arbitrator showed that on 22 January 2010, while on suspension, and three weeks before the employees' disciplinary hearing began, Maharaj resigned. A memorandum of understanding (MOU) was entered into between Maharaj and the

department on that day, in terms of which the department undertook not to proceed with disciplinary action against him in the light of his resignation. They also undertook to pay him his pension and other benefits without prejudicing him. The arbitrator described this as a 'settlement agreement'.

[18] During the disciplinary hearing, the employees raised the issue of Maharaj having been 'allowed' to resign. It was put to Mheshe under cross-examination during the internal hearing that he, too, could choose to resign. His response was that he 'didn't have any intention of leaving'. None of the employees opted to resign.

[19] At the arbitration, Mheshe asserted that given Maharaj's resignation, he ought to have been allowed to retire. In this regard, on 17 May 2010, towards the end of the internal disciplinary hearing, Mheshe applied to retire with effect from 1 July 2010. The employer, however declined this offer.

[20] The applicant submits that the arbitrator's finding that any of the employees were treated inconsistently *vis-à-vis* Maharaj is unreasonable. Amongst other things, this is because:

(a) Maharaj resigned from the employ of the department, a unilateral act, whereas the employer had the option to consent to an early retirement application or not. Resignation and an application for early retirement are different legal concepts;

(b) Any of the employees could have resigned, as Maharaj did, but elected not to do so; and

(c) Maharaj resigned before the hearing began and evidence against him had taken shape.

[21] I admitted new evidence that Maharaj had taken up employment in the department again in 2014.[2] This evidence is troubling yet irrelevant to the review application itself. This new evidence, brought to light *after* the arbitration, may however affect the relief I order, bearing in mind that the applicant has asked me to finally decide this matter and not remit it to the bargaining council. In this regard, the department's new superintendent general conceded that Maharaj's re-employment was wrong. He averred that when he discovered that Maharaj had re-entered the department's employ, the department instituted disciplinary proceedings against Maharaj for the misconduct for which the employees were dismissed. This disciplinary hearing is currently underway.

Gcolothela

[22] Gcolothela was charged with the employees and attended the same internal disciplinary hearing. He faced an unnecessarily complex charge over the trip to Bloemfontein. The charge had two parts to it with the department succeeding in convincing its internal disciplinary chairperson that Gcolothela was only guilty of having improperly received the benefits of the Bloemfontein jaunt. He was found not guilty of dishonesty in relation to concealing that the trip to Bloemfontein happened.

[23] Gcolothela was further acquitted on the charge relating to the dishonest response to the parliamentary questions as he was not present at the meeting with Maharaj. This fact was common cause at the arbitration. There was thus evidence before the chairperson showing that Gcolothela was meaningfully less culpable than the employees in respect of the Bloemfontein trip. For his less serious infraction, the internal chairperson issued Gcolothela with a final written warning. In these circumstances, the applicant submits, a finding by the arbitrator that the employees were treated inconsistently *vis-à-vis*

[2] I questioned this but the applicant agreed that I admit the evidence.

Gcolothela was unreasonable as his case was clearly distinguishable from that of the employees.

Mxesibe's case

[24] Mxesibe was charged together with the employees, but on 16 April 2010 he entered into a plea agreement with the department. In terms of the plea agreement, Mxesibe admitted guilt to various charges thus demonstrating remorse. He also accepted a final written warning and suspension without pay for two months. He further agreed to testify on behalf of the department at the employees' disciplinary hearing and the indemnity from dismissal granted to Mxesibe was conditional upon him being 'frank and honest' in his testimony.

[25] As provided for in the plea agreement, Mxesibe duly testified on behalf of the department at the employees' internal disciplinary hearing and mention was made of this plea in the internal chairperson's findings. Mxesibe also thereupon gave evidence on behalf of the department at the arbitration. In the process, he dealt with the plea agreement again.

[26] The applicant submits three salient criticisms of the arbitrator's finding that the employees' dismissal was unfair on account of an inconsistency *vis-à-vis* Mxesibe. First, the employees were not similarly situated to Mxesibe in that he entered into a plea agreement. He agreed to give evidence for the department against the employees, with the indemnity granted to him being conditional upon his evidence being frank and honest. The plea agreement was modelled on section 204 of the Criminal Procedure Act of 1977. In circumstances where this is a recognised means of securing evidence in the criminal law context, there is no reason why it should not be adapted and applied in the labour law context.

[27] Second, the employees were not similarly situated to Mxesibe, in that he displayed remorse by admitting guilt and accepting a penalty in the

plea agreement, while the employees did not do so. Right to the very end, the employees maintained their innocence, and contended that no action ought to have been taken against them, thus demonstrating no remorse whatsoever.

[28] Third, even if the employees were similarly situated to Mxesibe, any disparity of treatment did not give rise to the employees' dismissal being unfair. Consistency is an element of fairness and not a separate principle. It is only where an employer acts *mala fide* or with a discriminatory motive that the decision to dismiss the employees but not the comparator (in this case, Mxesibe) will give rise to unfairness.[3] In the present matter, there was no question or evidence of the department acting with *mala fides* or discriminatory motive. Instead, the department acted with a legitimate purpose to secure a conviction of the employees for serious misconduct. In the circumstances, no unfairness arose.

Bambiso

[29] Although the arbitrator made no finding that Bambiso constituted a valid comparator, the applicant argued that her conduct was distinguishable from the employees. She was not involved in the trip in any way and, instead of possessing direct knowledge of the Bloemfontein flight, she merely had an apprehension that it was irregular.

<u>Analysis of Evidence and Argument</u>

[3] *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd* (1999) 20 *ILJ* 2302 (LAC) at para 29; *ABSA Bank Ltd v Naidu & others* (2015) 36 *ILJ* 602 (LAC) at para 37. See generally, PAK le Roux 'Consistency in discipline – a new trend from the courts?' *Contemporary Labour Law* (2014) 24 (5) at 31.

[30] The review test by now is trite and is encapsulated in the SCA's judgment in *Herholdt*[4] and the LAC's judgment in *Gold Fields*[5].

[31] Neither the applicant nor the employees seriously challenged the arbitrator's finding that the employees were in fact guilty of the two charges for which they were dismissed. This is in essence a penalty review. The issue of inconsistency did not function as a stand-alone ground of substantive unfairness, the applicant argued. Rather, because similarly placed employees were not also dismissed, the arbitrator considered the sanction the employees received as being too harsh. While this is correct, I am not convinced much turns on this distinction in this case. The kernel of substantive unfairness in contemporaneous inconsistency is that the employer was prepared, for no good reason, to live with one employee after committing misconduct but not with another employee similarly placed. The issue is the same when considering the appropriateness of the sanction of dismissal which is whether the employment relationship can fairly be said to have been irretrievably damaged.

[32] On the first ground of review, I do not agree that the arbitrator's finding that the department acted inconsistently is bereft of any reasoning whatsoever. The arbitrator did not furnish reasons for discounting the apparently distinguishing features between the disciplinary situation of the employees and the comparators. However, I am hesitant to infer that the absence of such reasons reveals the arbitrator malfunctioned in his role. When the arbitrator found that the sanction of dismissal handed down to the employees was inappropriate because 'lighter sanctions' were handed out to others or that Mheshe should have been allowed to exit the public service without disciplinary consequence in the same way as Maharaj, his implicit reasoning is that, on the

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[4] *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

[5] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

evidence before him, any comparators were not in fact meaningfully distinguishable from the dismissed employees. While it is desirable, I do not think that the failure of an arbitrator to discount arguments he or she thinks have no merit generally constitutes a stand-alone ground of review. This would blow arbitration awards up into unmanageable balloons of argument. If, however, an arbitrator wrongly decides that a point has no merit, by, for instance not properly taking it into account, this may well constitute a valid ground of review if such an erroneous decision had a distorting effect on the ultimate outcome of the award[6].

[33] The situation *in casu* is different from *Boxer Superstores* in that a reason for the key finding (any distinguishing features are immaterial) can be inferred from a reading of the award as a whole rather than there being a complete absence of a reason. The first ground of review must thus fail.

[34] The second vein of review is, in my view, more profitably mined. This is whether the arbitrator's implied finding that there are no material distinguishing factors between the employees and the comparators is one a reasonable decision-maker would make.

[35] As to the identity of the comparators, the arbitrator only alludes to the comparator employees as "others" who were given a final written warning or settlement agreement. However, read holistically, the identity of the three comparator employees the arbitrator had in mind is discernible. They are Maharaj, Gcolothela and Mxesibe[7]. The problem is not that the identity of the comparators is unclear. The deficiency in the award is that the arbitrator made findings of inconsistency, some of which are unreasonable given the distinguishing features between the comparators and the employees that plainly emerged in the evidence.

[6] See *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC).

[7] The arbitrator does record that the employees also complained about the lack of disciplinary action against Bambiso but he does not make a finding that Bambiso's treatment actually constituted inconsistency.

[36] When the arbitrator holds Gcolothela and Mxesibe up as comparators he mishandled the application of the law on inconsistency or ignored crucial evidence. It is trite law that inconsistency does not arise if the dismissed employees were not similarly situated to the comparators relied upon by them. In a number of instances where commissioners have either failed to grasp this principle or apply it reasonably, their awards have been set aside on review.[8] In *ABSA v Naidu*[9], in the process of finding that the commissioner's finding of inconsistency was unreasonably, the LAC held as follows:

> '[41] Accordingly, I am not persuaded that Ms Pin Lai's matter was so similar to that of Ms Naidu as to have warranted that they should have both been treated in the same_way in terms of sanction. In my view, the facts in the two matters were sufficiently distinguishable.'

[37] I agree with the applicant that the cases of Gcolothela and Mxesibe were sufficiently distinguishable from those of the employees, with the result that a finding of inconsistency was unreasonable.[10] At the internal disciplinary hearing, Gcolothela was found guilty only of benefitting from the trip to Bloemfontein but not concealing that an irregular trip had taken place. He also did not participate in the meeting with Maharaj. These material facts were before the arbitrator and should have been properly taken into account. It was not. Consequently, the arbitrator's finding that the employees' disciplinary fate should have been the same as Gcolothela's is a finding no reasonable decision-maker would have made.

[38] Likewise, Mxesibe's situation was also distinguishable from that of the employees. He was offered and accepted a plea bargain in terms of

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[8] See, *inter alia*, *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC).

[9] *ABSA Bank Ltd v Naidu & others* (2015) 36 *ILJ* 602 (LAC).

[10] *Sidumo& another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at para 110: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

which testimony against the employees would secure him a lesser sanction. In my view, when an employer offers one within a group of suspected wrong-doers a plea bargain to enable it to acquire evidence of wrong-doing within the group, this, on its own, does not constitute inconsistent application of discipline. An important distinguishing feature existed: the existence of a plea agreement. The employees' complaint that they were also owed a plea deal betrays a misunderstanding of the type of plea deal on offer. It was not a plea deal where a lesser sanction was agreed in exchange for a guilty plea so as to avoid a hearing. The purpose of the plea bargain offered to Mxesibe was to secure evidence against the rest of the employees to enable their discipline. The lesser sanction agreed with Mxesibe was not in recognition that the charge he faced was not serious enough to warrant dismissal if he pleaded guilty but was rather a necessary compromise by the employer to induce the co-operation of an accomplice in a disciplinary hearing. The employer sought and obtained this co-operation from Mxesibe and not from the other employees. It is helpful to think of the plea bargain at stake in this case as an *accomplice plea agreement* as opposed to a straightforward *plea in mitigation of sanction*.

[39] The object of securing evidence to discipline employees who misconducted themselves would be completely defeated if every one of the employees involved in the misconduct were offered a plea bargain to testify against the others. Not to allow witness plea bargains on the basis that they create inconsistency would be to shut the door on an important mechanism used in criminal law every day and which may, in my view, with appropriate checks and balances, be fairly imported into labour law as a method of obtaining evidence of wrong-doing. Indeed, it is hard to see how, without the facility of witness plea agreements, an employer would successfully prosecute certain acts of misconduct. It is unfortunately true that wrong-doers are ever more resourceful, devising increasingly sophisticated methods of operation which hide their misconduct and identity from their employer. Accomplice testimony is

an essential tool in piercing the veil of secrecy surrounding certain offences especially in detecting corruption by public officials, syndicate theft and white-collar offences.

[40] The true attack on the present accomplice plea agreement would have been whether the department exercised its discretion to select Mxesibe unfairly. In my view, an employer possesses a wide amount of latitude in selecting whom among a group of people involved in misconduct it selects for an accomplice plea agreement. Factors that may legitimately be taken into account in selecting such a witness could include: an assessment of his or her availability, strength and credibility as a prospective witness; trustworthiness and ability to withstand any pressure to recant; depth of knowledge of the facts which make up the misconduct; access to corroborating evidence; cooperation and initiative during the investigation; attitude of remorse before the benefit of a lesser sanction was offered; and previous disciplinary record.

[41] An employer is not called upon to justify its decision to offer a plea agreement to one employee over another in fine detail. It should have a wide discretion in selecting the witness it wishes to use. The key issue is that its selection should not betray *male fides*. Signs that the decision to offer a plea deal were not fairly exercised would include: that the evidence the witness gave was not reasonably necessary to secure a guilty finding against the accused employees, including because such evidence was readily available from other sources; an imbalance in the relative degree of culpability of the witness and the accused employees, such that the proverbial 'big fish' was used to secure a guilty finding against the 'little fish'; that the decision to conclude a plea agreement was induced by an improper motive such as obvious favouritism or capriciousness; and/or unfair racial, gender or other discrimination in favour of the accomplice witness or against the remaining accused employees.

[42] It is further, in my view, for the party alleging that an employer has unfairly exercised its discretion in offering a witness plea agreement to a particular employee to make out such a case. In other words, the employee party has to lay an evidentiary basis for unfairness before the employer is called upon to justify its decision[11].

[43] I reject, however, the applicant's argument that Mxesibe's ostensible show of remorse, demonstrated by his guilty plea, is a distinguishing factor. Mxesibe pleaded guilty in the context of a comprehensive, negotiated plea agreement in terms of which he was induced to testify by being given a sanction short of dismissal. Had one of the other employees been selected for and accepted the plea deal, they would, of necessity, also have had to plead guilty. There was no evidence before the arbitrator suggesting that Mxesibe had a change of heart and thus pleaded guilty. Like the other employees he was dishonest during the misconduct and lied to investigators in his first affidavit. If accomplice plea agreements are to be imported into labour law, it is best not to be sentimental about those who accept them. Accomplice plea agreements are by-and-large induced by the avoidance of dismissal and not contrition. The evidence these accomplice witnesses provide should also be evaluated with this in mind.

[44] The absence of evidence of Mxesibe's remorse does not, however, mean that he is a valid comparator *vis a vis* the employees. What makes him different is that the employer, out of necessity and using its discretion, exercised its discretion to select him to be an accomplice witness. He was the witness upon whose credibility his employer decided to stake their case against the other employees and, absent any facts impugning the fairness of their choice, such a choice does not in itself constitute inconsistency. The arbitrator failed to appreciate that Mxesibe's selection as an accomplice witness, which was not

[11] see also *Masubelele v Public Health and Social Development Sectoral Bargaining Council and Others (LC), unreported, (JR 1151/2008)*

impugned in the evidence before him, made him different to the employees. This failure is a reviewable irregularity.

[45] Turning to Maharaj, the applicant's argument that his resignation and Mheshe's request for retirement are legally distinguishable methods of terminating employment strikes me as superficial. It asks that this court permit form to trump substance. Both Maharaj and Mheshe sought to bring their employment to an end when confronted with accusations of misconduct. Neither explicitly showed remorse for their actions. In the circumstances of this case, it matters little at which stage of the process they made the decision to seek a way out other than by dismissal. Mr Nduluzwana, for Mheshe, correctly emphasized that Maharaj's resignation was part of a settlement *agreement*. His resignation was not the simple unilateral act, leaving the employer's hands tied, that the applicant makes it out to be. This is because, an employer, faced with an employee who resigns ahead of a disciplinary hearing, has the option to convene the disciplinary hearing during the employee's notice period and even conclude it. The department's agreement not to pursue charges against Maharaj is an abandonment of this statutory (in the public service) and contractual right to discipline its employees up until the last day they are obliged to render service. Indeed, viewed properly, Maharaj also obtained a type of plea agreement. Its terms were that he would resign in exchange for no adverse disciplinary or financial consequences.

[46] The department's previous head of department was one Zitumane who gave evidence for the employees. In response to his evidence that Mheshe's early retirement would have allowed Mheshe to leave its employ without "tarnishing" his image, the applicant sought refuge in legal form to distinguish him from Maharaj. The legal form in which Mheshe unsuccessfully sought termination was retirement, something he was two months away from achieving in any event by effluxion of time. Yet the department was prepared to accommodate Maharaj's desire to terminate his employment on terms which were self-evidently

designed to prevent Maharaj's image being tarnished. Under cross-examination at the internal hearing and arbitration it was put to Mheshe that Maharaj simply resigned whereas his retirement required his employer's consent. As I have already found, this is only superficially so. Maharaj's exit from the department also required his employer's consent. This was consent not to commence disciplinary action against him as it was entitled to do during his notice period and thus tarnish Maharaj's image. In the circumstances of this case, Mheshe sought a similar indulgence from the employer to avoid discipline in exchange for his imminent exit. He only wanted the employer to hold off one month longer. While it was put to Mheshe that he was free to resign, it was certainly not put to him that the employer would additionally agree, as it did for Maharaj, to stop the disciplinary process against him during the notice period and guarantee that he suffered no financial prejudice because of his decision.

[47] Moreover, it was common cause that Maharaj was the mastermind and driving force in all three of the charges Mheshe faced. The evidence before the arbitrator showed Maharaj's behaviour to have been by far the most reprehensible. In spite of this, the department did not simply take note of his resignation and proceed with discipline. The department agreed additional terms with Maharaj that enabled another way out. Resignation and retirement may be different in legal form, but in the context of this case and specifically with regard to Mheshe, I can understand how the arbitrator found that this distinguishing feature was immaterial. Consequently, I decline to set aside the arbitrator's findings aside with regard to Mheshe.

[48] The arbitrator failed to notice that Mheshe was found guilty of a third offence, that of misusing or conspiring to misuse the aircraft. This is a reviewable irregularity. However, in the context of this case it makes no difference to the outcome. This is because I have found that Maharaj was a valid comparator *vis a vis* Mheshe on all three charges.

[49] The arbitrator also made certain findings on the appropriateness of sanction beyond pointing to the comparators who were not dismissed. These came down to trivialising the seriousness of the two charges of which the employees were found guilty or over-emphasising the extent of mitigating factors (as already discussed). In particular, the finding that the trust relationship had not been damaged cannot be reconciled with the nature of the misconduct of which the arbitrator found the employees guilty. This finding is at odds with the prevailing law.[12] In my opinion, no reasonable decision-maker would have found that the penalty for colluding to mislead the MEC about the misuse of an aircraft supposed to be used for medical emergencies warranted only a final written warning.

[50] Material errors of the sort set out above point to a *prima facie* unreasonable result. The remaining question is whether, in light of any other factors, the distorting effects of the arbitrator's misdirections on inconsistency and sanction rendered the result of the award unreasonable[13]. The employees submit in this regard that there was, in any event, insufficient sufficient evidence before the arbitrator to allow him find that dismissal was an appropriate sanction as the department failed to lead any evidence on the breakdown of the trust relationship and that this is fatal to the review application.

[51] There is no merit in this. In circumstances where employees are guilty of gross dishonesty or comparable misconduct, particularly in relation to their core job functions, the *ratio* in *Edcon*[14] does not apply. Since the ruling in *Edcon*, the LAC has twice found that it is not, as an invariable rule, necessary to lead evidence to establish a breakdown in

[12] It is well accepted by now that gross dishonesty warrants dismissal – a point again made by the LAC in *ABSA Bank Ltd v Naidu & others* (2015) 36 *ILJ* 602 (LAC) at paras 52-56.

[13] *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC).

[14] *Edcon Ltd v Pillemer NO & others* [2010] 1 BLLR 1 (SCA) at para 23

the trust relationship.[15] As a matter of substantive law, certain forms of misconduct, such as colluding to lie to the MEC about one's misuse of an emergency medical aircraft, would destroy the employment relationship.

Conclusion

[52] The arbitrator's finding that the employees' dismissal was an inappropriate sanction is, by and large, one that no reasonable decision-maker would make. His misunderstanding or misapplication of the evidence and prevailing law on inconsistency and severity of sanction has distorted the outcome of his award and these findings fall to be set aside.

[53] The exception to the above is the arbitrator's finding that Mheshe's dismissal was substantively unfair by reason of inconsistency. The reason this finding stands is that Maharaj, an employee similarly placed to Mheshe, was also allowed to exit the employer on terms substantively denied to Mheshe. I have found that the manner in which Mheshe and Maharaj sought to bring their employment to a close might have differed in legal form but they both required the same indulgence from the employer: to be allowed to leave its employ, more or less immediately, with their reputations intact. I point out that Maharaj constitutes a comparator solely in respect of Mheshe's dismissal as no evidence was led that any of the other employees sought to exit the department as a response to being accused of misconduct.

Relief

[54] In the event that I set the award aside, the employees ask that I remit the matter to the bargaining council for a rehearing. The applicant

[15] *Anglo Platinum (Pty) Ltd (BafokengRasemone Mine) v De Beer* [2015] 4 BLLR 394 (LAC) at para 19; *Department of Home Affairs and another v Ndlovu and others* [2014] 9 BLLR 851 (LAC) at para 18. The finding in *Edcon Ltd v Pillemer NO & others* [2010] 1 BLLR 1 (SCA) at para 23, is thus not an invariable rule and must be read in the light of the facts of the case.

seeks an order setting aside the award and substituting it with an order that the dismissal of the employees was fair. Mr. Myburgh argued that this court should exercise its discretion in terms of section 145(4) of the LRA to finally determine the dispute because the dismissal dates back to July 2010, this court is in as good a position as the bargaining council would be to decide the matter and the outcome is, in submission, a foregone conclusion.[16]

[55] I agree with Mr. Myburgh's submissions, except in respect to the relief owed to Mheshe.

[56] I notice from the identity number attached to Mheshe's application to retire, dated 17 May 2010, that he was at the time 64 years and five months old. I take judicial notice of the fact that the usual age of retirement in the public service is 65. There thus appears to be no basis for a reinstatement order of 2 ½ years' salary, later varied to 3 years, if Mheshe's dismissal occurred six and half months shy of his normal retirement age. However, sufficient information is not before me to make a definitive ruling on this. The relief awarded to Mheshe must be re-considered by the PHSDSBC taking into consideration relevant evidence and argument, including whether retrospective backpay is to be awarded beyond the date Mheshe would in any event have retired.

<u>Order</u>

[57] The second respondent's findings that the dismissal of the third, fourth, fifth and seventh respondents was substantively unfair and his order that they be reinstated with retrospective effect is hereby reviewed and set aside. This ruling is replaced with an order that the dismissal of the third, fourth, fifth and seventh respondents was fair.

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[16] *NUMSA & another v Voltex (Pty) Ltd t/a Electric Centre & others* [2000] 5 BLLR 619 (LC) at 628F-H.

[58] The application to review and set aside the second respondent's finding that the dismissal of the sixth respondent was substantively unfair is dismissed.

[59] The second respondent's reinstatement order of 2 ½ years' salary, later varied to 3 years, in favour of the sixth respondent is reviewed and set aside. The issue of the relief due to the sixth respondent is remitted to the PHSDSBC for a determination *de novo*, which inquiry must take into account the date on which he would in any event have retired and any relevant matters provided for in sections 193 and 194 of the LRA.

[60] There is no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Adv A Myburgh, SC, instructed by Wesley Pretorius and Associates

For the third, fourth and fifth respondents: Wikus van Rensburg Attorneys

For the sixth and seventh respondents: Adv M Nduzulwana, instructed by Diko Attorneys