



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not reportable

Case no: JR 1605/13

GIYANI SPAR

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION &
ARBITRATION**

First Respondent

MR. B.E.R. HONE

Second Respondent

SACCAWU obo RODNEY BALOYI

Third Respondent

Heard on: 1 February 2017

Delivered: 3 February 2017

Summary:

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 found that the third respondent had been unfairly dismissed by the applicant, and ordered his reinstatement.

- [2] The material facts are not in dispute and are recorded in the commissioner's award. The third respondent commenced employment in March 2000. He was dismissed on 5 February 2013 and at the time of his dismissal, was employed as a front-end supervisor. The applicant's owner testified that when the former branch manager left the applicant in September or October 2012, he decided that he would not appoint a new manager but would divide responsibility for the various components of the applicant's management between the supervisors, including the third respondent. Specifically, evidence was led that the third respondent was instructed to require staff to clock in and out for tea and lunch, an instruction that the owner assumed had been carried out. He discovered during the course of January 2013 that the third respondent had in fact not carried out his instruction. A disciplinary enquiry was convened on 23 January 2013 when the third respondent was found guilty of a failure or refusal to carry out an instruction and summary dismissed.
- [3] In his award, the commissioner accepted that the reasonableness of the rule in question (i.e. the requirement that the third respondent carry out reasonable instructions) was not an issue but what was in dispute, in essence, was whether the applicant had proved the alleged misconduct. What the evidence disclosed was a version by the owner that he had specifically instructed the third respondent to direct employees to clock in and out for tea and lunch, and a version by the third respondent who denied that he had ever received such an instruction. The commission accepted the third respondent's version. He did so for three reasons. The first related to documentary evidence which suggested to the commissioner that the owner and the third respondent had not investigated the consequences of introducing clocking in and out for lunch and tea breaks in the light of a clocking system that was in place and which provided for the automatic deduction of time for lunch and tea. The commissioner thought that had the third respondent been asked to implement the change, being aware of the system of automatic time deductions, he would have mentioned this to the owner before carrying out the instruction. Further, the evidence indicated to the commissioner that employees had never been required to clock in and out for tea and lunch breaks since the introduction of the automated system. He considered that the introduction of a significant change to the timekeeping system would require considerable prior communication with employees by senior management and not via a disputed

suggestion to a supervisor. Further, the commissioner noted the owner's testimony that there was no manager in the store between the departure of the previous manager in September or October 2012 and the appointment of a new manager in March 2013, but that evidence had established that a Mr Roodt had been established as an acting manager in January 2013. On this basis, the commissioner found that the owner's evidence could be called into question. For these reasons, the commissioner found that the applicant had failed to prove that the third respondent had carried out a reasonable instruction and was grossly insubordinate in doing so.

- [4] The grounds for review concern the commissioner's assessment of the evidence. The primary ground for review pursued at the hearing of the application was that the commissioner had misdirected himself by finding as he did in circumstances where the third respondent had confirmed at the outset of the hearing that the issues in dispute were whether the instruction given to him was a reasonable instruction, and whether the sanction of dismissal was too harsh. In other words, the applicant contends that the third respondent had never disputed the fact that the instruction had been given to him, and that it was not open to the commissioner to make a finding to this effect.
- [5] The record of the proceedings under review discloses that in the opening statements made by the parties' representatives, the existence of the instruction was not placed in dispute. Indeed, the commissioner questioned the third respondent's representative who had stated that the third respondent's case was that the instruction that he had been given was not one that he, as a supervisor, could be expected to discharge. The commissioner interpreted this to mean that the instruction given 'was not applicable to the applicant'. In other words, and as confirmed by the commissioner with the third respondent's representative, the instruction was not reasonable. The commissioner accepts this formulation of the dispute and accepts that the issues that he was required to decide first with the instruction given to the third respondent was reasonable, and if so, whether his refusal to comply with instruction ought fairly to attract the sanction of dismissal.
- [6] As is evident from the terms of the award, this is not the basis on which the commissioner proceeded. Instead, he found that there had been no instruction issued by the owner to the third respondent. In my view, it was not open to him,

given the terms in which the dispute had been framed by the third respondent's representative, to make this finding. In any event, none of the three reasons proffered by the commissioner for making the finding he did are sustainable, having regard to the evidence. What the commissioner was required to do, confronted as he was with a factual dispute, was to determine the probability of the respective versions that served before him. None of the reasons referred to in the award. None of the reasons mentioned by the commissioner serve to establish that the evidence given by the applicant's owner was any more or less probable than that given by the third respondent.

- [7] For the above reasons, in my view, the commissioner's factual finding that the applicant's owner did not issue an instruction to the third respondent to ensure that employees clocked out for lunch and tea breaks falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence. That finding therefore stands to be reviewed and set aside.
- [8] However, that leaves the issue of the appropriateness of dismissal as a sanction. This matter was not canvassed by the commissioner, on account of his factual finding. The only evidence of any consequence in relation to the appropriateness of sanction is the fact that the third respondent had relatively long service (12 years) and that the offence in question was his first disciplinary offence. Although the applicant's owner gave evidence as to his willingness (or, more accurately, his unwillingness) to continue to work with the third respondent, this was in relation to the remedy of reinstatement rather than the appropriate sanction for the misconduct committed by the third respondent. In these circumstances, in my view, the matter ought to be remitted to the first respondent for consideration, by a different commissioner, of an appropriate sanction for the offence of a failure to comply with a reasonable instruction.
- [9] I make the following order:
1. The finding by the second respondent that the applicant had failed to prove that the third respondent had refused to carry out a reasonable instruction is reviewed and set aside
 2. The matter is remitted to the first respondent for consideration by a commissioner other than the second respondent of the appropriateness

of dismissal as a sanction for the misconduct committed by the third respondent. To this end, the commissioner is entitled to have regard to the existing record, and may require the parties to lead further evidence or file any submissions necessary to make a determination in this regard.

3. There is no order as to costs.

Van Niekerk J

Judge of the Labour Court

APPEARANCES

APPLICANT: D.A. Swanepoel, Thomas & Swanepoel Inc, Tzaneen

THIRD RESPONDENT: Union official