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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 131/15

In the matter between:

**THORBURN SECURITY SOLUTIONS
SOUTHERN REGION (PTY) LTD t/a
THORBURN ARMED RESPONSE**

Applicant

and

MDLETYE, SITHEMBELA

First Respondent

CCMA

Second Respondent

MOSES, ORLANDO N.O.

Third Respondent

Heard: 21 June 2017

Delivered: 2 August 2017

Summary: Review – misconduct – insubordination. LRA s 145.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant, Thorburn Armed Response, dismissed the first respondent, Sithembela Mdletye, for insubordination. He referred an unfair dismissal dispute to the CCMA (the second respondent). Commissioner Orlando Moses (the third respondent) found that the dismissal was unfair and ordered the company to reinstate the employee. The company seeks to have the award reviewed and set aside.

Background facts

- [2] The company provides security services in terms of the Professional Security Industry Regulations Act ("PSIRA") to its customers in the Western Cape. The employee was an armed response officer as provided for in terms of PSIRA. He started working for the company on 29 October 2013. He was dismissed on 7 November 2014. When he was dismissed, he was on a valid final written warning for insubordination. The chairman of the disciplinary hearing found that he had committed misconduct in these terms:

'Insubordination: Not following a reasonable instruction from your manager in that on 30th October your manager instructed you not to attend either Saturday, Sunday or Monday night shifts, as you were to start on Tuesday the 4th November to cover another shift. You failed to follow this instruction by working on Saturday and Sunday night directly disobeying the direct instruction.'

The award

- [3] The arbitrator found that:
- 3.1 The company had not proven that the employee had received an instruction on 30 October 2014 to not to work night shift on 1, 2 or 3 November 2014;
 - 3.2 he would only be required to work a different shift if an agreement was reached to such effect and no such agreement was reached between him and his direct manager, Gerhard Claasen; and

3.3 the company denied him the right to be represented at the disciplinary hearing.

Evaluation : Procedural fairness

- [4] In concluding that the chairman, Rood, denied the employee the right to be represented at the disciplinary hearing, the arbitrator had regard to the minute of the disciplinary hearing and specifically the fact that Rood recorded that the employee's representative was not available and that the employee had failed to ensure his availability.
- [5] The arbitrator formed the view that this fact corroborated the version of the employee, i.e. that his elected representative was on duty on that date and the company informed him at the disciplinary hearing that he would solely be entitled to use a representative who is off duty.
- [6] Rood's version was that the employee's representative was not on duty on the date of the hearing. The reason why he was not present at the disciplinary hearing was simply that the employee had failed to secure his attendance.
- [7] It was the duty of the employee to secure the attendance of his representative. That representative was not in attendance at the onset of the hearing. There is thus no indication that the employee's representative attended the disciplinary hearing and was then told that he could not be in attendance as only off-shift employees were allowed to represent a fellow employee.
- [8] This is a factor which a reasonable commissioner would have considered in weighing up the directly conflicting versions of the employee and the company's witness, Rood. In failing to do so, the arbitrator committed a reviewable irregularity.

Evaluation: Substantive fairness

- [9] The employee was dismissed for failing to adhere to a repeated reasonable instruction. An audio record of the conversation between him and his superior, Claasen, used at the arbitration, reads as follows:

'G. CLAASEN: Tuesday morning 6 o'clock do you copy.

S. MDLETYE: The instruction.

G. CLAASEN: Yes it was Tuesday morning when I spoke to you.

S. MDLETYE: You never told me that you never told me that you never told me I mustn't come today.

G. CLAASEN: Okay I will give you another instruction today that you mustn't come to work tomorrow and Monday night so Tuesday morning 6 o'clock.

S. MDLETYE: I hear you what is the reason?

G. CLAASEN: The reason is that you must start on a Tuesday morning.

S. MDLETYE: Just tell me what is the reason that made you say I mustn't come tomorrow?

G. CLAASEN: Because I'm your operational manager and I'm not going to discuss it further you mustn't come to work tomorrow night or Monday you must start on Tuesday morning 6 o'clock thank you. That is all.

S. MDLETYE: What time is that? You don't have something to say to a person or I need to know what is the reason?

G. CLAASEN: Because there is somebody on leave on the other shift so you must start on Tuesday morning and I said you must come on Thursday and you acknowledged it and you said it was fine.

S. MDLETYE: That is why you never told me you suppose to tell me I know about that story.'

[10] Claasen further replied in cross examination that:

'...it was a reasonable time I instructed you not to come in to work yes in your contract it says that carry out the employer's lawful instructions conveyed from time to time so from time to time I can ask you please do this reasonable please do that.'

[11] The employee refused to work the changed shift.

[12] Mr Nel referred to the Constitutional Court's judgment in *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board*¹ where "insubordination" was defined by Dambuza AJ as '... when an applicant refuses to accept the authority of a person in a position of

¹ 2014 (3) SA 544 (CC) par 213 and 57.

authority over him or her. Insubordination is misconduct because it assumes a calculated breach, by the applicant, of the duty to obey the respondent's lawful authority'. And Froneman J described it as '... the disregard of ... authority or lawful and reasonable instructions'.

[13] On the facts before the arbitrator, the employee was guilty of insubordination. Yet the arbitrator concludes that, as the employee worked two shifts, i.e. 2 and 3 November 2014, before being charged with insubordination, the company in effect accepted his conduct.

[14] There is no rational or reasonable basis for such conclusion, specifically given the short time period between the transgression and the employee being charged. He was charged on 4 November 2014, i.e. the date upon which he was supposed to commence working day shift, which he did not do.

Conclusion

[15] A reasonable commissioner would have agreed with the disciplinary hearing chairperson's finding of insubordination and the fairness of the dismissal, more so as the employee was on final written warning for the same type of misconduct.

Order

The arbitration award dated 5 February 2015 under CCMA case number WECT 17731-14 is reviewed and set aside. It is replaced with an award that the dismissal of the employee, Mr Sithembela Mdletye, was substantively and procedurally fair.

A J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Adv A J Nel

LABOUR COURT