



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA, HELD IN
JOHANNESBURG**

Case no: JR 667/15

In the matter between:

MOETI JOHN LESEDI

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER TIMOTHY BOYCE
N.O**

Second Respondent

DISCHEM PHARMACIES

Third Respondent

Heard: 17 May 2017

Delivered: 15 February 2018

Summary: (Review – no evidence of improper motive –circumstantial evidence)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is a review application. Judgment was finalised and was due to be handed down on 30 May 2017, but inexplicably and regrettably this did not happen.
- [2] The only issue before the arbitrator concerned the substantive fairness of the applicant's dismissal. The applicant had been dismissed on two counts of misconduct: (a) for gross dishonesty in misleading management in his interview about his qualifications and experience and (b) gross negligence in completing and creating a prescription incorrectly.
- [3] On the first count, the arbitrator found that on the employer's own evidence the, employer accepted that the certificate that the applicant was a pharmacist's assistant was legitimate and that when he said he had experience as a pharmacist assistant in the public sector and community sector he had not misled the employer ('Dischem').
- [4] The second charge related to the incorrect entry of prescription information on to the computer system. The first prescription was for antibiotic syrup for a child but instead was entered on the system as a tablet having a dosage with a daily strength of more than 1100 mg of antibiotic compared to the prescribed amount of 750 mg in syrup form. Fortunately, the error was detected by a pharmacist before the medication was dispensed.
- [5] The second prescription was for five different kinds of medication. In the case of Glamaryl, the dose entered by the applicant was three times the prescribed dose. In the case of Carvetrend, the prescription was entered as three tablets daily instead of one. In the case of Calciferol, a dosage of one tablet twice a week was recorded as '2 tablets 3 times a day weekly'. In respect of Calcicard, a dosage of one tablet a day was captured as "one tablet 3 times a day once daily" and an Autrin dosage of one capsule a day was captured as "immediately and then for cough once daily", whereas the medication is an iron supplement not used for coughing. The incorrect capturing of the Calcicard medication could have caused blackouts in the patient.

- [6] There was testimony that the applicant had been moved from working in a call centre to over the counter work (OTC) because of the errors he had made capturing scripts at the call centre. The applicant claimed no knowledge of the reason he was moved. He had no explanation why he had been moved to the OTC section and argued that the employer had fabricated allegations to get rid of him. He denied making mistakes and although he admitted that entering the incorrect details could pose serious health risks for patients, he pointed out that his work was checked by a pharmacist.
- [7] The applicant's defence to the incorrectly captured first prescription was that the certified copy of the script he had generated had been generated by someone entering the computer system and using his name and details including his password. The arbitrator found that there was no explanation he could advance why someone would have done that. In relation to the second prescription, the applicant denied that the employer had produced any document showing that the certified copy was incorrect when he captured it on the system.
- [8] The arbitrator also noted that when the applicant was asked why the dispensary manager, who had a number of pharmacists to check the employees work, would falsify the certified copy of the second script he could not attribute any ill-motive to him and conceded that he did not have any problems with the manager.
- [9] In his evaluation of the evidence, the arbitrator readily agreed on the basis of the respondent's own evidence that the applicant was not guilty of the first charge but on the second charge found that the evidence of the dispensary manager was overwhelming and substantiated the charge, whereas the applicant's claim that the evidence was fabricated to falsely implicate him was unimpressive. The arbitrator found that there was no reason why an unknown person would have created an incorrect certified copy of the script with his name on it if the applicant had captured the certified copy correctly.
- [10] Turning to the question of the appropriate remedy the arbitrator felt that the misconduct did not warrant the sanction of dismissal because he had

only worked for approximately two weeks when he was suspended and no progressive discipline was applied.

- [11] Nonetheless, the arbitrator believed that reinstatement was not an appropriate remedy because it would have been intolerable. The primary reason for this conclusion was the fact that the applicant stubbornly refused to acknowledge any wrongdoing and moreover he accused the employer of fabricating evidence and making false allegations. The arbitrator concluded "These claims by the employee were patently false and I cannot see how sound employment relationship could ever be expected to develop between an employer and employee with employee falsely accuses his or her employer plotting to have him dismissed."
- [12] In the circumstances, the arbitrator awarded two months' remuneration as compensation taking into account his brief length of service and the fact that he was still employed as well as the fact that the employee had not produced any evidence to show that he had attempted to secure alternative employment after his dismissal.

Grounds of review and evaluation

- [13] Firstly, the applicant claims that the arbitrator failed to appreciate that the employer had an improper motive for bringing the charges against him. Part of this contention appears to be based on the belief that having failed to prove the first charge, the employer then sought to implicate him in another form of misconduct. The respondent points out that it was only after he was dismissed that the applicant obtained the certificate proving that he was registered to work as a pharmacy assistant in the community sector. There is nothing to gainsay Dischem's version that the certificate only came to light after the applicant was dismissed. Therefore, at the time of his dismissal, it was not unreasonable of Dischem to believe that he did not have the necessary qualification. Further, the second charge relating to the inaccurately captured scripts was not a charge brought subsequent to the failure to prove the first charge but was brought simultaneously with it and was the other reason he had been dismissed, so the argument that

it was launched as an attempt to bolster Dischem's case against the applicant does not make sense.

- [14] Apart from the fact that he could not identify who would have a motive to dismiss him, the only other suggestion the applicant could make in support of his claim Dischem's motives were improper was the allegation that it was because he had expressed an interest in joining a union. However, that is a claim which he abandoned for the purpose of the arbitration, and the arbitrator rightly cautioned him about raising it in the course of his testimony. This was because if he wished to rely on that evidence to suggest bad faith, it meant his case was no longer a case based on unfair dismissal for misconduct but an allegedly automatically unfair one and accordingly the arbitrator would not have been able to hear his case. If the circumstantial evidence of the certified copies of the scripts is considered, there was even less reason for the arbitrator to have believed that the second charge was simply a desperate attempt to implicate the applicant in some misconduct.
- [15] In a related ground of review, the applicant claims that the arbitrator failed to capture his evidence that the motive for charging him was a result of him having to ask about whether the institution he worked at had a union and that he was targeted because of that. It is true that the arbitrator did not mention this evidence in the arbitration but that is because when it was raised by the applicants representative, the arbitrator asked whether the applicant intended to pursue a case based on the reason for the dismissal being related to his wish to join a union but the applicant's representative was adamant that was not his case. Accordingly, there is nothing untoward about the arbitrator not mentioning it in his award, because the applicant was not contesting the fairness of his dismissal on that basis.
- [16] The applicant also contends that the evidence of the Call Centre Dispensary Manager was hearsay. A related point raised by him is that the manager's evidence could not be relied on as she did not authorise the first prescription and Dischem should have called the pharmacist who checked the prescription as a witness. It is true that Dischem did not call the pharmacist who had vetted the incorrect scripts to testify but the

documentary evidence itself pointed to the applicant as the originator of the inaccurately captured details, based on his initials being on the bar-coded stamps appearing on both doctors' prescriptions. It was sufficient to tender the evidence of these documents and the associated computer generated invoices, which could only have been created by a person using his login details and password, to shift the evidentiary burden to him to lead evidence in rebuttal.

- [17] In an associated ground of review, the applicant argues that the arbitrator could not have found that the evidence of the manager was 'overwhelming' if it was not corroborated. Dischem retorts that the corroboration the material was found in the documentary evidence relied on which the applicant could not effectively refute. The applicant made much of the fact that the computer generated invoice issued in respect of second prescription was not initialed by himself and the pharmacist unlike the other one. He argued that this supported his contention that it was manufactured purely for the purposes of the case. The respondent points out that the applicant conceded that for this document to be generated someone would have to have used his username and password and he was unable to suggest who might have done this or even who might have had a motive to do so.
- [18] During argument *Mr Kubayi* argued vigorously that it was evident that the computer generated invoice for the first prescription which appears at page 31 of the pleadings bundle has a bar-coded sticker which was not initialed by the applicant. The same bar-coded sticker for that script on the copy of the doctor's prescription however was initialed by the applicant, which meant he captured the correct prescription, but the computer generated invoice had not been generated by him because it lacked an initialed sticker. The evident difficulty with this argument was that the initialed sticker on the doctor's prescription was the same as the sticker on the computer generated invoice. Both the sticker on the prescription and that on the invoice contained the price appearing on the invoice, which means even if the applicant only initialed the sticker on the doctor's prescription, that sticker must in all probability have been generated when the invoice was generated. The prospect that the sticker he initialed was

for a correctly generated invoice but had exactly the same price as the amount of the incorrect generated invoice script is so remote that it renders the applicant's defence based on bad faith on the part of Dischem wholly implausible.

Conclusion

[19] Considering the analysis above, the crux of the applicant's case is that, the arbitrator incorrectly evaluated the evidence and ignored or failed to appreciate that the evidence relating to the inaccurately captured scripts was fabricated. The arbitrator was required to consider this defence on the probabilities and he discounted it in the light of the evidence of the certified copies of the scripts, which the applicant conceded could only have been generated by someone locked onto the system using his details. In the absence of evidence of any reason why the dispensary manager would have fabricated such evidence, it cannot be said that the inferences the arbitrator drew were unreasonable ones. In so far as the applicant believes that there was an improper motive for his dismissal, he elected to submit his case to arbitration on the basis that he was not guilty of the misconduct. In so doing, he chose to abandon his alternative claim of an automatically unfair dismissal which he could have referred to the Labour Court. In the absence of advancing any other motive, it is hardly surprising that the arbitrator did not find this defence plausible.

[20] In the circumstances, I am not persuaded that the arbitrator committed reviewable irregularities or reached conclusions no reasonable arbitrator could have reached in arriving at his findings based on the evidence before him.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

N E Kubayi of Noveni Eddy
Kubayi Inc.

THIRD RESPONDENT:

N Preston of Cliffe Dekker
Hofmeyr Inc