



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

CASE NO: PR 206/2016

Not reportable

In the matter between

GENERAL MOTORS SOUTH AFRICA

(PTY) LTD

Applicant

and

NATIONAL UNION OF METALWORKERS OF SA

First Respondent

JEROME SAMSON

Second Respondent

JAMES MACKRIEL

Third respondent

LUBABALO MDYOGOLO

Fourth Respondent

BRIAN COETZEE

Fifth Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Sixth Respondent

FREDERICK SAULS N.O

Seventh Respondent

Application heard: 20 March 2018

Judgment delivered: 6 April 2018

JUDGMENT

VAN NIEKERK J

- [1] The respondents apply for leave to appeal against the whole of the judgment delivered by this court on 30 January 2018. For convenience, I refer to the parties as they were cited in the review application. In its judgment, the court reviewed and set aside an arbitration award issued by the seventh respondent (the arbitrator), in which he had found that the dismissals of the second to fifth respondents (the employees) were unfair, and reinstated them with retrospective effect.
- [2] The reasons for reviewing and setting aside the award are set out in the judgment, and I do not intend to repeat them here. For present purposes, it is sufficient to record that the review application raised three primary questions. The first is whether it was permissible, at the level of principle, for the applicant to dismiss employees who had exceeded the limit of 30 days on account of excessive and persistent albeit absenteeism due to ill health. The second question is whether it was reasonable for the arbitrator to conclude that the

hearings conducted by the applicant were not truly incapacity hearings but hearings into allegations of misconduct. The third question is whether it was reasonable for the arbitrator to come to the conclusion that the dismissal of each of the individual respondents was unfair because the decisions about the extent of their incapacity were speculative. The court found in favour of the applicant in relation to each of these questions.

- [3] The respondents raise three broad grounds on which leave to appeal is sought, each of which broadly and respectively relates to the above issues. The first relates to the category of dismissal and whether the prevailing authority of *AECI Explosives Ltd (Zomerveld) v Mambalu* [1995] 9 BLLR 1 (LAC) ought to have been distinguished; the second relates to the nature of the enquiries conducted by the applicant; the third to the court's findings in respect of the fairness of the dismissals of each of the individual respondents.
- [4] In relation to the first ground, the respondents accept a category of dismissal for persistent but intermittent absence on the grounds of ill-health, but seek to distinguish *AECI* (where that authority was established) on the basis that the facts in that matter were not concerned with a collective agreement. In my view, the central issue is not whether a collective agreement formed part of the factual matrix in *AECI*, but whether the agreement in the present instance precluded a category of dismissal such as that recognised by the LAC in *AECI*. The collective agreement specifically envisages that employees would be at risk of dismissal on account of persistent but intermittent absence due to ill-health where absence exceeded the 30-day limit established by the BCEA. In other words, dismissals in those circumstances would be permissible, on the terms and in accordance with the procedure established by the agreement. There is nothing in the collective agreement that precludes the applicant from dismissing the employees for intermittent absence, in other words, from applying the principle established in *AECI*. In short, the collective agreement acknowledges the principle and provides

for the terms of its implementation. There is thus no merit in the first ground of appeal.

- [5] In relation to the second ground, the court concluded that in so far as the arbitrator had held that the individual respondents had been dismissed for a failure to comply with their contractual obligations (a form of misconduct), on the evidence, this was simply not the case. The evidence demonstrated that while the individual respondents were unable to attend work with the regularity that their contracts required of them, it did not necessarily follow that the issue was one of conduct and that any hearing ought only to have been concerned with allegations of misconduct. The court's decision on this point – i.e. that the applicant was entitled to treat the matter as one of incapacity due to ill-health – is hardly controversial, and there is no merit in the ground for appeal.
- [6] In relation to the third ground of appeal, that which concerns the court's decision in relation to the arbitrator's finding that the applicant had speculated on the employees' medical conditions, it should be recalled that the applicant did not take issue with the assertion that the employees were capable of performing their duties when they were at work. What was at issue was their inability to report at work with the required degree of regularity. The number of days absence was an obviously relevant matter, as were the numerous counselling sessions held with each individual, and the offers of support and assistance offered each of them by the applicant. The individual circumstances of each employee are recorded in the judgment and need not be repeated here, but none of them establishes any degree of speculation on the part of the applicant.
- [7] In short, none of the grounds for appeal have merit. The respondents have failed to establish that another court would reasonably come to a different conclusion. The application stands to be dismissed. Finally, here is no reason why costs should not follow the result.

I make the following order:

1. The application for leave to appeal is dismissed, with costs.

André van Niekerk

Judge

Labour Court