REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 806/13

J 2033/14

In the matter between:

G4S CASH SERVICES SA (PTY) LTD	**Applicant**
and	
NBCRFLI	**First Respondent**
COMMISSIONER T NYATHELA	**Second Respondent**
HENDRY CHILOANE	**Third Respondent**

Heard: **31 May 2018**

Delivered: **1 June 2018**

Summary: Review – LRA s 145 – dismissal for misconduct – award finding dismissal unfair and reinstating employee. Award not reviewable. Application dismissed with costs.

JUDGMENT

STEENKAMP J

Introduction

[1] Two applications were heard simultaneously. Both arise from an arbitration award by the second respondent, Ms T I Nyathela, a panellist of the first respondent, the National Bargaining Council for the Road Freight and Logistics Industry. She found that the applicant, G4S, unfairly dismissed the third respondent, Mr Hendry Chiloane. She ordered G4S to reinstate the employee. G4S seeks to have the award reviewed and set aside in terms of s 145 of the LRA.[1] The employee seeks to have the award made an order of court in terms of s 158(1)(c). Both applications were opposed.

[2] The Bargaining Council could not provide a recording of the arbitration proceedings. The parties reconstructed the record with the help of the commissioner and her handwritten notes. The parties agreed that the reconstructed record was sufficient for the Court to decide on the review application.

Background facts

[3] Mr Chiloane was employed as a radio controller. The employer's main witness, Mr Isak Maartens, described the employee's duties as entailing controlling vehicles that do cash pick-ups by cellphone or radio. He must give instructions to cash in transit vehicle drivers to ensure that pick-ups are done.

[4] When he was asked why the employee was disciplined, Maartens replied that "there was an email requesting proof that the client was serviced. I [Maartens] went to the manager to report that that the employee was not giving me proof that he picked up from the client."

[5] The employee was notified to attend a disciplinary hearing to answer to the following allegations of misconduct:

[1] Labour Relations Act 66 of 1995.

> "1. Failing to comply with an instruction from management: On 2010-12-29 you were issued with an instruction by management to provide the outstanding receipts for casual services on 2010-12-30. You failed to do so.
>
> 2. Dereliction of duties: In November 2010 you were instructed to ensure that casual services were done as per the spreadsheet provided and that when the services were rendered to ensure that the copies of the receipts were collected from the crews. You failed to adhere to the instruction.
>
> 3. Negligence: As the controller you are responsible for the controlling of operations and to ensure that all services requested by clients are done. You failed to do so and this resulted in a lot of services not rendered."

[6] The chairperson of the disciplinary hearing, Mr William Monyela, found the employee "guilty" on all three "charges" and he was dismissed with immediate effect. The employee referred an unfair dismissal dispute to the Bargaining Council.

The arbitration award

[7] Only two witnesses testified at arbitration: the employee and Mr Maartens, the branch security officer for the employer.

[8] Maartens testified that he had received an email requesting proof that a customer had been serviced. He instructed the employee to give him the receipt for the pick-up. The employee refused and told him to find it in the box room as it was not his responsibility. He stated that "the case against the employee is not about the receipts but that he failed to ensure that the pick-ups were done". As a result of pick-ups not being done, G4S had lost some R50 000, 00. He conceded that receipts were kept in the box room but stated that they were first given to the controller. The receiving controller was Mike Majutla.

[9] The employee testified that he did not give Maartens the receipts as it was not his responsibility. His responsibility was to have telephonic and radio discussions with crew and customers, not to keep receipts from pick-ups. He conceded that he told Maartens to go and find the receipts in the box room.

[10] The arbitrator started from the premise that the employer bore the onus to show that the dismissal was fair. She accepted the employee's consistent evidence that it was not his duty to handle receipts and that they were kept in the box room. She noted that the employer did not provide the employee's job description and that, under cross examination, Maartens could not deny that the receipts went straight to the box room. She concluded that the employer had failed to prove on a balance of probabilities that it was the employee's responsibility to keep the receipts from pick-ups.

[11] Regarding the complaint that the employee had missed pick-ups, leading to a R50 000 loss, the arbitrator noted that the employer had not led any evidence to show how it had arrived at that figure. And it called no witnesses to testify that pick-ups had not been done. The employee insisted that he had executed his duties. On a balance of probabilities, the employer had not proven that the employee had failed to inform crew to do pick-ups.

[12] The arbitrator also found that the employer had acted inconsistently by not charging the other controller, Mike Matjula.

[13] The arbitrator was not satisfied that the trust relationship had broken down. She found that the dismissal was unfair and ordered G4S to reinstate the employee retrospectively.

<u>Review grounds</u>

[14] Mr *Crafford* raised some seven grounds of review:

14.1 The arbitrator did not consider the oral evidence of the employer's witness, Maartens.

14.2 The finding that the employer did not prove the loss of R50 000 was "incorrect".

14.3 The arbitrator's negative inference regarding the failure to call customers as witnesses was incorrect.

14.4 There was no inconsistency in not charging Mike Matjula.

14.5 The finding on the trust relationship was without adequate reasoning.

14.6 The arbitrator had an unbalanced approach in weighing up the evidence.

14.7 The arbitrator did not consider the actions of the employer "were indicative of its adherence to proper procedure and fairness".

<u>Evaluation / Analysis</u>

[15] I will deal with each of the review grounds in turn, although Mr *Crafford* focused his oral argument on his contention that the crux of the matter was that the employee had refused an instruction to find the receipts and that that in itself should have justified his dismissal for insubordination.

[16] The problem with that submission is that the employer's sole witness, Maartens, stated quite clearly that ""the case against the employee is not about the receipts but that he failed to ensure that the pick-ups were done". And the arbitrator dealt with both complaints.

Maartens's evidence

[17] Mr *Crafford* submitted that, in concluding that it was not the employee's duty to keep the receipts, the arbitrator "failed to consider the oral evidence and the documentary evidence presented by the applicant [G4S] during the arbitration". He pointed in this regard Maartens's evidence that the crew handed their receipts to the controller before they went to the box room.

[18] But, as the arbitrator records in her award, Maartens did not deny in cross-examination that the receipts went straight to the box room. The arbitrator's notes reflect this exchange:

> "Q: You cannot say with certainty that the receipts from pick up do not go via his [the employee's] office but straight to the box room?
>
> A: Yes, I cannot deny…"

[19] The arbitrator pertinently took that into account. Her conclusion on a balance of probabilities, having considered and weighed up the two versions before her, is not so unreasonable that no other arbitrator could have come to the same conclusion.

R50 000 loss?

[20] Mr *Crafford* argued that the arbitrator incorrectly found that the employer had not proven how it arrived at the loss of R50 000. But Maartens had testified that 63 customers had been missed. He added:

> "An amount is worked out for each pick up. I added amounts together and arrived at 50 000 approximate – not sure. I cannot disclose the amount. I do not have evidence of that."

[21] From this exchange it is apparent that the arbitrator's conclusion was reasonable. As Maartens conceded, he did not have evidence of how he had arrived at the amount of R50 000, 00. This ground of review fails.

Negative inference: failure to call witnesses

[22] The arbitrator noted that G4S had not called any of its customers to testify that pick-ups had not been done. Mr *Crafford* submitted that the arbitrator incorrectly drew a negative inference from this failure and that she misunderstood the process regarding pick-ups. She did not consider that the customers do not communicate directly with the controller.

[23] Although the arbitrator's finding in this regard is no more than a passing comment, it was not unreasonable to point out that the employer could have called witnesses to testify as to the missed pick-ups. However, there is nothing in the award to point to her drawing a negative inference from this omission. She merely weighed up the evidence of the employer against that of the employee and came to a reasonable conclusion on the balance of probabilities.

Inconsistency

[24] The arbitrator found that the employer had acted inconsistently by not charging the other controller, Mr Matjula. Mr Crafford says in his heads of argument that "evidence to this effect was never lead" [*sic*] and that the arbitrator's finding is "without merit and irregular".

[25] It was common cause that both Messrs Chiloane and Matjula worked in the control room. Both of them refused to provide receipts. Yet, when challenged, Mr Maartens could not say that Matjula had been charged.

Maartens stated that Mike (Matjula) was the relieving controller and that he “would not hold him responsible for the control room”.

[26] The finding that the employer acted inconsistently by charging only one of the two controllers is not so unreasonable that no other arbitrator could have made the same finding.

Trust relationship

[27] The employer states that the arbitrator’s opinion that the parties could continue working together “is without any adequate reasoning”. But she does provide her reasoning, albeit briefly. She found that the employee had not committed the misconduct complained of. In those circumstances, there was no good reason why he should not be afforded the primary remedy of reinstatement. Her conclusion is not open to review, as opposed to appeal.

Unbalanced approach?

[28] Mr *Crafford* submitted that the arbitrator had an “unbalanced approach” in weighing up the evidence, in that “certain findings regarding material issues are not sustainable and that she in general failed to grant the employer a fair arbitration”.

[29] This ground of review is vague and without substance. The parties had a fair hearing. The review ground is without merit.

Failure to consider employer’s actions

[30] The final review ground is that the arbitrator “failed to consider that the actions of the employer were indicative of its adherence to proper procedure and fairness”.

[31] Again, Mr *Crafford* did not elaborate upon this vague and unsubstantiated complaint. Procedural fairness was in any event not in issue. This review ground has no merit.

<u>Conclusion</u>

[32] The conclusion reached by the arbitrator is not so unreasonable that no other arbitrator could have come to the same conclusion on the same evidence. The award is not open to review, as opposed to appeal.

[33] In those circumstances, there is no reason why the arbitration award should not be made an order of court.

[34] This Court must take into account the requirements of the law and fairness when deciding costs.[2] Taking into account the first requirement, the unsuccessful party should pay the costs. And in fairness, the employee – who was dismissed eight years ago – should be reimbursed for the legal costs he had to incur to defend an award in his favour.

<u>Order</u>

[35] I therefore make the following order:

35.1 In case number JR 806/13, the application for review is dismissed.

35.2 In case number J 2033/14, the arbitration award issued under NBCRFLI case number LPRFBC 18418 dated 26 February 2013 by commissioner T I Nyathela is made an order of court.

35.3 The applicant in case number JR 806/13 and respondent in case number J 2033/14 (G4S Cash Services SA (Pty) Ltd) is ordered to pay the costs in both applications.

Steenkamp J

Judge of the Labour Court of South Africa

[2] LRA s 162.

APPEARANCES

APPLICANT:	C Crafford (attorney).
THIRD RESPONDENT:	A Goldberg (attorney).