THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1249/16

In the matter between:

TRANS CALEDON TUNNEL AUTHORITY SOC LIMITED **Applicant**

and

CARINA BLEEKER **First Respondent**

RONEL DE WET **Second Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Third Respondent**

Heard: **02 May 2018**

Delivered: **15 August 2018**

Summary: **Review application – failure to renew a fixed-term contract when reasonable expectation was justified.**

Unfair labour practice – unpaid performance related bonus – decision to moderate the final performance appraisal score was arbitrary and capricious.

JUDGMENT

NKUTHA-NKONTWANA. J

<u>Introduction</u>

[1] In this application the applicant seeks an order reviewing and setting aside the arbitration award issued by the second respondent (commissioner) under case number GATW14482/15, dated 27 May 2016. The commissioner found, firstly, that the applicant's failure to renew the first respondent's (Ms Bleeker) fixed-term contract constitutes a dismissal in terms of section 186(1)(b) of the Labour Relations Act (LRA);[1] and, secondly, that the decision not to pay Ms Bleeker her bonus that was due when her fixed-terms contact terminated constitutes an unfair labour practice in terms of section 186(2)(a) of the LRA. Ms Bleeker is defending the award.

[2] The application is essentially hinged on the following grounds:

2.1. That the commissioner incorrectly found that Ms Bleeker was dismissed when she had failed to prove that she had a reasonable expectation as required by section 186(1)(b);

2.2. That the commissioner failed to apply her mind to the evidence before her that Ms Bleeker was not entitled to a bonus due to her rating falling below 3.2 threshold;

2.3. That the commissioner created a perception of bias through her conduct by upholding Ms Bleeker's objections whilst dismissing the applicant's objections;

2.4. That the commissioner incorrectly drew a negative inference when the applicant failed to call the Chief Executive Officer (CEO), Mr James Ndlovu, and the Chief Operations Officer (COO), Ms Jeanette Nhlapo, as witnesses;

2.5. That the commissioner failed to apply her mind to the evidence that was before her by ignoring inconsistencies in Mr Bleeker's evidence

[1] Act 66 of 1995 as amended.

and accepting hearsay evidence in relation to the applicant's practice when it comes to renewal of fixed-term contracts.

Factual background

[3] The facts in this matter are mostly common cause and are outlined with meticulous detail in the award. I do not wish to repeat them save to highlight those that are pertinent.

[4] Ms Bleeker had been in the employ of the applicant for 18 years at the time of her dismissal. Prior to 2010 her employment was permanent. In 2010 she applied for the position of Manager: Enterprise Wide Support Service (EWSS) and was appointed on a five year fixed-term contract, commencing from 1 September 2010. This position was permanent when it was created in 2003 and was called Corporate Affairs Manager then.

[5] In 2009 the applicant's Board of Directors decided to convert the position from permanent to a fixed-term of five years. In fact, it was the applicant's evidence that the Board's decision affected all executive positions in order to allow rotation of executives within the roles. Nonetheless, the nature of the position remained permanent.

[6] Naturally, Ms Bleeker was concerned about the impending expiry of her fixed-term contract and approached the Human Resources Manager, Mr Mabena, for advice sometime in June 2015. She was advised to draft a motivation to the CEO for the renewal of her contract, which she did on 15 June 2015. The only feedback she received in that regard was that the CEO was still pondering on the request.

[7] On 5 August 2015, whilst waiting for the response on her expiring fixed-term contract, Ms Bleeker received an instruction from the CEO to attended a workshop that was scheduled to take place on 30 September 2015 to 1 October 2015. Clearly, this engagement fell outside the term of Ms Bleerker's contract.

[8] On 18 August 2015, Ms Bleeker was advised that her contract would be extended for a month and shall terminated on 30 September 2015. No reason was proffered for the decision not to renew Ms Bleeker's contract. Ms Bleeker was adamant in her evidence that the applicant had been renewing executive managers' fixed-term contracts as a matter of practice. She was the only one whose contract was not renewed. This evidence was not disputed.

[9] At the time of Ms Bleeker's termination, she was due for a performance bonus. The performance appraisal started before 30 September 2015. In the EXCO meeting of 7 August 2015, Ms Bleeker and her colleagues were informed that the scores had already been allocated and that there would be one on one feedback discussion. Ms Bleeker's contract was terminated before she could receive feedback as promised.

[10] Ms Bleeker never received her bonus and upon enquiry she was informed that she was not eligible as her score had been moderated down from 3.75 to 3.1. She need to score 3.2 on order to qualify for a bonus. The applicant had unilaterally decided to moderate the score. Mr Moledi, the head of internal audit, testified that the moderation of Ms Bleeker's score was informed by, firstly, the performance targets she failed to meet; secondly, the organisational fruitless and wasteful expenditure that was apportioned to each division; and lastly, the investigation of the fixed assets that was pending at that time.

<u>Review test</u>

[11] The review test as postulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] had been expounded in various Labour Appeal Court cases and simplified in *Head of the Department of Education v Mofokeng*[3] as follows:

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[2] (2007) 28 ILJ 2405 (CC).
[3] *Mofokeng* [2015] 1 BLLR 50 (LAC) at paras 30 to 33; see also *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

> '[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, … this court in *Gold Fields* … held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…
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> [31] … Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.
>
> [32] … To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result …
>
> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute.'

<u>Evaluation</u>

[12] The first enquiry in this matter pertains to whether there was dismissal as defined as follows in terms of section 186(1)(b):

'(1) Dismissal means that-

(a) ...

(b) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.'

[13] Ms Bleeker bore the onus to prove that she had been dismissed by establishing that she held a reasonable expectation that her fixed-term contract would be renewed.[4] The commissioner was in turn required to determine whether on the facts before her, objectively considered, it had been established that Ms Bleeker held a reasonable expectation that her contract would be renewed.[5]

[14] The commissioner correctly found that Ms Bleeker held an expectation that her contract would be renewed. The CEO had a discretion to renew the contract at the end of the term and he decided otherwise, contrary to the practice. The applicant took issue with the admission of the evidence on discrepancies in relation to the manner in which the applicant handled the renewal of fixed-term contracts. However, this point is untenable as the applicant doesn't dispute that there were other fixed-term contracts that had been renewed.

[15] It is also common cause that the reason for fixing the term of executive manager's employment contracts was to allow for rotation. Even though, no evidence was led on how the rotation was intended to happen, it is

[4] Section 192 of the LRA states:
'(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.'

[5] *Ekurhuleni West College v Education Labour Relations Council and Others* [2017] ZALAC 75 at paras 17 and 18, see also *SA Rugby Players' Association v SA Rugby (Pty) Ltd* (2008) 29 ILJ 2218 (LAC) para 44 where the test is articulated as follows:

> "The enquiry is whether a reasonable employee, in the circumstances prevailing at the time, would have expected the employer to renew his or her fixed term contract on the same or similar terms."

inconceivable that the applicant would decide not to renew Ms Blekeer's contract when she had been in its employ for 18 years and the position was in any event available post the term of her contract.

[16] It follows that Ms Bleeker's expectation that her fixed-term contract would be renewed was justified. The commissioner was correct in her finding that the applicant's failure to renew the employment relationship constitutes an unfair dismissal.

[17] Consequent to the commissioner's finding that the requirements of s186(1)(b) had been fulfilled and Ms Bleeker had been dismissed, the onus of proof shifted to the applicant. It had to establish that the dismissal was both procedurally and substantively fair. The applicant chose not to lead any evidence in that regard. Since Ms Bleeker dealt directly with the CEO and COO, they were the only people who could shed some light as to why her contract was not renewed. The commissioner was on point in drawing an adverse inference from the failure to lead evidence of these two critical witnesses overall.

[18] Nothing turns on the extension of the contract by a month other than extending the terms of the contract that was not renewed. Therefore, there were no two fixed-term contracts as contended by the applicant.

[19] Turning to the section 186(2)(b) dispute in relation to the unpaid bonus, it is clear that the applicant did not communicate the reasons for moderating Ms Bleeker's performance appraisal score or afford her an opportunity to challenge the decision. What is apparent from Ms Bleeker's undisputed evidence is that she had been engaging the CEO on the obstacle that could have impacted on her performance and had been assured that those issues would be factored during performance appraisal.

[20] Also, without prior notice, Ms Bleeker could not have known that she was going to be held responsible for the overall performance of the organisation, including the fruitless and wasteful expenditure. At least, the applicant ought to have afforded Ms Bleeker an opportunity to be heard prior to taking the

final decision not to pay her bonus, a well-entrenched benefit defined in *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[6] as an '…existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion.' Even though the employer has a discretion not to pay a bonus, that discretion must be exercised judiciously. In this instance, Ms Bleeker was presented with a *fait accompli.*

[21] In the premise, it is my view that the applicant's decision not to pay Ms Bleeker her performance bonus for the financial year 2014/2015 is arbitrary, capricious and inconsistent with the constitutional imperatives.[7] The commissioner cannot be faulted in her finding in that regard.

[22] Having had regard to the transcript, I agree with Ms Bleeker's counsel that the applicant's complaint that the commissioner was bias is ill-conceived. The applicant had declined an opportunity to formally challenge the commissioner's perceived bias. In any event, to succeed, the applicant had to establish that there was a reasonable suspicion of bias on the part of the commissioner.[8] I am not convinced that the manner in which the commissioner conducted the proceedings created a justifiable impression that she was inclined to assist Ms Bleeker in putting her case and to challenge the applicant's case.[9] Conversely, the applicant's representative, Mr Mabena, was not conversant with the arbitration process and the commissioner had to be more inquisitorial without descending into the arena.

[23] Ultimately, the commissioner understood her role and exercised her discretion in accordance with the three considerations stated by the Constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal*

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[6] [2013] 5 BLLR 434 (LAC) at para 50.
[7] *Supra* at paras 42 and 53. See also *NEHAWU v University of Cape Town and Others* 2003 (2) BCLR 154 (CC) at para 34.
[8] *BTR Industries SA (Pty) Limited and Others v MAWU and Another* (1992) 13 ILJ 803 (A), *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059.
[9] *Jansen v Commission for Conciliation Mediation and Arbitration and Others* [2014] ZALCJHB at para 12.

Industries and Others,[10] to, firstly, resolve the real dispute between the parties; secondly, to do so expeditiously; and thirdly, to act fairly to all the parties. Also, she studiously dealt with the issue of the relief.

<u>Conclusion</u>

[24] In all the circumstances, the commissioner's findings cannot be faulted and the arbitration award falls within the ambit of reasonableness required. The application stands to be dismissed.

[25] Dealing with the issue of costs, I have taken into account the state of the record and the applicant's attitude when it was warned of the inappropriateness of overburdening the Court with irrelevant documents. Also, the applicant ought to have been better advised on the prospects of vainly challenging the award in the light of its failure to lead evidence to prove that its decision not extend Ms Bleeker's contract was procedurally and substantively fair. Therefore, there is no reason in law and in fairness why the applicant should not pay Ms Bleeker's legal costs.

[26] In the premises, I make the following order:

<u>Order</u>

1. The review application is dismissed with costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

[10] 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC) at para 65.

Appearances:

For the applicant:	Advocate Pranisha Pillay
Instructed by:	Selomo Attorneys Inc.
For the first respondent:	Johanette Rheeder of Johanette Rheeder Incorporated