



Not reportable

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

Case Nos: JR 1203/16

J 1256/16

In the matter between:

HOLLARD (PTY) LTD

Applicant

and

THEMBA HLATSHWAYO (N.O.)

First Respondent

**THE COMMISSION FOR
CONCILIATION, MEDIATION &
ARBITRATION**

Second Respondent

YASSEN HASSAN EBRAHIM

Third Respondent

Heard: 6 September 2018

Delivered: 11 September 2018

Summary: (Review- absenteeism – findings of arbitrator on substantive fairness not unreasonable)

JUDGMENT

LAGRANGE J

Background

- [1] The third respondent in this matter was dismissed for unauthorised absenteeism for the period 21 to 24 December 2015.
- [2] Less than a month before that, he had received counselling and a written warning relating to poor attendance. On 21 December, it is common cause that he reported his absence to one Siphokazi Nyetela ('Nyetela'), a team leader. Nyetela was not Ebrahim's team leader. His team leader was Serona. It was also not disputed that he could not attend his doctor who normally treated him for his condition, which the applicant was aware of. It was suggested by the applicant that he could have gone to any other doctor and the medical aid would have paid for this, but this was not pertinently raised in the arbitration with Ebrahim. In relation to the medical justification for his absence, the issue for the applicant was that, Ebrahim did not produce a medical certificate on his return to work. Ebrahim had raised the reason for his absence at the disciplinary enquiry.

The arbitration award

- [3] The arbitrator found that the third respondent's dismissal was substantively and procedurally unfair and ordered his reinstatement.
- [4] The arbitrator's reasoning in relation to the finding of procedural unfairness appears to be the following:
 - 4.1 Ebrahim was asked to provide a statement prior to the respondent making out its own case in disciplinary enquiry which the arbitrator considered to be a glaring flaw and was contrary to the disciplinary procedure. It should have been run according to the applicant's own disciplinary code;
 - 4.2 as a result of the procedural irregularity his personal situation was not considered, and
 - 4.3 he was not provided with minutes of the internal enquiry.

[5] The arbitrator's finding of substantive unfairness seems to be based on the following:

5.1 The applicant's own code did not recognise absenteeism as a serious form of misconduct.

5.2 His failure to see a doctor was due to shortage of ready cash.

5.3 The applicant was aware of his condition and had given him time off for it previously.

5.4 The third respondent had informed Nyetela of his situation. The failure of the applicant to call Nyetela to shed more light on whether she was contacted or not, justified an adverse inference against the applicant.

Grounds of review and evaluation:

[6] In essence, the applicant raised the following grounds of review:

First ground

[7] The arbitrator misconstrued the relevance of the evidence about whether or not the third respondent spoke to Nyetela, because it was common cause that he did. However he only informed her of his absence on the first day and did not contact anyone during the remaining three days and in any event, she was not his team leader who he ought to have contacted, so it was irrelevant that he communicated with her.

[8] The issue of Nyetela not being Ebrahim's team leader was never put to him in the arbitration. His evidence was that, at the time, Nyetela was the manager on duty. This was also not disputed.

[9] While the arbitrator was wrong in drawing an adverse inference of some kind on account of the applicant's failure to call Nyetela as a witness, there was no dispute that Nyetela was contacted by SMS and the applicant did not put up an alternative version of the contents of the SMS. Similarly, the applicant did not dispute Ebrahim's claim that he also spoke to Nyetela. It also did not gainsay his evidence that he advised her that he was ill with the same symptoms he had previously and would consult with a doctor but

could not say when he would be back, and that she had responded that it was 'fine' and they would speak when he returned. He claimed that he had showed her his bank statements to show he could not afford to visit a doctor at the time. At his enquiry, it was common cause that he said he had self-medicated as he knew what he had to take for his condition.

- [10] It is unclear what the nature of the adverse inference was that the arbitrator claimed to draw on the basis of Nyetela's absence. Such an inference might have been warranted if the applicant disputed Ebrahim's version of what was communicated to her by him, but it did not contest it. In effect, the arbitrator could have accepted his version without needing to draw an 'adverse inference' in the true sense of the term. Consequently, the arbitrator's error had no material impact on the reasonableness of the inference that could be drawn about Ebrahim's communication with Nyetela.

Second ground

- [11] The applicant alleges that, in the absence of any medical records, there was no evidence to support the third respondent's claim that he was absent due to illness. In terms of company procedures, he required a medical certificate before his leave would be treated as authorised sick leave, given the length of his absence. In this regard the arbitrator also failed to consider the 'undisputed' evidence that the medical aid allowed him access to specific doctors at no further cost
- [12] The only time it was suggested he could have used his medical aid to go to another doctor was when the commissioner was questioning Ms G Williams, the call centre manager, after she had already been re-examined by the applicant's representative. After outlining various types of leave employees could apply for, she testified that if no proof of sick leave was presented, then a counselling session would be held with the employee and if it happened again then there would be a session with HR and a warning would be issued depending on the scenario and the severity of the case. In Ebrahim's case, he had been counselled on one occasion on 25 November 2015 in respect of days he had been absent during the months of September, October and November which were all authorised

absences. On 17 December he had then been issued with a warning following two instances of unauthorised leave.

- [13] It is true there was no evidence other than Ebrahim's word that he was suffering from a recurrence of a condition and therefore he had not complied with the rule. The applicant did not dispute that he was suffering from a particular condition or that it knew of it. It also did not dispute his evidence that the doctor who normally treated him for the condition was on leave. The evidence on whether he would not have had to pay for treatment and medication if he had gone to another doctor was at best equivocal and was not central to the applicant's case. The foundation of its case was that, without a medical certificate the leave was unauthorised whatever the reason for not obtaining one. The applicant also did not attempt to dispute Ebrahim's version that on 21 December he had explained his absence on account of a recurrence of his illness and that Nyetela appeared to accept that he would explain things on his return, albeit that she might have expected him to have returned with a certificate.
- [14] In relation to this ground, it does not appear that the arbitrator concluded that his leave was authorised but rather that there were circumstances which mitigated his failure to return with a certificate. That was not a wholly unreasonable inference to draw.

Third ground

- [15] There was no evidence to support a conclusion that he was in any way prejudiced by the manner in which the disciplinary enquiry was conducted and accordingly no basis for concluding it was procedurally unfair.
- [16] In this respect, the applicant is on stronger ground. The arbitrator appears to have overlooked that Ebrahim was given an opportunity to challenge the company's opening statement at the enquiry but chose not to pose any questions arising therefrom. The alleged failure to provide him with minutes of the enquiry was also not something which impacted on the procedural fairness of the enquiry as such. The procedure of the company making a statement and allowing the employee to challenge it, is somewhat unusual but in the absence of the employee wanting to

challenge its contents or question the author of the statement and being deprived of that opportunity, any prejudice he might have suffered was not demonstrated. It is trite law that mere non-compliance with a disciplinary code, without any attendant prejudice arising therefrom, is not sufficient to make out a case for procedural unfairness.

Fourth ground

- [17] The arbitrator most importantly failed to take account of the fact that he had been subjected to a system of progressive discipline for absenteeism and had received his last warning for it for days before committing the offence again.
- [18] It is true that Ebrahim had received counselling in November about absenteeism but inexplicably none of that absenteeism was unauthorised. The first and only instance of counselling followed by a first and only written warning was on 17 December which was for unauthorised absenteeism. This is one of those instances where the court cannot say that his absence on 21 to 24 December so clearly warranted dismissal, that it is incomprehensible how the arbitrator could have come to a different conclusion. It may be that the arbitrator neglected to consider an alternative or lesser sanction such as a final warning, if he thought the infraction was not serious enough to warrant dismissal because of mitigating factors and the absence of prior final warning, but his finding that the dismissal was substantively unfair cannot be set aside using the applicable standard of review.¹ The arbitrator's findings in this respect fall within the ambit of his power to determine the substantive fairness of the dismissal² and are not findings no reasonable arbitrator could have reached on the evidence before him.

¹ See *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at 2812, para [32].

² See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at 2427-8:

[61] There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. H All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that

Relief and costs

- [19] The review is partially successful only on the issue of procedural fairness, but that does not affect the relief awarded so it is not necessary to alter the relief granted. On balance, the more significant finding of substantive fairness is upheld and the third respondent is entitled to his costs in my view.

Order

- [1] The arbitration award of the first respondent dated 16 May 2016 issued under case number GAJB 2410-16 is reviewed and set aside only to the extent that the arbitrator's finding that the dismissal of the third respondent was procedurally unfair is replaced with a finding that the dismissal was procedurally fair.
- [2] Accordingly, paragraph 6.1 of the award is replaced with the following :
- 6.1 I find that the dismissal of the applicant, Yassen Hassan Ebrahim, by the respondent, Hollard Insurance, was substantively unfair.
- [3] The said award, as amended above, is made an order of court.
- [4] The applicant must pay the third respondent's costs.

Lagrange J
Judge of the Labour Court of South Africa

the commissioner is to determine the dismissal dispute as an impartial adjudicator. Article 8 of the International Labour Organization Convention on Termination of Employment 158 of 1982 (ILO convention) requires the same. Any suggestion by the Supreme Court of Appeal that the deferential approach is rooted in the prescripts of the LRA cannot be sustained.

APPEARANCES

APPLICANT:

A J Posthuma of Snymans
Inc.

THIRD RESPONDENT:

A Goldberg of Goldberg
Attorneys

LABOUR COURT