



Of interest to other judges

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

Case no: JR 903/16

In the matter between:

**ANGLO OPERATIONS (PTY) LTD
(GOEDEHOOP COLLIERY)**

Applicant

and

**NATIONAL UNION OF
MINEWORKERS**

First Respondent

SOLOMZI MPIKO (N.O.)

Second Respondent

NOZIPHO FELICIA PENNISTON

Third Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Fourth respondent

Heard: 06 September 2018

Delivered: 14 September 2018

Summary: (Review – insubordination and failure to obey a reasonable instruction – arbitrator’s failure to contextualise conduct led to failure to

appreciate gravity of misconduct and to consider relevant evidence leading to findings which cannot be sustained on the evidence)

JUDGMENT

LAGRANGE J

Background

- [1] The third respondent, Ms N Penniston ('Penniston') was found guilty and dismissed for failing to carry out and disregarding an instruction to bring her copy of her letter of appointment to the company, as the company had lost its copy. The letter reappointed her with effect from 17 February 2015 as an Instrument Mechanician at the Goodehoop Colliery's Simunye Shaft under s 7(4) of the Mine Health & Safety Act, 29 of 1996 ('MHSA'). The appointment is a statutory one in terms of which a person with qualifications can be appointed under regulation 2.9.2 of the Mine Health and Safety Regulations (Minerals Act) to perform health and safety functions imposed by the MHSA on the employer and the mine manager.
- [2] The arbitrator concluded that Penniston had failed to carry out an instruction given by the engineering manager of the colliery, Mr R Youell ('Youell'), to submit her copy of the appointment letter.
- [3] Before the return of her copy of the letter of appointment became a bone of contention, Penniston had made a major issue about signing the letter of appointment in the first place. It was only after the intervention of the union, the acting engineering manager and the HR manager that she could be persuaded to sign the letter nearly six weeks after it should have been signed. The reason for her reluctance was a clause in the letter stating that the appointment cancelled and superseded all previous letters of appointment. It was only when the HR manager issued her with a separate document confirming that the appointment did not affect her contract of employment that she agreed to sign the letter. The same clause was in the previous appointment letter she had signed in 2014 as well.

- [4] Unfortunately, soon after signing it, the general manager's secretary appears to have lost the company's copy. This led to the requests being made to Penniston to return her copy. For a long time, she maintained that she could not find her copy, which she explained was partly owing to her moving house. It was her persistent failure to produce her copy which ultimately led to senior managers issuing her with instructions to do so. Her non-compliance with those instructions led to her dismissal.
- [5] Prior to Youell issuing the instruction described below, there had been various other instructions issued to Penniston, none of which she complied with, namely:
- 5.1 On 23 April 2015, Ms J Olivier, the mine's Human Resources Business Partner, who occupied a managerial position, instructed Penniston to bring a copy of the letter in as quickly as possible.
 - 5.2 On 30 April 2015, Olivier followed up this instruction with an email to Penniston repeating the instruction and proposing that if she did not have her copy anymore they would reprint one for her to sign. There was no response from Penniston. Penniston claimed that she did not have access to her company email at the time.
 - 5.3 On 7 May 2015, Ms K Antwerp ('Antwerp'), Penniston's line supervisor, instructed her to bring a copy of the letter. Penniston agreed this was a reasonable request. It was never suggested at that stage that Penniston could not locate it.
 - 5.4 At a meeting on 4 June 2015, the Human Resources Manager, Mr M Dugmore, orally instructed her to bring the copy by lunchtime the following day.
- [6] There was also evidence that the section engineer where Penniston worked, Mr M Nefale, had sent an email to Olivier on 7 May 2015 stating that despite speaking to Penniston, she was still refusing to provide the letter of appointment. Youell also testified that he became aware in May 2015 that the mine did not have a copy of the appointment letter and that Antwerp and Nefale had asked Penniston to provide her copy.

- [7] Youell spoke to her informally about it on 8 May and asked her if he could not provide her with a copy to sign if she had perhaps mislaid her copy, but she said it was not necessary as she still had her copy. Penniston denied he offered to provide another copy for her to sign but never challenged his evidence on this point under cross-examination. Nor did she put her version to him that it was difficult for her to look for her copy because of all her responsibilities at home. She also did not put her version that he threatened her with dismissal if she did not bring it.
- [8] Youell testified that Penniston had refused or was unwilling to submit her copy of the letter to the HR department. On 5 June 2015, he instructed her to bring the copy to work on 8 June, but she was absent on leave that day and only returned on 11 June. On her return, she still did not provide the copy, nor did she even attempt to contact Youell. In essence, her explanation for not attending to the instruction was that, she was too busy on her return to work to do so. The arbitrator noted that she did find time to lodge the grievance, but did not have time to revert back to Youell. In his view, it was reasonable for Youell to expect that she would report back to him at the earliest opportunity, which was 11 June.
- [9] On 12 June, having received nothing from Penniston, Youell lodged a complaint against her for not complying with his instruction. On the same day, she lodged a grievance against him for the instruction he gave her a week earlier, on 5 June. Her complaint was that the instruction given to her by Youell 'had nothing to do with my job as a mechanician' and that it was unfair to 'victimise' her for someone else's mistake, namely the General Manager's secretary apparently having lost the company copy of the contract. As a solution to her grievance, she wanted Youell to stop giving her with 'unlawful instructions'.
- [10] On 2 July 2015 the General Manager, Mr E Becht ('Becht') presided over the grievance hearing. He summonsed Youell to the grievance hearing and learned that Penniston had disregarded previous instructions to submit the copy. He repeated the instruction saying she should either bring it in or sign a new copy by the following day. He offered to have another copy printed for her to sign but she declined the offer saying she

would fetch her copy. Despite this, she only brought the document a week later.

- [11] The arbitrator concluded that since the applicant had already been charged with misconduct by the time Becht repeated the instruction, the charge could not have incorporated her refusal to obey his instruction. He concluded that the only charge she was facing was that of not complying with the instruction of the engineering manager.
- [12] The arbitrator also rejected the suggestion that previous requests by various HR personnel to the third respondent could constitute instructions because those staff were not in her line management structure. He accepted too that, she could not have responded to instructions on email because she had no access to email. In that regard, he accepted that even though her evidence in this regard was challenged, her claim could not be shown to be improbable. Lastly, he found that in the absence of direct evidence from her line managers that they also instructed her to hand in the letter, the claim that they did so was unsubstantiated, even though he accepted that they could have engaged with her concerning her letter of appointment.
- [13] The arbitrator also considered the argument that, deliberate failure to comply with the instruction was considered to be an act of gross insubordination. However, he noted that Penniston was only found guilty of failing to comply with an instruction or disregarding it. Having regard to the disciplinary code, the fact that she had a clean record and that the recommended sanction was a severe warning in the absence of any reasons why the employer was justified in deviating from those guidelines, the sanction of dismissal was inappropriate.
- [14] He further found on the basis that the employer had not suspended Penniston pending the enquiry and therefore it could not be said that the trust relationship had broken down.
- [15] Accordingly, he found that Penniston's dismissal was substantively unfair and reinstated her with retrospective effect to the date of her dismissal.
- [16] He also found that her dismissal was procedurally unfair on the basis that:

- 16.1 The employer had failed to consult the union before instituting disciplinary charges against her.
- 16.2 The employer had deviated from the disciplinary code in allowing the engineering manager to be the complainant when the code only provided for the line manager to make a complaint.
- 16.3 The general manager who chaired the appeal hearing could not have been neutral and was probably biased the appeal when he heard the appeal, because in his capacity as the chair of her grievance hearing he had also reissued the instruction to hand in the letter and thereby had become a participant in the dispute.

Grounds of review

[17] The applicant seeks to review the award on the grounds of reasonableness and submits the following reasons:

- 17.1 The arbitrator failed to consider the seriousness of her failure to provide a signed letter of appointment because it was obliged to have such a letter in order for the applicant to work on the mine in her appointed capacity in terms of the Mine Health and Safety Act 29 of 1996 ('the MHSA').
- 17.2 In finding that the applicant did not have justifiable reasons for deviating from the recommended sanction in the disciplinary code, the arbitrator ignored the fact that Penniston had committed gross insubordination by failing to provide the letter and that in the absence of having such a letter she could not work on the mine. Moreover, the arbitrator failed to appreciate that she had wilfully refused to provide the document and there could have been serious consequences if she was found to be performing her duties without it. He also ought to have had regard to the fact that she had been requested to provide the letter on numerous occasions over a period of four months and had failed to give adequate explanation for not doing so. As such, her conduct amounted to a serious, persistent and deliberate challenge to the employer's authority.

17.3 In relation to the finding that her dismissal was procedurally unfair on account of the employer failing to consult with the union before instituting disciplinary action, it simply ignored the uncontested evidence that hearing was postponed when it became apparent that there might have been a need to consult with the union. Despite being fully aware of this, the arbitrator simply ignored this when he reached his conclusion.

17.4 The arbitrator failed to consider that all the other employees who had instructed her to submit her copy of the letter were in managerial positions and had the necessary authority to instruct her to return the letter.

17.5 By interpreting the failure to suspend the third respondent as evidence that there was no breakdown in the relationship, the arbitrator misconstrued the purpose of a suspension which is a separate issue, to be determined on its own merits. Instead, the arbitrator should have focused on the effect the third respondent's conduct had in undermining the trust that managers could have in her that she would follow instructions.

17.6 The arbitrator ignored evidence that even when she filed her grievance, she defended her failure to comply with the instruction of the engineering manager to bring the letter of appointment as it had nothing to do with her duties.

Evaluation

[18] Penniston's counsel characterised the matter as a "storm in a teacup". Certainly, that is how the saga began. It could have been resolved simply by Penniston agreeing to sign another copy of the letter. Instead, Penniston's persistent failure to produce the letter caused the matter to escalate and the proverbial storm in a teacup grew into a mini tornado, which sucked in management at different levels until eventually the general manager himself became involved.

[19] The review is one based on reasonableness and the current test is now well established, viz:

Mere errors of fact or law may not be enough to vitiate the award. Something more is required. 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 enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[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 enquiry. 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 enquiry, 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. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have

diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.¹

- [20] Accordingly, the court must ultimately be satisfied that the conclusions reached by the arbitrator are ones that could not have been arrived at by any reasonable arbitrator if the material errors in the reasoning of the arbitrator were corrected.

First and second and sixth grounds of review

- [21] Both these grounds relate to the arbitrator's appreciation of the gravity of Penniston's misconduct. The arbitrator treated Penniston's failure to provide her copy of the letter in an extraordinarily rigid and narrow way, by discounting all instructions issued by anyone other than Penniston's direct line management and by excluding consideration of the mine manager's instruction from consideration. This narrow appreciation of the events was reflected in his failure to appreciate that being able to provide a copy of the letter of appointment was vital in the event of an inspection by the DMR and that operations could be halted if such a letter could not be produced.
- [22] By narrowing down the misconduct to a single failure to comply with one instruction by Youell, entailed a completely misleading characterisation of that conduct which occurred in the context of prolonged and repeated efforts to get Penniston to co-operate in submitting her copy over a period of almost four months, in circumstances where she never sought to justify or explain her failure for doing so at the time and where, more than once, she declined the obvious alternative of simply signing another copy. Moreover, even if she had been charged before Becht issued the instruction, the fact that she didn't even respond to that instruction from the general manager promptly ought to have been considered by the arbitrator as an aggravating factor and also indicative of her lack of commitment to remedying her previous non-compliance. She might not have been charged with gross insubordination, but she never put a coherent explanation to the mine's witnesses for her non-compliance other than not receiving some of the email instructions, and it is difficult to

¹ *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at 2812-3

understand how the arbitrator could not have appreciated that her conduct could not be interpreted as anything less than persistent and deliberate challenge to the employer's authority. The way she framed her grievance against Youell exemplifies her attitude at the time: she simply did not accept the legitimacy of his instruction on a highly technical basis. It is also telling that, if she had told him she had been unable to obtain the certificate because of all her other domestic responsibilities, as she claimed in her evidence, that she did not even give the slightest hint of this in her grievance.

Third ground

[23] I agreed that the arbitrator simply ignored the fact that the hearing was postponed when the objection was raised that the union had not been consulted before instituting disciplinary action against Penniston, even though it is highly debatable that her status in union structures entitled her to be treated as a shop steward when it came to disciplinary action.

[24] However, this was not the only ground of procedural unfairness and I cannot say the arbitrator was unreasonable in finding that the general manager ought not to have chaired the appeal hearing owing to his direct involvement in the matter in issuing a further instruction to Penniston after she had been charged. In any event, in the circumstances of this matter, that would not warrant any compensation in my view as the primary enquiry was not impugned and Penniston in any event walked out of the enquiry.

Fifth ground

[25] The arbitrator based his conclusion that trust had not been destroyed entirely on the employer's failure to suspend Penniston pending her enquiry. By contrast, there was Youell's evidence that she could still perform her duties as he knew she had been validly appointed and he had been advised not to suspend her. On the other hand, he felt that her persistent refusal to comply with the simple and reasonable instruction, compromised the trust relationship that should have existed.

- [26] The implication of the arbitrator's logic is that, even though the reasons for a suspension are quite independent of determining the guilt of an employee, an employer should anticipate the ultimate question to be determined in a dismissal enquiry, namely the intolerability of the employee remaining at work because of the gravity of their misconduct and its impact on the employment relationship. A failure to do so and to suspend the employee would otherwise lead to a presumption of trustworthiness irrespective of the outcome of the enquiry. This is clearly a misdirection and the arbitrator failed to consider the impact of the Penniston's recalcitrant conduct, which was established in the hearing, on the integrity of the trust relationship going forward.
- [27] It is true Penniston had a clean record before she was dismissed, but the arbitrator's failure to contextualise her non-compliance with the instructions against the build up to Youell's first instruction after she declined to sign a copy and her refusal to accept his authority and consequent unwillingness to comply promptly with the mine manager's instruction even when she was facing the disciplinary charge. The conclusion on the evidence before the arbitrator is inescapable that the matter escalated to a various serious level because of Penniston's obdurate attitude over a considerable period. Moreover, it was conduct displayed by a qualified person in a responsible position in the mine, not a junior employee, who might be more easily excused a failure to appreciate the implications of non-compliance. Penniston had herself to blame for the way it escalated and the serious ramifications it had.
- [28] In light of the above, I am satisfied the review should succeed in respect of the finding of substantive unfairness.

Order

- [1] The arbitration award of the second respondent issued under case number MP 8024-15 dated 3 March 2016 is reviewed and set aside, save for his finding that her dismissal was procedurally unfair.

- [2] The second respondent's finding that Penniston's dismissal was substantively unfair is substituted with a finding that Penniston's dismissal was substantively fair.
- [3] Insofar as Penniston's enquiry was procedurally unfair, it did not warrant any award of compensation.
- [4] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

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LABOUR COURT