THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1956/16

In the matter between:

PETER DEAN **Applicant**

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER ARNE SJOLUND N. O **Second Respondent**

FESTIVE (A DIVISION OF ASTRAL OPERATIONS LIMITED) **Third Respondent**

Heard: **26 November 2019**

Delivered: **03 December 2019**

Summary: Review – although arbitration is a hearing *de novo* – a commissioner does not start at a clean slate. Duties – to determine, through evidence, whether the misconduct that led to a dismissal is established and whether the sanction of dismissal is fair. The duty of the reviewing Court is not to appeal but to review by applying the test whether the decision arrived at by a commissioner tasked with the determination of fairness is one that a reasonable decision maker may arrive at. Held: (1) The application for review is dismissed. (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application seeking to review and set aside an arbitration award issued by the second respondent, in terms of which the dismissal of the applicant was found to be fair. The applicant was dismissed for misconduct of fraud and/or dishonesty. The applicant contends that the award is defective and ought to be set aside by this Court.

Background facts

[2] The applicant was employed by the respondent on or about 18 December 2012 as Refrigerator Foreman. Following an internal investigation, the applicant was charged with three acts of misconduct. Two of the acts involved fraud and or dishonesty in that for a period of about eight months (January to August 2015), the applicant improperly claimed overtime, which could not be reconciled with the clock cards and that for the month of September 2015 there were no clock cards for the claimed overtime.

[3] The applicant was found guilty of two of the allegations of fraud and dishonesty in relation to the months of April and September 2015 overtime claims. Resultantly, on 25 December 2015, the applicant was dismissed. Aggrieved by his dismissal, the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging unfair dismissal. At the arbitration proceedings, the applicant sought legal representation. On 30 March 2016, the second respondent issued a written ruling refusing legal representation. After hearing evidence, the second respondent issued the impugned award on 9 August 2016.

[4] Aggrieved by the award dated 9 August 2016, on or about 21 September 2016, the applicant launched the present application. The application is opposed by the third respondent.

Grounds of review

[5] In his founding papers, the applicant alleged that the award is not one that a reasonable commissioner would arrive at when the evidence and the law are taken into consideration. He further alleged that the award is riddled with defects because:

5.1 The second respondent failed to comply with provisions of the Labour Relations Act[1] (LRA) with regard to conducting a fair and proper arbitration;
5.2 Factual findings did not correspond with the evidence placed before her;
5.3 She exceeded her powers in that she acted in an *ultra vires* manner;
5.4 Failed to apply mind to the facts and the law;
5.5 Issued an irrational, unjustifiable and an unreasonable award;
5.6 Failed to assess the evidence;
5.7 Denied legal representation and;
5.8 Committed gross irregularity and misconduct.

The issue of legal representation

[6] On this issue, the second respondent issued a separate written ruling on 30 March 2016. In terms of section 158 (1) (g) of the LRA, this Court retains jurisdiction to review the performance or purported performance of any function provided for in the LRA on any grounds permissible in law. The applicant in his notice of motion did not seek an order to review this ruling. What the applicant did, improperly so, was to raise the refusal of legal representation as a ground of reviewing the award of 9 August 2016. Thus, the ruling of 30 March 2016, has not been attacked and shall remain valid and binding.

[1] No. 66 of 1995, as amended.

[7] When this issue was raised with Mr Du Randt, appearing for the applicant, he submitted that section 158 (1B) of the Act prevented a piecemeal attack. It is indeed so that the LRA discourages piecemeal approaches. However, such does not mean that a separate decision may be attacked in the papers where such a ruling is not referred to as being attacked. Therefore, the submission is unhelpful to the applicant. Until set aside by a competent Court, the ruling of 30 March 2016 remains valid and binding on the parties.

Evaluation of the merits of the review

[8] The applicant was dismissed because he made himself guilty of fraud and or dishonesty by claiming overtime for the month of April and September 2015. The second respondent was faced with two conflicting versions. The first of which was that the third respondent contended that there existed a rule that required the applicant to clock in and out when undertaking overtime duties. The applicant's version was that the rule was only introduced in October 2014. In order to resolve this disputed fact, the second respondent took into account a common cause fact that in March 2015, the applicant was penalized for failing to prove that he worked overtime and has since failed to challenge that. On that, she drew an inference that the applicant agreed that he did not work the time claimed. This Court is unable to fault this inference particularly because it is one a reasonable decision maker may draw.

[9] There was no dispute that the applicant failed to clock in when he allegedly worked overtime. In argument, Mr Durandt, submitted that it was impossible for the applicant to clock as he did not physically come to work. This is a lame excuse, given the fact that on the applicant's own version, from October 2014, a rule was introduced to clock in. In the Court's view, this rule was introduced for a good reason. The reason was simply to curb claiming of overtime not worked. If an employee clocks in when commencing overtime duties and clocking out after the duties, an

employer is able to firstly confirm that overtime work was indeed undertaken and secondly to confirm the hours worked. It is a logical and reasonable rule to put in place.

The April 2015 claim

[10] It is undisputed that the April 2015 overtime claim was compiled and signed by the applicant. For 12 April 2015, there is clear evidence that the applicant did not clock in or out as required by the rule. Instead, it is recorded by hand that "*went to Seekat for motors and went to PLA to work on project for killing*". In line with the rule, there is no evidence that indeed the applicant worked overtime as claimed. The applicant bore the evidentiary burden to show that indeed he worked overtime and for how long. Had he complied with the clocking rule, it was going to be easy to ascertain this. The applicant knew from October 2014 that he needed to clock in and out yet he simply failed to do so. It must follow that in failing to do so the applicant must have been hiding something from his employer. The following finding by the second respondent demonstrates the point and cannot faulted:

> 'This would suggest the respondent version of what transpired over a long period of time where the applicant failed or neglected to clock and claimed that he was at work whilst he was not and claimed time and overtime would be the more probable version.'

[11] The version presented by Mr Harman was that the applicant was not at work and claimed time he was not entitled to. He reported this to Mr, Muller who reprimanded the applicant. The applicant as testified changed the behaviour but later reverted to the not clocking and claimed time he did not work.

[12] When an employee claims overtime that he or she did not work, that employee is misrepresenting the true facts with a clear intention to fleece the employer. That is fraud and dishonesty. A finding that the applicant is

guilty of fraud and dishonesty as charged is one that a reasonable commissioner may arrive at. Heavy reliance was placed on the decision of the Labour Appeal Court in *Drs Dietrich Voigt and Mia (Pty) t/a Pathcare v Bennet and others*[2]. The case is distinguishable on the facts. There, the employee inflated the rate for overtime. The employee claimed at the rate of 1.5 as opposed to1.0. When the overpayment was discovered the employee refunded the money. The employee there failed to clock out and as a result the lunch breaks were not deducted from the overtime.

[13] In the matter before me, given the applicable rule of clocking in and out, the only manner to prove that the applicant indeed worked is the clock cards. The evidence points to the fact that the applicant did not work as testified by Mr Harman. Therefore, the principle enunciated in the *Dietrich* case is not applicable to the applicant.

The September 2015 claim

[14] In relation to this claim, the allegation specifically stated that no clock cards were available for the claimed overtime. The evidence did point that the applicant compiled overtime claim for the month of September. Indeed at the time of the investigations leading to his suspension, the claim form, as compiled by him, was not signed and/or submitted for approval. The documents to have been used for this claim indicated that there was no clocking, yet the applicant was *en route* to claim again overtime to the tune of about R5 644.50. During evidence, Harman insisted that clocking needed to be proven. The fact that the applicant was still to submit other clock cards is nothing but an afterthought. Thus, the applicant was equally guilty of not providing the clock cards for the hours already reflected in the compiled September claim. A conclusion that the applicant was guilty as charged is unassailable.

[2] [2019] 8 BLLR 741 (LAC)

The grounds considered.

[15] Other than a bald allegation of failure to comply with the LRA, there is no indication as to which provisions of the LRA were not complied with. Thus, this ground is not entertainable. Similarly, there is no basis for the alleged *ultra vires* acting. On the contrary, the findings of the second respondent are supported by the evidence presented before her. Failure to apply mind entails considering irrelevant factors and ignoring the relevant ones. There is no evidence to support the ground of failure to apply her mind. Proper reading of the award reveals that the second respondent assessed the evidence that was presented before her. Overall, the award is one that a reasonable commissioner may arrive at. This Court only possess reviewing powers and does not have appeal powers. Properly considered, this is an appeal disguised as a review.

Conclusion

[16] In summary, the denial of legal representation is a subject of a separate ruling which has not been challenged. The findings that the applicant was guilty as charged are unshakeable and are consistent with the evidence presented. All the grounds punted for are without merit. The award falls within the bounds of reasonableness thus unassailable in law.

[17] In the results I make the following orders:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: J Du Randt of DPP Attorneys, Rosebank.

For the Respondent: L Salt of ENSafrica, Sandton.