

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR712/15

In the matter between:

TZANENG TREATED TIMBERS**Applicant**

And

**NATIONAL BARGAINING COUNCIL FOR
THE WOOD AND PAPER SECTOR****First Respondent****M MASETLE N. O.****Second Respondent****CEPPWAWU OBO S MALATJIE AND 29 OTHERS****Third Respondent****Heard: 12 February 2020****Delivered: 24 March 2020**

Summary: Review – striking employees clocked in while on strike – prevented from clocking out at knock off time – charged with fraudulent clocking – believed would in any event not be paid because of no work no pay principle – arbitrator's award that summary dismissal under the circumstances was unfair is one a reasonable commissioner could have made – application dismissed

JUDGMENT

Introduction

- [1] The applicant seeks to review and set aside an undated arbitration award under case number WSB-LP-14-08-1789, which held that the employees' dismissals were substantively unfair. The second respondent (arbitrator) reinstated the employees but ordered that re-instatement was not retrospective and no backpay was payable.
- [2] The applicant failed to comply with clause 11.2.2 of the Practice Manual in filing the transcript of the proceedings. The applicant launched an application to revive the review application. It also asked for condonation for the late filing of its notices in terms of Rule 7A.
- [3] The applications for condonation were unopposed. Having considered the delay and the explanations for the delay the Court condoned the non-compliance and reinstated the review.

Background

- [4] The applicant's business operations concern the chemical treatment and supply of timber poles for various industries, but mainly transmission poles for Eskom. Fifty-seven of the hundred and forty-seven employees of applicant embarked on a protected strike on 4 August 2014.
- [5] Of the 57 union members on strike 30 arrived and clocked in. They are referred to as the individual respondents or the employees. They did not proceed to work but left the premises without clocking out and continued to strike in their work uniforms. The 30 employees or the individual employees are represented by CEPPWAWU ("the union").
- [6] At 12:00 the 30 striking employees who did not clock out attempted to gain access to the premises in order to collect their lunchboxes. It is common

cause that they did not convey an intention to clock out. The applicant denied them access for fear of intimidation of non-striking employees and damage to company property.

[7] At 16H50 the individual respondents requested access to the respondent's premises to access their lockers and to clock out. This is the normal time to knock off had they been working. Security again denied them access for fear of intimidation and damage to property.

[8] The union at approximately 18:24 on 4 August 2014 sent a letter to the applicant requesting it to allow the employees to access their personal belongings in the lockers and access to facilities such as toilets. It is common cause that the letter did not contain a request for access to the clocking machine to permit the employees to clock out.

[9] The applicant has a rule on clocking in and out titled "*Clocking Instructions*" dated July 2011 and clause 3 provides as follows:

"If an employee leaves the premises he/she must lock out. Employees leaving the premises without clocking out will face disciplinary action."

[10] After the strike the employees were suspended following which the employees were charged with fraudulent clocking:

"Charge 1: Fraudulent clocking in that on 4 August 2014 you clocked in for duty and left the premises without clocking out. This is a class 1 – very serious offence."

[11] The company's disciplinary code lists what is called class 1 offences, which are regarded as very serious and possible sanctions that may be imposed in the event of a guilty finding. One of the very serious offences listed is:

"Fraudulent timekeeping – clocking in for someone else, having someone clocking for you, clocking without actually working."

[12] The code further provides that an employee who committed the above offence would be taken to a formal disciplinary enquiry and the sanction of dismissal alternatively suspension without pay for a limited period may be imposed. The policy sets out the following nature of disciplinary action for a class 1 offence:

"The company will follow the following disciplinary code:

Class One	-	Very Serious
First Offence	-	Formal Disciplinary Enquiry
Disciplinary Action	-	Suspension without pay or dismissal."

[13] The employer dismissed them for a class I (serious) offence in that they allegedly acted fraudulently when clocking in, then leaving the premises without clocking out and attempting to clock out at knock off time.

[14] In the arbitration Suzette Denton testified on behalf of the company. She confirmed that on the two occasions, around 12:00 and 16:50 the individual respondents were denied access to the premises. The union put it to her that the employees did not clock out because the applicant denied them access to the premises. In cross-examination she said the following¹ :

"APPLICANT REPRESENTATIVE: So if you denied people to clock out, how possible do you think these people will manage the clock out in order to comply with the rules of the company?

RESPONDENT REPRESENTATIVE: Sir, because even if they were allowed to clock out, the offence would have been there, and was there, because they were not busy working when they were clocking out, they were busy running and jumping up and down outside the premises. The offence was already there. So whether I denied them to come and clock out or not, it's not the dispute Mr Ndou. The dispute is the offence was there. They should never have left the gate. The moment they passed that gate leaving the premises they committed the offence.

APPLICANT REPRESENTATIVE: Are you saying the industrial action was illegal?

¹ Transcript at p. 45 line 9.

RESPONDENT REPRESENTATIVE: I am not. We are not on the point of the industrial action Mr Ndou. They were committing an offence. The strike has got nothing to do with this. The employees left my premises without following company rules and regulations, without clocking out. This is the misconduct.

COMMISSIONER: Let me come in. As I understand Mr Ndou, and as per agreement, the employees committed a misconduct. However, the defence is that the employer that is the defence, the employer denied them access.

APPLICANT REPRESENTATIVE: Yes Commissioner.

COMMISSIONER: Yes, that is the dispute. But now as I understand during evidence in chief, this witness testified that the offence was committed at the time when they clocked in and left the premises without clocking out. That's the evidence.

APPLICANT REPRESENTATIVE: Much as we are proving that they didn't clock out because they were denied access.

COMMISSIONER: Yes.

APPLICANT REPRESENTATIVE: And she proves in terms of her response.

COMMISSIONER: Yes, no she agrees that the access was denied at 12 o'clock and at ten to five.

APPLICANT REPRESENTATIVE: Commissioner, she used the words the policy regarding clocking out is regarded as flawed on the time which has to do with finance, and obviously the principle of no work no pay has applied, so I don't know whether that offence could be classified as a class 1 offence. Can you explain to us?

RESPONDENT REPRESENTATIVE: Okay. I can explain to you sir, because how else do we control the attendance of employees? How else do we know that employees are striking or are merely sick, because if they are sick and they bring in a medical certificate, the employer acknowledges that and we have a clocking system where we record the sickness or the annual leave or anything. So that's our control measurement. So how will I know who is striking? Who is on annual leave? Who is clocked into work? Okay. The rule is there and for people to clock in and leave the premises to go on strike does not cancel my rule. That is the rule of this company and it is the rules and regulations and it's the right of this company and any other employer to enforce rules and regulations and disciplinary action in the company. Whether employees are on strike or not on strike. The conduct of employees must always be acceptable and this was misconduct and it's unacceptable."

- [15] She further testified that they could identify the thirty striking employees who clocked in because they were the ones that did not clock out for lunch, clock back for lunch and clocked out at 17:00. They must have been the ones on strike. They also had visual footage of who was on strike. There are photographs. In addition, they could identify those who were on leave or had medical certificates. They then investigated the records of each and every employee and evaluated their positions and that is how they arrived at identifying the thirty employees.
- [16] The individual employees appealed against their dismissal and one of the grounds of appeal was that the circumstances leading not to clock out was caused by the employer's management as they denied access to the premises. In her view clocking in for duty without actually working and leaving the premises while clocked in constituted fraud. She testified that in the disciplinary enquiry the employees acknowledged that they were fully aware of the clocking rules and consequences should they be found guilty of such an offence.
- [17] She also testified that the fact that they wished to clock out at 16:55 meant that they would have had working hours recorded for purposes of claiming payment. On that occasion they never explained that they had made a mistake by not clocking out before they had left the premises.
- [18] Mr Jacques Griesel also testified on behalf of the company saying that as soon as an employee clocks in and out he claims payment for the day. The company would have allowed them to clock out at say 07:45. In addition there is a remedy for employees who forgot to clock out but none of the thirty employees followed the procedure. There is no need for employees on strike to clock in. If they clock in they report for duty and not for the strike. According to him the striking employees did not get paid for the three days they were engaged in strike action. The company applied the principle of "no work no pay". The only way he could measure that people were not striking was by looking at the clock cards to see who clocked in in the morning and who clocked out.

[19] Mr Letsoalo also testified on behalf of the company. He conducted the inductions for new employees and he explained the conditions and policies to the individuals. He testified that the purpose of the clocking system is to show that the person is on duty as the company pays an individual according to the clocking system. When a person clocks in the applicant will pay that person. It would be possible that the company would pay someone on strike if that person had clocked in and out because the company pays according to the clocking system.

[20] Mr Ephraim Malemela testified on behalf of the employees. He confirmed that they went in and clocked in as they knew that they were not going to be paid for that day:

"INTERPRETER: When we clock in it is for the employer to see that a such and such person is at work even though we are at strike (inaudible)."

[21] He conceded that the clock machine controlled who was at work. He then explained the following:

"RESPONDENT REPRESENTATIVE: So Mr you take it that was you, you are at work while you are on strike and you have the right as an employee to clock because you are still an employee while you are at work. Explain to me how do you want the employer to establish who is on strike and was at work if we have to allow everybody to clock?

INTERPRETER: They will see at the machine who has come and who did not come.

RESPONDENT REPRESENTATIVE: Exactly so when you're on strike are you at work?

INTERPRETER: when I'm at, when I'm busy on strike is the same as when I'm at work. That is the same.

RESPONDENT REPRESENTATIVE: Mr Malemela why did you clock in on the fourth and the fifth? What is the reason?

INTERPRETER: It, it showed that I came to work.

RESPONDENT REPRESENTATIVE: you were fully aware that you are claiming working hours.

INTERPRETER: I knew that I was not going to be paid because when we are on strike you are not paid."

[22] He denied that he clocked in to claim payment that he was not entitled to. He then was confronted with the fact that he was not supposed to work on 4 August 2014. He was on night shift and without authority did not work the night shift, but that morning reported for the day shift and clocked in.

[23] Ms Malatji testified on behalf of the employees. She confirmed that the clocking system is for the company to see who has clocked in and is at work so that they can detect from the clocking system if you are not at work. She also testified that they clocked in because they were at work and the strike was legal. She testified as follows:

"RESPONDENT REPRESENTATIVE: Okay, so why did you clock in and leave the premises?

INTERPRETER: it's because I, I, I know that the strike is legally and it's done while we are at work.

RESPONDENT REPRESENTATIVE: Okay, so if you are clocking in, what happens to, do the company pay you?

INTERPRETER: No

RESPONDENT REPRESENTATIVE: Okay, so why didn't you clock out when you left the premises, before you left the premises on 4 August?

INTERPRETER: Uhm it's because I knew I am going to clock, clock uhm to clock in again at 12 o'clock to take my food and again clock out and then I will go and I will not go back to the yard.

RESPONDENT REPRESENTATIVE: Okay, so you are fully aware that you are claiming payment yet you were not busy with the duties that you were appointed for?

INTERPRETER: What I knew is that when I, I clock, I clock in and I, I did not work, they are not going to pay me."

[24] When asked to explain how the company was going to identify those who clocked in but were on strike she responded that the company was going to identify them because all those who were wearing uniform were outside and Suzette and the others were going to identify them. She testified further:

"RESPONDENT REPRESENTATIVE: Why was it important for you to clock out?

INTERPRETER: It's because we wanted to go because already we, we, we clock in, in the morning.

RESPONDENT REPRESENTATIVE: I'm putting it to you, you are lying you wanted the clock machine to register 9 working hours for you.

RESPONDENT REPRESENTATIVE: So then why clock out?

INTERPRETER: Because we were on the strike, which was done by the all the workers who were, by workers who are in that uhm company."

[25] It was again put to her that they attempted to be dishonest:

"RESPONDENT REPRESENTATIVE: Right, I'm putting it to you again that you were trying to be dishonest to claim payment from the company while you are not actually not working and that was the motive for attempting to clock out.

INTERPRETER: We didn't want to claim uhm, money we knew that if we did not work we were not supposed to get money.

RESPONDENT REPRESENTATIVE: Okay, so why clock?

INTERPRETER: We clocked because we knew that we are coming to work."

The award

[26] The arbitrator determined that dismissal was not an appropriate sanction. The following are the relevant observations in the award:

"[61] The applicants have maintained that the respondent denied them access to clock out. This was in reference to the two requests made by the applicants to the security officer at 12H00 p.m. and approximately 16H 50 p.m.

- [62] ... They signed for those policies understanding fully what they meant. I therefore find that the applicants were aware of the clocking instructions which require them to clock in and proceed to work. If they wanted to go out, they should have clocked out.
- [63] However the applicants testified that they clocked in and knew that the respondent would apply "no work no pay principle". The principle was indeed applied by the respondent and the applicants were punished for not working. This mitigates the intention to defraud the respondent. The fact that the applicants embarked on a protected strike and a misunderstanding seemed to have prevailed.
- [64] ... While the respondent submitted that the applicants should not have clocked in, the applicants understood that even if they clocked in, they knew that the principle of "no work no pay" would be applied. I am of the view that there was a misunderstanding in this regard.
- [65] This is clearly a serious matter for the respondent in terms of its code. This misconduct is a class 1 offence that leads to dismissal in terms of the respondent's code. However the circumstances under which the misconduct was committed and the understanding that prevailed amongst the applicants is worth considering.
- [66] In *Toyota SA Manufacturing (Pty) Ltd v Radebe & Others* (1998) 19 ILJ 1614 (LC), the Court indicated that dismissal should not be a "knee-jerk" to all serious offences. There may be circumstances which have a tempering effect, not on the seriousness of the offence as such, but on the severity of the penalty, in this case, the applicant submitted that they clocked in and proceeded to dance in support of the strike because they understood that a "no work no pay principle" would be applied. This is so because the employer in did not pay them for the days that they were on a protected strike.
- [67] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) the Court stated that "in deciding how commissioners should approach the task of determining the fairness of the dismissal, it is important to bear in mind the security of employment is a core value of the constitution which has been given effect to by the LRA. In approaching the dismissal dispute impartially a Commissioner will take into account the totality of the circumstances.
- [68] Having regard to the circumstances surrounding the infringement, I am of the view that dismissal is not an appropriate sanction."

[27] The arbitrator accordingly determined that the dismissal of the 30 members was substantively unfair on the basis that dismissal was not an appropriate sanction.

The grounds for review

[28] The grounds for review relate to the penalty. There are essentially two grounds for review:

28.1 The arbitrator committed a gross irregularity in that he failed to take relevant evidence into account in coming to a finding that the sanction of dismissal was not appropriate; and

28.2 The arbitrator's finding that the penalty of dismissal was not appropriate is not rationally connected to the evidence and is a decision that a reasonable decision-maker could not have reached.

[29] The attack on the award is directed at essentially the following finding:

"This mitigates the intention to defraud the respondent. The fact that the applicants embarked on a protected strike and a misunderstanding seemed to have prevailed."

Analysis

[30] The applicant submits that the arbitrator failed to find that the individual respondents intentionally made a misrepresentation that constitutes fraud. The fraud allegedly lies in the alleged representation that they made that they were at work and were entitled to claim payment as they clocked in and would have clocked out at knock off time.

[31] The submission is that the arbitrator failed to appreciate that the explanation of why they clocked in and left without clocking out did not make sense and should have been rejected out of hand. The explanation according to the

applicant was unacceptable and therefore the inescapable inference is that the individuals made a misrepresentation with the intention to defraud the applicant.

- [32] The applicant's submission is that their version that it was their understanding that they believed that they were entitled to clock in and clock out because it was a legal strike during working time and because of the no work no pay principle they would not be paid, should have been rejected out of hand. The failure of the arbitrator to make a finding rejecting the explanation and not finding that they acted fraudulently, according to the applicant, renders the award reviewable.
- [33] The third respondent submitted to the contrary that the arbitrator made a reasonable finding when the arbitrator held that their belief that they were not going to be paid "*mitigated against the intention to defraud the company*". The submission is premised on the understanding that the Commissioner made a finding that the conduct of the individual respondents did not constitute fraud as this explanation mitigated against an intention to defraud the company.
- [34] The actual wording of the award is different: "*This mitigates the intention to defraud the respondent* (own emphasis)". It is not clear whether the arbitrator actually found that there was no fraud or whether the arbitrator found that the fraud that there was, was mitigated by the beliefs of the thirty employees.
- [35] What is clear from the award is that the arbitrator considered, for purposes of sanction, those factors that may "*... have a tempering effect, not on the seriousness of the offence as such, but on the severity of the penalty.*"
- [36] The two witnesses for the individual respondents were pressed in cross examination to admit that they wished to defraud the company. Both explained that they believed that because it was a legal strike it was like a working day where they can clock in and out without receiving any remuneration as they were participating in the strike.

- [37] The applicant's code provides for two different sanctions. The applicant has not tendered any evidence in the arbitration as to why the alternative sanction, that of suspension without pay, was inappropriate.
- [38] The applicant opted for summary dismissal. It appears to have done so having regard to a consistent application of discipline in the past where individuals abused the clocking system. This is not a comparison that is cast in stone. In this case the individual respondents participated in industrial action as a group. They could never have believed that they would never be found out and therefore would get paid if they clocked in and clocked out as would be the case of an individual. They were just too many. In addition, they believed that they were not entitled to payment by reason of the application of the principle of no work no pay. This is a reasonable belief. This belief seems to have been irrespective as to whether they clock in and clock out.
- [39] It is not a clear case where the only inference to be drawn having regard to the individual respondents' explanation, is that they intended a misrepresentation thereby committing fraud. The explanation is not such that it can be rejected out of hand.
- [40] The applicant made much of the fact that their defence was that they were prevented access by the applicant and therefore could not clock out. The applicant submitted that that was not a defence at all and for that reason the inference drawn should be that they attempted to defraud the company.
- [41] Having regard to the evidence it is clear that their understanding was that this was a work-related matter because it was a legal strike. This was coupled to their belief that they would not get paid.
- [42] The arbitrator referred to this as a misunderstanding. The "misunderstanding" could only have been that the individuals believed that because it is a legal strike they could report as on a normal working day, clock in and clock out and participate in the strike action understanding that they would not be paid by reason of the no work no pay principle.

[43] These circumstances differ from the other examples cited in the applicant's disciplinary code, that is clocking in for somebody else or having somebody else clock in for you or clocking in and not working, where there clearly is an intention to abuse the system to claim remuneration. In this case the statement by the individual employees that they knew they were not going to be paid creates a different scenario that may be distinguished from the conduct of an individual abusing the system. In this case the evidence of Ms Denton also was that apart from having regard to the clock cards reflecting that they did not clock out it was possible to identify the striking employees from photographs and video clips. In addition the applicant certainly knew that approximately one third of its labour force was out on strike.

[44] The ultimate finding that summary dismissal was not a fair sanction is one that a reasonable Commissioner could have arrived at.

Costs

[45] Having regard to the considerations in making a cost order it is not appropriate to saddle any party with a cost order.

[46] In the premises the following order is made:

Order

1. The review application is revived.
2. The late filing of the applicant's notices is condoned.
3. The application is dismissed with no order as to costs.

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate R. Grundlingh
Instructed by: Serfontein Viljoen & Swart.

For the Third Respondent: M Makhura of Cheadle Thompson & Haysom

LABOUR COURT