



THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case No: PR114/23

In the matter between:

NELSON MANDELA UNIVERSITY

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

FRANCOIS DU TOIT N.O.

Second Respondent

NATIONAL TERTIARY EDUCATION UNION

Third Respondent

NICOLAAS LOUW

Fourth Respondent

Heard: 29 January 2025

Delivered: 3 March 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand down is deemed to be 3 March 2025.

JUDGMENT

MAKHURA, J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award dated 2 May 2023 issued by the second respondent (commissioner) under the auspices of the first respondent (CCMA). The applicant, Nelson Mandela University (University) also seeks substitution of the award with an order that the dismissal of the fourth respondent (employee) was substantively fair, alternatively remitting the dispute to the CCMA for arbitration *de novo* before a different commissioner. The application is opposed by the employee.

Background facts

[2] The employee was appointed by the University with effect from 1 April 2013 to establish the new Bachelor of Emergency Medical Care programme within the University's Emergency Medical Department.

[3] He was charged with and dismissed for two allegations of fraud, contravention of sections 5, 8.1.9 and 8.1.9.4 of the Code of Ethical Behaviour and contravention of the Anti-Fraud Corruption Policy. It was alleged that he submitted two fraudulent claims of R21 120.00 and R18 000.00 in 2018 and 2019 respectively. In these alleged fraudulent claims, the employee claimed 96 hours and 76 hours which were:

‘purported to have been worked by yourself, which hours were never worked on the platform / on the road as per the requirements of the

¹ Act 66 of 1995, as amended.

secondary contract, resulting in you making financial gain and University being financially prejudiced.’ [Emphasis added]

[4] Section 5 of the Code of Ethical Behaviour (Code) sets out the values of the University to include integrity and taking responsibility. Section 8.1.9, including 8.1.9.4, specifically provides that employees have a duty to act in good faith towards the University and that they should receive no other benefits as a result of their association with the University than they are entitled to in terms of their contracts of employment. The University’s primary focus was the charge of fraud.

[5] The University has a policy titled “*Policy on the Management of Secondary Appointments*”, which regulates the secondary agreements or appointments (secondary contracts). A secondary contract is defined as:

‘an additional contract entered into between the University and the employee for work carried out for the university, by a permanent or contract staff member of the University, over and above the work / duties which the employee is required to discharge in terms of his / her primary contract, but taking into account flexibility allowed to academic employees.’

[6] The objectives of the Secondary Appointments Policy include setting general rules “*in order to regulate the undertaking of work that is over and above an employee’s normal workload, and to ensure that the Secondary Appointments are concluded within the parameters of the Terms of Reference*”.

[7] Section 4 of the Secondary Appointments Policy sets out examples of work that may be carried out in terms of the secondary contract. These are evening classes in cases where academic employees are already fully occupied in terms of their primary workload and where a faculty requires a specialised lecturer to present a particular module and a programme or policy development that falls outside an employee’s normal workload and which is undertaken to develop course material.

[8] The employee concluded the secondary contracts with the University, represented by Nanette Smith (Smith), in 2018 and 2019 respectively. These secondary contracts are each contained in a one page document only and are in all material respects the same. I reproduce the 2018 secondary contract below:

'Query Approved Web Appointments with Financial Detail

...

Personnel Number: ...

Personnel Name: Mr NE Louw

Routing Number: 2833558

State Date: 01-Jul-2018

End Date: 31-Dec-2018

Department: 2623

Department Name: Emergency Medical Care

Post: 9707

Post Description: Clinical Assistance

Campus: 11

Campus Name: Ocean Sciences Campus

Personnel Type: P1

Personnel Description: Permanent Academic Staff with a Secondary Appointment

Appointment Type: 64

Appointment Description: T AC C PT +24 -M

Remuneration Type: A

Remuneration Description: Ad Hoc Claims

Monthly Claim: 0

Total Amount: 21120

No of Months:'

[9] On 2 November 2018, the employee completed three separate intermittent contract work claim forms for August, September and October 2018. These forms were for the course or subject presented "*EMC Assistance – VWIL300 + VWIL400*". For

August 2018, the employee claimed 8 hours for work performed on the first Saturday of the month. For September 2018, he claimed that he worked on the first Saturday and Sunday of the month for 14 hours and the third Saturday for 8 hours. In October 2018, he claimed 20 hours for work performed on the second Friday and Saturday, 27 hours for the third Friday and Saturday, and 19 hours for the fourth Friday and Saturday. The total hours claimed was 96, amounting to R21 120.00.

[10] On 18 November 2019, the employee completed one form for September, October and November 2019. The course or subject presented was “*Lecturing Assistance – VWIL300, VWIL400*”. He claimed 24 hours for each month, totalling 72 hours.

[11] It is common cause that these claims were approved and the employee was paid a total of R39 120.00. The University commissioned an investigation into various alleged irregularities, which included the above transactions. The final investigation report was issued on 12 May 2022. The investigation report made the following findings in respect of the two transactions:

‘An amount of R39,120... was paid to Mr Louw for hours purported to have been worked, which in fact were never worked. Mr Louw has admitted during the interview and in a written submission that he never worked these hours on the platform / on the road ...’ [Emphasis added]

[12] In a summary of the interview notes signed by the employee on 18 March 2022 and the investigator, Nimmesh Karamdeo (Karamdeo), on 22 March 2022, the employee admitted that the work he performed for the R21 120.00 claim “*might relate to other activities / job requirements and not working on the road / platform*”. For the 2019 claim and payment of R18 000.00, the employee admitted that he did not work the 72 hours “*on the road with students (Clinical Platform), as is reflected on the contract claim form*” although he was “*involved in student activities that go beyond the normal office hours and is directly related to the delivery of services to students*” and that he was involved in activities that were not part of his normal duties.

[13] The claim forms do not require the employee to list the activities undertaken or the nature of work he performed nor did it require him to stipulate the exact time when he performed the work, that is, when he commenced and concluded the task.

[14] The employee's unchallenged case was that he worked "*an exorbitant number of hours during the year with students which is related to the student learning activities, that is beyond the normal office hours*" including the orientation camp, Vasbyt event, Masiphakameni, the wilderness search, rescue hikes, Ironman and excursions which he was never compensated for. The employee admitted that:

14.1 His after-hours or extra work on activities that were undertaken other than on the road or on the platform were more than the hours reflected in the claim forms;

14.2 The secondary contract claim that he had approved which reflects 72 hours with students on the road / platform is not correct or a true reflection in relation to the extra work that he was actually claiming payment for;

14.3 He did not discuss with Smith that the contracts she had approved were not for work on the road or platform; and

14.4 He was willing to pay back the amounts claimed because he had not rendered the clinical training and should have been more transparent with the nature of the claim.

[15] In his email dated 22 March 2022 to Karamdeo, the employee stated that:

'As I said in the interview, I claimed the hours with a clear conscience because I had worked many more hours than claimed in the secondary contract, but acknowledge, once more that on a technicality, I did not do the work contained in the secondary contract. In retrospect I regret what I did, but I am prepared to work the time in now for no compensation.' [Emphasis added]

[16] The above sentiments were also echoed in an additional general comments attached to the email. The employee stated that the Clinical Training Grant allows for

payment of employees for work performed other than working with students on the road and that the after-hour activities listed in the minutes (i.e. the orientation camp, Vasbyt event, Masiphakameni, the wilderness search, rescue hikes, Ironman and excursions) form part of the provisions of the Clinical Training Grant. He further argued that this led him to submit the claim as he did – with a clear conscience – because he did not claim outside the Clinical Training Grant. He once again offered to make things right by working the hours because there was not sufficient transparency regarding the deviation from the contract.

[17] The investigation report concluded that the employee:
'misrepresented himself to his line management when concluding two secondary contracts in 2018 and 2019, respectively. Mr Louw was contracted to conduct clinical training with the students working on the platform on a need identified by himself. However, at the time of contracting he knew that these contracts [were] meant to reimburse him for extra hours that he alleges were worked without any compensation; and
Defrauded the University for his benefit by claiming the contracted hours while knowing that these were never worked for training the students on the platform...' [Emphasis added]

[18] The report then recommended that corrective action be taken against the employee for "*willingly defrauding the University of R39 120 by misrepresenting the claims against two secondary contracts in 2018 and 2019 for hours not worked to the prejudice of the University. In considering corrective action, Management should take into consideration Mr Louw's acknowledgement of wrongdoing and his willingness to pay back the funds or work in the hours*". Consequently, the employee was charged with defrauding the University.

[19] The disciplinary hearing against the employee was held on 13 July 2022. The employee was represented by Professor Norman Kemp from the National Tertiary Education Union (NTEU). The employee pleaded guilty to the charges as set out above

and the parties submitted mitigating and aggravating factors. The University submitted in aggravation that the employee's justification of his conduct was solely for his personal gain and his belief or impression that he was entitled to submit the claims by virtue of all his after-hours activities. The University argued that the employee used his authority to advance his own financial interest, that his conduct went against its values and that the trust relationship had irretrievably broken down.

[20] The chairperson found that it was wrong for the employee to use the time spent on other work to claim for what was not due to him and that the misconduct was serious. He recommended that:

'If retaining the employee's service would not create any inconsistent application of discipline amongst the University staff, I would recommend that the employee be issued with a final written warning valid for 12 months and that he repays the monies that were paid to him in the sum of R39 120.00.

However, if the above proposed sanction would lead to inconsistent application of discipline at the University, I accordingly recommend that the contract of employment of Nicolaas Louw must be summarily terminated.'

[21] The University dismissed the employee with effect from 30 August 2022.

The arbitration proceedings

[22] The employee referred an unfair dismissal dispute to the CCMA. He summarised the facts as follows in his dispute referral form:

'The employee was dismissed for allegedly committing fraud by claiming for work that he did which was outside the secondary contract he was appointed on. The employee had no intention to commit fraud and thought he had the right to claim for work done, but not as contained in the secondary contract. The employee pleaded guilty to the charge and offered to pay back the money, but the employer did not accept his offer to pay back, and because he pleaded guilty found him guilty and the sanction was dismissal. The employee pleaded guilty because he

felt remorseful about his erroneous claim and although he had no intention of defrauding the employer, the employer has refused to accept it.

Because in a fraud case intent must be proved, and the employer has failed to do so we believe this is unfair dismissal.'

[23] The parties concluded a pre-arbitration minute. The employee argued that he pleaded guilty as part of a plea bargaining agreement or settlement agreement that his plea of guilty would attract a sanction short of dismissal, being a final written warning and was done without prejudice. The University disputed the plea bargain or settlement agreement and any concession to a final written warning.

[24] The employee recorded that he had no intention of submitting fraudulent claims despite his guilty plea at the disciplinary hearing. He contended that his claims "*fell within the work for which he was appointed for Clinical Assistance, and that is why he has stated throughout that he made the claims with clear conscience*". This was disputed and rejected by the University, which also argued that the employee was intentional in his conduct.

[25] The employee disputed the University's contention that the effect of his conduct is that the trust relationship had irretrievably broken down. He stated that this contention by the University was based on a guilty plea and that he would change his plea to that of not guilty during the arbitration proceedings.

[26] Other than the change of plea, the evidence led at arbitration proceedings was largely common cause on the material aspects of the dispute, as reflected under background facts above. In his evidence, the employee testified that 14 hours may be deducted from the hours claimed since this did not fall within the claimed period.

The award

[27] The commissioner started his analysis of the evidence and matter by considering the nature of the charges and what the University was required to establish. Having referred to the charges against the employee, the commissioner found that the University had to establish that (1) the employee claimed the hours he had never worked for, (2) that the terms of the secondary contracts required that the hours claimed must be for work on the road or platform and (3) financial benefit to the employee and financial loss to the University.

[28] The commissioner then found that the secondary contracts do not require that the work must be performed on the road or platform. He observed that the University's conclusion that the work must be performed on the road or platform was based on what Mugsien Rowland (Rowland), the complainant, said to the investigator, Karamdeo. Rowland was not a witness at the arbitration proceedings and the University did not lead any evidence to support Rowland's interpretation that the work must be performed on the road or platform. It appears that the University and Karamdeo, and the employee, accepted Rowland's interpretation as a fact that the secondary contract required that the work be performed on the road or platform. The commissioner continued:

'Firstly, the charges were drafted on that basis. Secondly, the applicant admitted that he had obviously not worked on the platform or the road... He submitted that the Clinical Training Grant allowed for work other than work done on the road or platform and he therefore submitted the claim with a [conscience]. Thirdly, the applicant pleaded guilty. Obviously, because he had not worked on the platform or on the road.'

[29] The commissioner rejected the employee's case that he pleaded guilty as part of a plea bargain. He found that the employee pleaded guilty because he had obviously not worked on the platform or on the road. The commissioner observed that:

'He however maintained that there had not been enough transparency on the contract requirements and from this technical point of view he was willing to work [to] make it right.'

[30] He found that the employee did not work on the platform or on the road. The commissioner continued to make an important finding - that this did not confirm that the secondary contract required the employee to work on the road or platform. He continued:

‘Even if I am wrong, the element or requirement of intent has to be considered. The question is whether the applicant had the intent to claim hours as if he was working on the platform or road. I am not persuaded that the applicant had the intention to deceive the respondent.’

[31] The commissioner concluded that:

‘It appears to me that when he had put pen to paper in his claim he was not aware that the claim could only be for work on the road or platform and that he was actually busy committing misconduct. I am not convinced that he was aware that his conduct was unlawful or wrong, in my view the applicant was claiming for work he believed to have been done and could legitimately be claimed for. For the reasons above, I cannot find that the respondent proved that the secondary contract’s requirements was for work to be done on the platform or road and that the applicant had intent (mens rea). The applicant is therefore not guilty of the charges for which he was dismissed. His dismissal was substantively unfair.’

[32] The commissioner proceeded to deal with the remedy. He referred to section 193 of the LRA and found that there was no evidence before him that could prevent an award of reinstatement. He awarded reinstatement but ordered that the reinstatement should not operate retrospectively allegedly because the applicant failed to exercise the amount of care he was required to and that his hands were not clean. The commissioner also considered that the employee had been working after his dismissal.

The review application

[33] The University seeks to upset the award on the basis that the commissioner's decision fails the reasonableness test. The criticisms against the award are broadly that the commissioner committed misconduct and gross irregularities, misconceived the nature of the issues, incorrectly determined issues that were not before him and committed material errors of fact and law. The University contends that the commissioner disregarded relevant material, abrogated his responsibility to assess the totality of the evidence and thereby denied it the right to a fair hearing. It contends that the commissioner failed to have due regard to the following facts - the claims were lodged pursuant to the two secondary contracts and could only claim for work done during the time periods stipulated by the respective contracts.

[34] The University contends that the employee conceded that he claimed against the funds derived from the secondary contracts and not for work performed in terms of the secondary contract, which implies that he was aware that the claims did not fall within the ambit of the secondary contracts, which showed a fraudulent intent on his part. The commissioner is accused of ignoring this evidence.

[35] It was further contended that the employee conceded that "*he had not done work contained in the secondary contracts*" and that he claimed additional hours worked outside the parameters of the secondary contracts. The University referred to the employee's mitigating factors which reiterated and confirmed that his claims were not in terms of the secondary contracts. The employee also admitted that the hours worked do not correspond with the hours actually claimed.

[36] In its supplementary affidavit, the University contends that the commissioner disregarded that the employee had initially offered to repay the amounts paid to him which was a demonstration that he claimed the payments with full knowledge that they were not due to him and that his change of tune during arbitration proceedings that he was entitled to those payments was an afterthought which ran directly contrary to his earlier acceptance. Furthermore, the employee acknowledged that some of the hours he claimed against the secondary contracts actually related to work done before the

secondary contracts or that they were outside the scope of the secondary contracts, but the commissioner ignored the employee's evidence that he entered into the secondary contracts believing that he should be compensated for the extra hours he worked.

Analysis

[37] The test applicable to the current application has been authoritatively set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*². It is whether “the decision reached by the Commissioner is one that a reasonable decision-maker could not reach?”. This is a stringent test, one that ensures that awards are not interfered with lightly³ and one that does not require this Court's agreement with the award, but simply requires an enquiry into the reasonableness of the award.⁴

[38] The commissioner started his enquiry into the fairness of the employee's dismissal by considering the reason for which he was dismissed. The employee was dismissed for fraud. The University alleged that the employee fraudulently claimed payment for hours that he never worked on the road or platform.

[39] The commissioner properly construed the issues before him by correctly identifying the reason for the dismissal. To demonstrate that he understood the nature of the enquiry, he identified that the University had the onus to establish that the employee claimed payment for the hours he had never worked for, with full knowledge that he could only claim for work performed on the road or platform and that he benefited from the transaction and the University suffered loss. The University did not dispute that the employee had carried out the work as he explained. Further, it is not in dispute that the work carried out was of clinical assistance, as set out in the secondary contract. The employee's evidence that he worked many hours than claimed was not

² [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.

³ *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 100.

⁴ *Duncanmec (Pty) Ltd v Gaylard NO and others* (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 - 43.

disputed. In fact, it was the University's duty to establish that he did not work these hours or worked less hours than he claimed.

[40] The University failed to address or sufficiently address the most fundamental and significant finding made by the commissioner – that the secondary contracts do not require the work to be performed on the road or platform. I have already reproduced the secondary contract above and it makes no requirement for the work to be performed on the road or platform. The commissioner's observation and finding that the contract makes no such provision is correct. The definition of secondary contract also makes no such limitation and the scope of secondary contract is broadly defined to cover any work of clinical assistance.

[41] The commissioner made an astute observation that the charges against the employee were drafted on the basis of this accepted *albeit* mistaken belief that the employee could only claim for work performed on the road or platform. The employee's apology, concession that he did not work the hours claimed and his offer to correct the wrong by working or paying back the money were influenced by the University's and his misconception of the secondary contract that it required work to be performed on the road or platform. There is no dispute that the employee worked even more hours than he claimed for.

[42] During the hearing, I asked Mr Le Roux, appearing for the University, what was the misrepresentation on the part of the employee. Well, the answer, so the Court was informed, was in the employee's answer during the interview with Karamdeo. In other words, an employee who for his naivety or misapprehension of the employer's policy or the contract, pleads guilty to the charge is bound by his plea and the arbitrator or this Court must accept the guilty plea as is, and not enquire whether indeed the employee's plea is an admission of all elements of the charge. If this was the legal position, it would be untenable. It cannot be the legal position.

[43] In my view, the employee's plea of guilty at the disciplinary hearing does not axiomatically make him guilty of the offence. The court or in this case the CCMA, must enquire and satisfy itself that the employee had freely, voluntarily and unequivocally admitted all the elements of the charge. This duty necessarily extends to the chairperson of the disciplinary hearing.

[44] The employee had maintained that he worked for the hours claimed and that in fact, he worked more than the hours claimed. The employee was clearly influenced by a common mistake when he entered a plea of guilty that he could only claim in terms of the secondary contract for work performed on the road or platform. The claim forms contain no misleading statement and this was never the University's case. Mr Le Roux could not point to any information in the claim forms that were misleading. For these reasons, I am not persuaded that the employee's plea of guilty at the disciplinary hearing evinced a free and unequivocal admission of all the elements of the charge of fraud, including unlawful misrepresentation. That he admitted to having claimed for other work outside the claim period does not negate his undisputed evidence that he worked more hours than he claimed for. This work was within the scope of the secondary contract. Accordingly, the commissioner's finding that the University did not establish intention and therefore failed to prove that the employee was guilty of fraud is supported by the record and is unassailable.

[45] The commissioner, having concluded that the employee was not guilty of the charge, dealt with the appropriate relief. He found that the University did not lead evidence to suggest that a continued employment relationship would be intolerable or that it would be reasonably impracticable to reinstate the employee.⁵ The commissioner made an award of reinstatement. He refused to order retrospective reinstatement allegedly because the employee's hands were not clean and that the employee had been working after his dismissal. In the absence of a cross review, this aspect of the award stands.

⁵ See: section 193(1)(a) and (2)(b) and (c) of the LRA.

[46] In conclusion, the University has failed to establish that the award falls to be reviewed and set aside. The award meets the reasonableness threshold and the review application stands to be dismissed. Finally, this is a not a matter that warrants a costs order.

[47] In the premises, the following order is made:

Order

1. The review application is dismissed with no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr F Le Roux

Instructed by:

Joubert Gaplin Searle Attorneys

For the 3rd Respondent:

Mr B Dyke SC

Instructed by:

Brown Braude & Vlok Incorporated