



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C128/2020

In the matter between:

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION WORKERS UNION (AMCU)
obo MZAMO AND 14 OTHERS**

Applicant

and

**THE METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

First Respondent

GAIL MCEWAN N.O.

Second Respondent

**SA STEELWORKS,
A DIVISION OF SA METAL (PTY) LTD**

Third Respondent

Heard: 26 June 2025

Delivered: 11 November 2025

JUDGMENT

VAN VOORE, AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ ("the LRA"). The applicant is the Association of Mineworkers and Construction Workers Union ("AMCU") acting on behalf of Mr Mzamo Mkhangelì and 14 other members.
- [2] The applicant launched an application to, *inter alia*, review and set aside an arbitration award of Ms Gail McEwan ("the commissioner"), the second respondent. The commissioner presided over arbitration proceedings under the auspices of the Metal and Engineering Industries Bargaining Council ("the bargaining council"), the first respondent.
- [3] The relief sought by the applicant includes that this Court reviews and sets aside or corrects the commissioner's arbitration award under case number MWE11939 (the arbitration award) dated 1 February 2020, substitutes the decision of the commissioner with a finding that the dismissal of the individual members is substantively unfair and that they are retrospectively reinstated without any loss of any benefits from the date of their dismissal, alternatively referring the matter back to the first respondent for a hearing *de novo* before a commissioner other than the second respondent.
- [4] The application is opposed by SA Steelworks, a division of SA Metal (Pty) Ltd, the third respondent.
- [5] The third respondent took disciplinary action against Mzamo Mkhangelì (Mkhangelì) and 14 other employees who comprised the Blue team. A disciplinary hearing was convened on written notice to the employees. The employees were found guilty of allegations of misconduct, including unauthorised absence from work, breach of company policy and gross insubordination. The employees were dismissed.
- [6] An alleged dispute was referred to the bargaining council. Following arbitration proceedings, the commissioner issued the arbitration award. In the arbitration award, the commissioner determined that the dismissal of the 15 employees who

¹ Act 66 of 1995, as amended.

comprised the Blue team was substantively and procedurally fair. The arbitration award records the following:

"[40] I find on a balance of probabilities that the dismissal of the fifteen employees in this matter is fair on procedural and substantive grounds. Consequently, this case is dismissed."

[7] In the arbitration award, the commissioner further determines, *inter alia*, the following:

"(34) In terms of the contracts of employment for all the employees in this case there is a clause headed normal working hours which in summary confirms a forty-four hour week from a Tuesday to a Monday; there is a requirement to work continuous rotating shifts; the manager/ supervisor would advise of their actual working hours and shifts; a ten percent shift allowance is included in your weekly wage; the actual working hours may differ from department to department and is dictated by the operational requirements; actual working hours may be extended beyond the normal working hours due to operational requirements and objectives and deadlines. Nothing is stated that would bind the employer to retain the shift times or cycles. The introduction of the new shift roster, in light of the above, is a work practice and does not constitute terms and conditions of employment but in terms of the contract entered into between the parties is a work practice. No other documents regulating the relationship such as collective agreements containing such a provision was placed before me. No additional terms that can be implied from the parties' conduct or from the custom and practice in the workplace was placed before me. A shallow attempt was made to make a case that because the blue team had been working the same shift pattern since 2016 a practice had developed. As such the employer had the right to change the practice which they did over an extended period of time. There was no vested right for the employees to retain their shift times in perpetuity."

"(35) In light of the above I find on a balance of probabilities that the employer was not compelled to reach agreement with the employees regarding the introduction of the new shift rosters on 9 January 2019. It was, as stated, a prudent courtesy to have spent time in consultation and

discussion with the employees and their representatives. It was not disputed that there is more than one union at the employer none of which unions had a recognition agreement with the employer. It should never have taken over a year to introduce the shift changes which after research done, showed that on a slower rotational shift there was more rest time for the employees. The change was also made due to the high injury and high absenteeism rates. There is no contractual right for the employees to work a specified shift in perpetuity. The changing of the shift is a work practice and the employer was entitled to have unilaterally introduced such changes although much consultation and discussions took place. The employees were not able to demonstrate that the changes affect their contractual rights.

- (36) The blue team (all the employees in this case) returned to work on 9 January 2019 and due to the circumstances prevailing on that day had not been required to work their scheduled night shift. The blue team worked the night shift on 10 January 2019 at which stage, after the discussions held, the employer had the view that like the other teams the blue team would be working on the new shift rosters from 10 January 2019 onwards. The testimony of Mzamo was that the blue team intended not to comply with the new rosters and hence were absent on 11 and 12 January 2019 without permission and without notifying the employer. Their absence was due to a refusal to work the new shifts as rostered. Such absence was unauthorised and uncommunicated as is required by the company policy. Hence the employees were in breach of the policy of the employer. In the circumstances, the employees are found on a balance of probabilities to be guilty of charges 1, 2 and 3.

- (37) The instruction to work the 2019 shift roster was a legal instruction from the employer, who gave the employees sufficient time to raise concerns in this regard. The concerns raised were dealt with and absurdly included considerations for other jobs to be worked in their spare time, which is also contrary to the policies of the employer. The refusal to abide that instruction in the workplace practice change amounts to gross insubordination. This is so given the number of times the employees were instructed to work according to the new rosters effective from 1 January 2019. The employer had also given all workers

the opportunity to raise any concerns they had with the change in the shift cycles and those concerns which were raised had been addressed. From the data provided on the impact of slower rotational shifts (which was in operation and is already showing that absenteeism and injuries on duty had been significantly reduced) the change in the shift patterns had been required based on the operational requirements of a plant where it was not disputed there are some dangerous operations over which additional care needed to be taken by the workers in such areas. The actions of the employees and their approach towards the changes being made, which were lawfully allowed to be changed for a very valid reason, amount to gross insubordination. In the circumstances I find on a balance of probabilities that all of the employees in this case are guilty of charges 4 and 5.

(38) *I have found on a balance of probabilities that the shift roster change amounted to a work practice over which no agreement with the employees was required. The blue team who are the employees in this matter, have been found guilty of the 5 charges which they individually faced. In the circumstances I find on a balance of probabilities that the dismissal of the employees in this matter is fair on substantive grounds."*

[8] The grounds of review include the following:

- 8.1 The commissioner did not properly apply the then-applicable Schedule 8 of the Code of Good Practice in determining, *inter alia*, whether dismissal is an appropriate sanction;
- 8.2 The commissioner failed to properly consider length of service and that a final written warning would have been a more appropriate sanction as dismissal was too harsh;
- 8.3 The commissioner did not properly consider the evidence that one member undertook to work the new shift subject to 'the go ahead from the Union';
- 8.4 The commissioner failed to properly consider that there was no intimidation during the attendance of EFF members at the company

premises and placed too much emphasis on such attendance in determining that dismissal was an appropriate sanction;

- 8.5 The commissioner did not properly consider the applicant's closing argument, as her findings were issued a short time after receiving the closing argument;
- 8.6 The commissioner arrived at an unreasonable outcome;
- 8.7 The commissioner misconceived the nature of the inquiry;
- 8.8 The commissioner, in the manner in which he dealt with the dispute, failed to consider the central dispute, which was key to the determination of the matter. The key issue that needed to be determined was whether the individual Applicants were guilty of the misconduct they had been charged with and had been found guilty by the employer;
- 8.9 The commissioner misconstrued the concept of insubordination;
- 8.10 The commissioner did not even enquire as to whether the individual applicants were guilty of insubordination or gross insubordination. A reasonable decision-maker in the position of the commissioner would have been alive to the difference between insubordination *per se* and gross insubordination, which must give rise to the ultimate sanction of dismissal;
- 8.11 The commissioner failed to apply her mind to the legal requirement of insubordination. Accordingly, the commissioner committed a material error in fact and law by failing to apply her mind to the requirement of insubordination and/or gross insubordination upon which the employer based its decision to dismiss the individual applicants;
- 8.12 The commissioner failed to consider whether the refusal to obey the instruction amounted to insubordination at all, and further, the commissioner failed to assess the gravity of the insubordination;

- 8.13 The commissioner ignored the reasons why the individual applicants failed to report for work. It is submitted that this was crucial to the determination of the matter. The evidence quite clearly demonstrated that the individual applicants were of the genuine belief that the employer could not unilaterally change the shift pattern, and if they wished to change the shift pattern, it would have to be by way of agreement;
- 8.14 The commissioner clearly failed to take into consideration that the individual applicants were not in wilful disobedience, but that the individual applicants' refusal to work in accordance with the shift pattern was based on a genuine belief that the instruction was unreasonable and unlawful;
- 8.15 The commissioner found further that on a balance of probabilities the shift roster change amounted to a work practice of which no agreement with the employee was required;
- 8.16 The commissioner, without any further consideration, found the individual applicants guilty of gross insubordination merely upon the fact that, in the view of the commissioner, they were wrong in their understanding of the law in respect of unilateral changes to terms and conditions of employment;
- 8.17 The commissioner did not analyse one bit of evidence. It is clear that the commissioner decided this matter not on the evidence, but solely on the narrow issue of whether the employer was entitled to change the shift pattern or not;
- 8.18 The commissioner overlooked and ignored the facts of the matter and the reasons why the individual applicants did not follow the instruction to work in accordance with the new shift pattern;
- 8.19 The commissioner came to the unreasonable finding that the manner in which the employees approached this situation was adversarial and confrontational when the facts of the matter showed that the individual

applicants were acting in the mistaken belief that the changes were unilateral and therefore unlawful;

- 8.20 The commissioner ignored the fact that the individual applicants lacked legal knowledge in relation to the law in respect of changes to the shift patterns and unilateral changes to terms and conditions;
- 8.21 The commissioner failed to consider and take into account the totality of the circumstances when determining whether the individual applicants were guilty of gross insubordination;
- 8.22 The commissioner did not give sufficient weight to the fact that it had been the practice of the employer and the employees to work on the old shift pattern for many years and that it had not been changed;
- 8.23 The commissioner also failed to properly consider the reasonableness of the shift pattern and merely concluded that because the employer had the right to change the shift pattern that this made the instruction reasonable;
- 8.24 The commissioner ignored the fact that certain individual applicants returned to work on 9 January 2019 and were prepared to work in accordance with the old shift pattern. The commissioner ignored that the individual applicants did not have the intention not to work, but always displayed an intention to work, but in terms of the long-established shift pattern;
- 8.25 The commissioner did not properly consider the evidence of Mkhangelisi; and
- 8.26 The decision reached by the commissioner is not one that a reasonable decision-maker could not have reached.

Background

- [9] The third respondent is in the business of recycling metal. The third respondent produces steel billets and steel reinforcing bars from recycled material. The third respondent employed 1255 employees in different divisions.
- [10] Due to the nature of the third respondent's operations, the Melt Shop operates 24 hours a day, seven days a week. Until 2019, the Melt Shop operated a six-day shift cycle: 07h00 to 19h00 day shift, two night shifts from 19h00 to 07h00, and those employees then got two days off.
- [11] Three different teams of 15 employees work various shifts in the Melt Shop. Those teams are the Blue team, the Orange team and the Purple team. The employees who were dismissed formed the Blue team.
- [12] The third respondent had engaged the employees in relation to changes to the shift pattern since early 2018.
- [13] In a memorandum dated 4 December 2018, issued to Melt Shop employees, the third respondent informed employees of changes to the shift patterns.² The memorandum of 4 December 2018 records, *inter alia*, the following:
- "Please note that with effect from 9 January 2019 the proposed shift system will be implemented."³
- [14] The 4 December 2018 memorandum informs the employees that the new shifts would be four-day shifts, two days off, four-night shifts and two days off.
- [15] The operations of the third respondent shut down for the year-end on 12 December 2018 and recommenced operations on 9 January 2019. On 9 January 2019, and following further engagement with the employees, the third respondent again informed the employees that the new shift system (pattern) had been implemented with effect from 9 January 2019. Other than one night shift on 10

² Record, pages 62 - 63

³ Record, page 63

January 2019, employees forming the Blue team did not work the new shift system.

[16] The employees comprising the Blue team informed the third respondent that they would be working in accordance with the prior shift pattern. On 13 January 2019, the Blue team employees presented themselves at the workplace purportedly to work in accordance with the prior shift pattern. The employees were refused entry to the workplace.⁴

[17] A disciplinary hearing was convened on written notice to employees who formed the Blue team. The disciplinary hearing notice records *inter alia* the following:

"DETAILS OF YOUR ALLEGED OFFENCES:

It is alleged that you have committed the following misconduct:

1. *Unauthorised absence in that you refused to work your shift starting Friday, 11 January 2019.*
2. *Unauthorised absence in that you refused to work your shift starting Saturday, 12 January 2019.*
3. *Breach of company policy in that you failed to notify your employer of your absence as required.*
4. *Gross insubordination in that you have refused to abide by the 2019 Shift Structure.*
5. *Gross insubordination in that you refused to abide by your employer's instructions regarding the Shift Structure and addressing concerns regarding the structure, as contained in the SA Steelworks' letter of 10 January 2019.*

*You are required to attend a formal disciplinary hearing which is being convened to investigate whether or not you are guilty of the alleged offences."*⁵

⁴ Transcript, page 142, lines 14 – 19

⁵ Record, pages 64 – 65

- [18] The employees were found guilty of various allegations of misconduct, including unauthorised absence in that they refused to work certain shifts and gross insubordination, and were dismissed. The employees were informed of the termination of their employment in a letter dated 29 January 2019.⁶
- [19] As noted above, an alleged dispute was referred to the bargaining council. The presentation of the evidence at the arbitration proceedings took place over several days. On day one of the arbitration proceedings, the commissioner observed that the dispute before her was '*an alleged unfair dismissal*' dispute.⁷ The commissioner further informed the parties that the third respondent bears the onus, on a balance of probabilities, to prove that the dismissal of the applicants was fair.⁸
- [20] Mr Mashologu (Mashologu), on behalf of the employees, informed the commissioner that the employees were not challenging the procedural fairness of their dismissal.⁹
- [21] Mashologu further informed the commissioner that the employees were challenging the substantive fairness of their dismissal, stating:

"COMMISSIONER:

and in terms of substance?

MR. M. MASHOLOGU:

Ja, we, this is what we're challenging Commissioner, because the Employees, we feel very strongly that they didn't commit any of those acts. Employees think

COMMISSIONER:

Insubordination, you mean?

MR. M. MASHOLOGU:

Yes, the Employees were working the shift they knew, they have agreed with the Company to work that shift, that's what they were involved in.

⁶ Record, pages 212 - 213

⁷ Transcript, page 9, lines 10 - 13

⁸ Transcript, page 48, lines 14 - 17

⁹ Transcript, page 48, lines 16 - 18

this other shift, the new shift, the implementation is what we're disputing.

COMMISSIONER:

You're saying they were not consulted on the new shifts?

MR. M. MASHOLOGU:

Yes, they were no -, they were consulted via correspondences but there weren't any agreements, only saw the memo."¹⁰

[22] The evidence before the arbitration proceedings included that of Marike Aaris (Aaris). Aaris is the third respondent's Head of Human Capital. Aaris' evidence included the following:

22.1 The third respondent recycles metal. It has a big operation at SA Steelworks.¹¹

22.2 The operations of the Melt Shop include melting with furnaces. In the Rolling Mill, the third respondent produces rolled billets. The individual applicants all come from the Melt Shop.¹²

22.3 The Melt shop is a 24/7 operation. The melting of material is a very high cost for electricity involved. The machines involved in those processes cannot handle stop/start processes from a maintenance point of view in that *'when you melt a material it is more of a liquid form, which takes time, so we cant stop and start because there is a lot of money involved in running those processes'*.¹³

22.4 The operation is run continuously in order to avoid stop/start processes and unnecessary costs and damage to the machines.¹⁴

¹⁰ Transcript, page 49, lines 1 - 12

¹¹ Transcript, page 54, lines 8 -15

¹² Transcript, page 55, lines 9 - 19

¹³ Transcript, page 56, lines 10 - 17

¹⁴ Transcript, page 56, lines 20 - 22

- 22.5 In 2018, employees in the Melt Shop worked a six-day shift cycle, two days day shift from 07h00 until 19h00, followed by two days night shift from 19h00 to 07h00.¹⁵
- 22.6 The third respondent consulted the Melt Shop employees during the week of 15 January 2018.¹⁶
- 22.7 The third respondent initiated discussions about changing the shifts from the fast-rotating shift to the nine-day cycle, being in line with the Rolling Mill within the same part of the business.¹⁷
- 22.8 With reference to the memorandum dated 19 January 2018: *"Representatives informed management that all Melt Shop staff downed tools on 11 January at around 4 o'clock as they do not agree with the nine-day shift proposal"*.¹⁸
- 22.9 Management met with all employees, all shifts present, *"in the cloak room with all shifts present, that for that point in time we would not make any changes"*.¹⁹
- 22.10 The employees had engaged in 'down tools' on 11 January 2018. The third respondent advised employees that in the event of further 'down tools', it would take disciplinary action.²⁰
- 22.11 Engagements continued during March 2018 and April 2018.²¹
- 22.12 The third respondent issued a memorandum dated 12 November 2018.²² The 12 November 2018 memorandum reads as follows:

¹⁵ Transcript, page 64, lines 7 – 18 and page 65, lines 1 - 7

¹⁶ Transcript, page 84, lines 7 – 17; Record, page 68

¹⁷ Transcript, page 85, lines 14 – 20, page 86, lines 1 - 12

¹⁸ Transcript, page 87, lines 1 - 3

¹⁹ Transcript, page 87, lines 1 - 16

²⁰ Transcript, page 89, lines 1 – 9

²¹ Transcript, page 89, lines 15 - 22

²² Record, page 69

"Shift change due to operational requirements

Please note that after careful consideration of its operational requirements and also taking the interests of employees into account, the company hereby advises all Meltshop employees at SA Steelworks that as per the first day of working week in 2019 the shift cycle will be changing.

Currently the Meltshop runs on a 6 day shift cycle.

As per January 2029 Meltshop will run on a 9 day shift cycle.

In general, the 9 day shift cycle will be as follows for all employees:

3 days day shift, followed by 3 days night shift, followed by 3 days off.

Should you have any concerns about this change of the shift-cycle, you are hereby invited to submit these in writing to HR by no later than 23 November 2018.

Yours faithfully"

22.13 Employees were invited to respond or submit any other ideas to HR within a certain timeframe.²³ The timeframes afforded the employees sufficient time and an opportunity for the three teams of shifts to communicate with each other.²⁴

22.14 Employees responded to the memorandum, recording concerns.²⁵ The concerns raised by employees related to the impact of the new shift pattern on overtime pay and fatigue.²⁶

²³ Transcript, page 94, lines 15 - 20

²⁴ Transcript, page 95, lines 1 - 7

²⁵ Transcript, page 97, lines 1 - 19

²⁶ Transcript, page 98, lines 7 - 10

22.15 Employees in the various teams all responded to the third respondent's internal memorandum dated 12 November 2018.²⁷

22.16 On 21 November 2018, the third respondent issued an internal memorandum responding to the comments received from the employees on 16 November 2018.²⁸

22.17 The company sought to accommodate the employees' concerns at the same time as achieving a slow-rotating shift. The company proposed a four-day shift followed by two days off, as well as a four-day night shift followed by two days off, making no change to the employee's wages in any way or to the pay cycle. In addition, the actual hours worked per week would remain 44 hours per week.²⁹

22.18 The Melt Shop employees rejected the shift system as recorded in the internal memorandum of 21 November 2018. The Melt Shop employees 'want to carry on the way they are working'.³⁰

22.19 On 4 December 2018, the third respondent issued a further internal memorandum to the employees. The memorandum sought to address the concerns of the employees. The 4 December 2018 memorandum records, *inter alia*:

"Therefore with the new system there will be fewer changes from dayshift to nightshift and back, and there will always be days off in between the changes from dayshift to nightshift and back.

Therefore employees will get more rest with the new shift system.

Please note that with effect from 9 January 2019 the new proposed shift will be implemented."³¹

²⁷ Record, pages 70 – 73

²⁸ Record, pages 74 – 76

²⁹ Transcript, page 100, lines 1 - 22

³⁰ Transcript, page 101, lines 7 - 15

³¹ Transcript, page 105, lines 1 – 22; Record, pages 79 – 80

22.20 Before the annual shutdown, all employees were informed of the new shift roster. The new shift roster to be implemented from 9 January 2019 was placed on notice boards.³²

22.21 Following the memorandum of 4 December 2018, the third respondent received communication from the trade union about *"some requests last minute for a general meeting to take place prior to the shutdown, when/where the company was unable to accommodate them/it"*.³³

22.22 On 9 January 2019, the company reopened after the shutdown. The Purple team was meant to be on the day shift, the Blue team would be on the night shift, and the Orange team would be off. What transpired was that both the Purple team and the Blue team in their entirety were at the workplace on the morning of 9 January 2019. A few members of the Orange team were also present. All the employees remained in the cloak room and were not at their workstations.³⁴

22.23 The employees indicated that the reason they are not working, and that they are at work, was because they do not agree with the new shift roster.³⁵

22.24 Management met with the representatives of the employees and discussed their concerns. No new concerns that had not already been raised and responded to were raised by the employees. Management informed the representatives of the employees that the new shift roster of 2019, as placed on the notice boards, was applicable. Management also informed the employees that a failure to adhere to the new shift roster would result in disciplinary action.³⁶

³² Transcript, page 106, lines 1 – 7; Record, pages 81 – 83

³³ Transcript, page 106, lines 10 – 12

³⁴ Transcript, page 112, lines 9 - 19

³⁵ Transcript, page 113, lines 1 - 10

³⁶ Transcript, page 114, lines 5 – 19; page 115, lines 2 – 18; Record, page 88

22.25 Employees were also informed that if they were still unhappy, they should use the right forum, put their concerns and suggestions in writing, *'in order to have a constructive discussion to remedy the situation'*.³⁷

22.26 Members of the Blue team were present even though they were not allocated to work the day shift on 9 January 2019 and had been at the company premises all day. The Blue team indicated that they felt too tired to attend to the night shift on 9 January 2019, and the Divisional Director of SA Steelworks *"then used his discretion and stated that the Blue Team does not have to work the nightshift that night, they will not be disciplined but no work, no pay applies"*. The Divisional Director also informed the employees that the *'no discipline'* would *'only apply if it was agreed that everybody would adhere from that date onwards to the 2019 shift structure'*.³⁸

22.27 The feedback from the representatives following the intervention by the Divisional Director was that the employees agreed.³⁹

22.28 On 10 January 2019, all shifts were worked by the teams, including the Blue team, *'as per the new 2019 shift structure'*.⁴⁰

22.29 As from 10 January 2019, the Orange and Purple Teams have continuously worked the 2019 shift structure *'without fail'*.⁴¹ After the meeting that took place on 9 January 2019, the third respondent issued a letter to employees who comprised the Blue Team. That letter is dated 10 January 2019. The 10 January 2019 letter again records the new six-day shift structure for 2019.

22.30 The 10 January 2019 letter also records, *inter alia*:

³⁷ Transcript, page 116, lines 1 - 4

³⁸ Transcript, page 116, lines 8 - 18; Record, pages 85 - 88

³⁹ Transcript, page 121, lines 1 - 3

⁴⁰ Transcript, page 124, lines 1 - 10

⁴¹ Transcript, page 124, lines 15 - 18

"As per communication before shutdown 2018/2019 you were scheduled to report for dayshift at 07:00 on 9 January 2019 as per the shift structure 2019.

Some of employees of the Blue Team chose to report to work on 09 January 2019 at 07:00 without being booked for a shift. The Divisional Director has approved that those employees who decide not to report for their scheduled shift at 19:00 on 09 January will not be disciplined for being absent, however, the basic rule of no work, no pay will apply.

...

We urge you to apply constructive, recognised and lawful methods by which your concerns may be addressed. We are happy to engage with yourselves and the union in the proper manner and forums.

You are expected to assume your duties as per the 2019 shift schedule on 10 January 2019. Not adhering to the 2019 shift schedule with regard to dates and times will result in disciplinary action.

If you have any queries please feel free to contact the HR Department."⁴²

22.31 If employees attend to a shift after 18h00, the company provides transport.⁴³

22.32 On 11 and 12 January 2019, the employees refused the arranged transport, they were not adhering to the new shift structure.⁴⁴

22.33 On 13 January 2019, some members of the Blue Team arrived at work. Security informed them that the correct team was on duty for the day shift, that the Blue Team was not scheduled to work the day shift on 13 January 2019 and asked them to return home.⁴⁵

⁴² Transcript, page 129, lines 5 – 21 and page 130, lines 1 – 4; Record, pages 89 – 91

⁴³ Transcript, page 137, lines 1-8

⁴⁴ Transcript, page 138, lines 1-8

⁴⁵ Transcript, page 142, lines 14 – 19

22.34 When a team does not arrive to work their shift, *"there is no production happening, so that has an incredible impact on costs, on productivity, Health and Safety wise and on our machinery as I explained earlier, when there is a stop-start process, it has a very negative impact from a cost point of view, as well as our machinery"*.⁴⁶

22.35 The impact of the employees' conduct was significant; the company made a great financial loss in the region of R 2 million.⁴⁷

22.36 After the employee's dismissal, they attended at the company's premises with members of the EFF on two occasions. On the second occasion, and in the reception area, they were threatening and intimidating office staff.⁴⁸

Evidence of Aaris under cross-examination

[23] The evidence under cross-examination included the following:

23.1 The employment contracts do not stipulate shifts. The employment contracts specifically record *"the actual hours of work may differ from Department to Department and as indicated by operational requirements"*. The employment contract further records that *"your Manager/Supervisor will inform you of your actual working hours and shift that you will be required to work"* and that the employment contract *"doesn't state the actual hours or the actual days because that might change and therefore, they will be informed by their Manager as and when their shift roster needs to change for operational reasons"*.⁴⁹

23.2 In relation to a note within the bundle of documents which records that *'Aaris confirmed that various things were discussed but there was no agreement. Agreement is not required'*, Aaris testified that she was not disputing that *'no agreement was required'* and that *'No agreement is*

⁴⁶ Transcript, page 143, lines 15 – 21

⁴⁷ Transcript, page 189, lines 1-14

⁴⁸ Transcript, pages 227-230

⁴⁹ Transcript, page 258, lines 3 – 20

required, no changes were made to conditions of employment'. On 9 January 2019, management met with the employees, and it was 'agreed that the employees would adhere to the new shift roster, as also... seen in how the Employees from thereon behaved'.⁵⁰

[24] The evidence before the arbitration proceedings included that of Mr Willem Van Schalkwyk (Van Schalkwyk). Van Schalkwyk's evidence included the following:

- 24.1 He looks after Operations and is also involved in engineering and most aspects of the business on the SA Steelworks side of the plant.⁵¹
- 24.2 In the Melt Shop, the business runs a steel smelter. The machines must be kept running for as long as possible to make it viable for the business. If the furnaces are cooled down earlier than they should be, then it adversely impacts the operation of the furnace, and this has an *'impact on the profitability of the Company'*.⁵²
- 24.3 If a shift of employees does not arrive, there are also safety concerns; the business cannot leave the factory unattended.⁵³
- 24.4 If a shift does not arrive for duty, the cost implications include *'a fixed cost of about forty thousand rand per hour production loss'*.⁵⁴
- 24.5 Over two shifts, the production loss would be approximately R 960 000 or R480 000 per shift.⁵⁵
- 24.6 The Blue Team was allocated to work the night shift on 10 January 2019, and *'the Blue Team did come to shift, they did adhere to the shift cycle and they carried on with the production'*. He testified:⁵⁶

⁵⁰ Transcript, page 310, lines 3 – 20; Transcript, page 311, lines 1 – 5, Record, page 360

⁵¹ Transcript, page 365, lines 1 - 13

⁵² Transcript, page 367, lines 8 – 18; page 368, lines 1- 21

⁵³ Transcript, page 370, lines 6 - 10

⁵⁴ Transcript, page 376, lines 12 – 17

⁵⁵ Transcript, page 377, lines 7 – 19

⁵⁶ Transcript, page 431, lines 4 – 8

"MR. W VAN SCHALKWYK: *Correct, it seems like after the meeting that we had on the 9th of January, that they adhere to the shift roster because they followed, we (inaudible), them off on the 9th, on the evening of the 9th and because of the complaints that they might be tired and it was taken into account that it might have created a unsafe working scenario. Where, by the next day the Purple Team was booked for the shift, they did arrive. On the 10th of January the Blue Team was booked nightshift and they also arrived as scheduled, that's what I said, and as per that, it seems like they adhered to the shift roster."*⁵⁷

24.7 The failure of the Blue team to arrive for the shifts as scheduled had a knock-on effect on production. There was lost production for the shifts that were not worked. The knock-on effect includes the time taken to reheat furnaces.⁵⁸ The costs per shift would include electricity. In relation to losses, *"it's very difficult exactly to say how much money you lose because of the amount of power that you need to run for the duration of the shift, that we don't run production because its different power ratings that you use... so it's, you know, it's approximately fifty thousand, I cant guarantee that it is fifty thousand. We work on a fixed rate of forty thousand, that's excluding electricity and furnace equipment damage"*.⁵⁹

Evidence of Mzamo Mkhangelili (Mkhangelili)

[25] The evidence of Mkhangelili includes the following:

25.1 Employees met with the third respondent in January 2018, *"when they were changing the roster from this two days dayshift and two days*

⁵⁷ Transcript, page 434, lines 10 – 18

⁵⁸ Transcript, page 375

⁵⁹ Transcript, page 380, lines 1 – 20

*nightshift to three days dayshift and three days nightshift, we met with them and we stated clear to them".*⁶⁰

25.2 Employees received the memorandum dated 12 November 2018,⁶¹ and they responded to that memorandum.⁶²

25.3 The employees received the memorandum dated 21 November 2018. The employees responded to the memorandum.⁶³

25.4 Mkhangelili returned to work on 9 January 2019. They reported for the day shift: *'all of us, Orange, Purple Team and the Blue Team plus a few guys of the Orange Team'*, and they waited until the induction started. They had a caucus discussing this matter. Management approached them *'it's where we went to them and discussed the new changes with them'*.⁶⁴

25.5 No agreement was reached with the management; according to management, they were supposed to be on the night shift. The employees (Blue team) told management that they cannot be on the night shift, *"but we are here for the whole day. We will go to nightshift according to the we'll follow that old roster of us that we used to work... there was no agreement and then we go home... the following day we came for nightshift and worked that nightshift on the 10th. Then on the 11th according to the roster that we used to work of two days and two nights, we go off... on the 11th and 12th".*⁶⁵

⁶⁰ Transcript, page 528, lines 1 – 6

⁶¹ Transcript, page 530, lines 9 – 15, Record, page 69

⁶² Transcript, page 530, lines 9 – 15, Record, pages 70 – 73

⁶³ Transcript, page 531, lines 1 – 9

⁶⁴ Transcript, page 535, lines 1 – 10

⁶⁵ Transcript, page 536, lines 13 – 20; page 537, lines 1 – 7

25.6 The Blue team employees came back on 13 January 2019, in the morning. The security denied them access to the premises, *'they gave us the roster that we must follow according to the management'*.⁶⁶

25.7 He and other employees arrived at the company premises on 15 January 2019. There was a mass meeting, and after the mass meeting, the employees went back to the plant. They were called by management and they were suspended.⁶⁷

25.8 Mkhangel's evidence included the following:

"MR M MASHOLOGU:

and can you tell us, what was the exact reason for you, as Employees, not to work those shifts?

MR. M MKHANGELI:

Our reason, we wanted them to reach an agreement with us with, regarding with the proposal that we made for them because we proposed to them to get more rest, and instead of if they want to change us from this two days dayshift, two days nightshift, we're rather work eight hours' shift, that was one of our proposals, 'cause one of the reasons that we requested more day off, it's because of the injuries that were happening. Now, we, in one of these memos our response, we stated clear that we reject this new roster because we won't get more rest because in this new roster, you will see there is a time whereby we work four nightshift without getting any allowances because we thought maybe they would come to us with promises that at least, financially we will get adjustment because now instead of working two days night, or two nightshift, we will be working more nightshift, which means it will be more complicated than the

⁶⁶ Transcript, page 537, lines 6 – 13

⁶⁷ Transcript, page 538, lines 2 – 18

two nightshift that we used to work because during that two nightshift, there were also a lot of injuries that were happening.”⁶⁸

Mkhangelì under cross-examination

[26] Mkhangelì's evidence under cross-examination included the following:

- 26.1 His employment contract records that he will be required to work continuous rotating shifts, that his manager or supervisor will inform him of his actual working hours on shifts that he will be required to work and that the actual hours of work may differ from department to department and are dictated by operational requirements. Mkhangelì confirmed that to be the case.⁶⁹
- 26.2 The employment contract records that he agrees to work 44 consecutive hours per week, and that he will work continuous rotating shifts, which is a combination of day and night shifts.⁷⁰
- 26.3 The transcript also records the following:

“MR. B. GUY: Yes Mzamo, and that's what the company (inaudible), we're saying the same thing. We're also concerned about the incidents on the Blue Team, about the injuries in duty, and that is why they proposed the change in the structure because they believe and they can argue this much, is that this is a better system, it's a safer system, there's more rest on the new system than on the old system and I think you know that.

MR. M MKHANGELI: The problem with that is that you are saying it here now but while you have a time to go to explain this to the guys, you didn't do so, you just wrote a memo. When we called you to come and explain the advantage of this

⁶⁸ Transcript, page 539, lines 6 – 22

⁶⁹ Transcript, page 564, lines 1 – 20; Bundle of documents, pages 448 – 452

⁷⁰ Transcript, page 565, lines 1 – 11

new roster and disadvantage, you never came to us, that is my point of departure because if the Company, at least one of them, did they come to us and explained clearly, maybe the outcomes of this should have been better.”⁷¹

- 26.4 Mkhangelì was referred to the document titled ‘Summary of meeting 9 January 2019. Time 11:15am’⁷². Mkhangelì confirmed that he attended the meeting of 9 January 2019. Mkhangelì confirmed that the summary of the meeting records certain interventions by him. The summary specifically records:

“Mzamo states that the Employees’ rights were ignored by not consulting with staff prior to the implementation of the new shift structure. He states that staff never agreed to the new shift structure and the staff only received notification, only that staff only received a notification of the shift roster.”⁷³

- 26.5 Mkhangelì was referred to the part of the summary that records his intervention in the following terms:

“Mzamo responded by saying that letters sent back and forth was not a form of consultation and once again staff never agreed to the new shift. Staff only received a notice of the new shift roster.

Mariké explained that if his statement was true, then management would not have responded to the staff proposals and that there was in fact a formal consultation process adhered to, Mariké encouraged a further discussion in a constructive manner where employees must use and engage in the company process in place to resolve matters. She stated that the tools down action was a disruptive process of reaching a resolution.”⁷⁴

⁷¹ Transcript, page 587, lines 1 – 13

⁷² Record, pages 85 – 88

⁷³ Transcript, page 625, lines 17 – 22; Record, pages 85 – 88

⁷⁴ Transcript, page 627, lines 14 – 21 and page 628, lines 1; Record, page 86

26.6 Mkhangelì confirmed that the summary does record his intervention at the meeting on 9 January 2019.⁷⁵

26.7 Mkhangelì further confirmed that the summary of the meeting at page 87 was accurate:

*"Mzamo said the Blue Team will not be able to report for nightshift because the staff were at work from 07:00am. They will not be able to get enough rest to report for nightshift."*⁷⁶

26.8 The summary of the meeting of 9 January 2019 concludes by recording the following:

"The company gave workers every opportunity to raise any concerns about the new shift structure after workers were advised of the proposed new shift structure on 12 November 2018.

The company responded to all concerns raised. If employees have additional concerns about the new shift structure which have not already been raised they should deal with them through the correct process.

The company promotes constructive communication in order to avoid unnecessary escalation of the situation.

We urge staff to apply constructive, recognised and lawful methods by which your concerns may be addressed. Management is happy to engage with staff members and the union in the proper manner and forums.

All staff are expected to assume their duties as per the 2019 shift schedule and not adhering to the 2019 shift schedule with regard to dates and times will result in disciplinary action.

*Meeting adjourned at 14:00."*⁷⁷

⁷⁵ Transcript, page 627, lines 14 – 21 and 628, line 1

⁷⁶ Transcript, page 632, lines 9 – 14

⁷⁷ Record, pages 87 – 88

26.9 The transcript further records the following:

“MR. B GUY: ...Do you honestly believe today that you did the right thing by not arriving to work?

MR. M MKHANGELI: yes

MR. B GUY: Do you think that was the right to have done?

MR. M MKHANGELI: According to my understanding, if there was no agreement, I was doing the right thing because on our first roster, the one that we're working, there was agreement.”⁷⁸

26.10 During the visits to the company premises, accompanied by members of the EFF, *‘they were never rude’*. They were there to resolve an issue concerning monies due to them.⁷⁹

Relevant legal principles

[27] The relevant legal principles are well known. Those principles were restated in *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*⁸⁰. In that matter, the court held:

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

⁷⁸ Transcript, page 646, lines 19 – 22; page 647, lines 1 – 3

⁷⁹ Transcript, pages 663-664

⁸⁰ 2013 (6) SA 224 (SCA) at para 25.

[28] In *Nyathikazi v Public Health & Social Development Bargaining Council & others*⁸¹, the court held:

"After the decision in Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) and the further explication in Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA), it is clear that our law dictates that an award delivered by an arbitrator will only be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before him or her. A material error of fact and the particular weight to be attached to a particular fact may in and of itself not be sufficient to set aside the award but will only be done if the consequence thereof is to render the ultimate outcome unreasonable."

[29] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mining) v CCMA and Others*⁸², the court held:

"Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health and another v New Clicks SA (Pty) Ltd and others (Treatment Action Campaign and Innovative Medicines SA as amici curiae) 2006 (2) SA 311 (CC) [also reported at 2006 (1) BCLR 1 (CC) – Ed]). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable – there is no room for conjecture and guesswork."

⁸¹ (2021) 42 ILJ 1686 (LAC) at para 21.

⁸² [2014] 1 BLLR 20 (LAC) at para 21.

[30] In *CUSA v Tao Yang Metal Industries and Others*⁸³, the court held:

"Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities". This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do."

[31] In *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*⁸⁴, the Court held:

"[19] The test for review is this: "Is the decision reached by the arbitrator one that a reasonable decision maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator."

[20] This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision maker could make".

⁸³ [2009] 1 BLLR 1 (CC) at para 65.

⁸⁴ (2021) 42 ILJ 1071 (LAC).

[32] The review test has been recently restated in the matter of *Makuleni v Standard Bank of SA (Pty) Ltd & others*⁸⁵ (*Makuleni*) as follows:

"[4] *The import of these remarks demands reflection in order to digest the essence of the exercise that a commissioner embarks upon. The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.*

...

[13] *The Labour Court's view of the case differed from that of the commissioner. As shall be addressed hereafter there are serious flaws in the reasoning articulated in the judgment. However, what is immediately deserving of emphasis is that, even if the perspective of the Labour Court is plausible and reasonable, that is an insufficient reason to displace the award in terms of the review test addressed above. To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result. In our view, no material criticism can be advanced of the award that meets the threshold test for review."* (emphasis added)

[33] It is in light of these principles that the commissioner's award and the arbitration proceedings ought to be assessed.

The arbitration award

[34] In the arbitration award, the commissioner records, *inter alia*, the following:

"(30) *I am required to determine on a balance of probabilities whether the dismissal of the employees who were in the Blue Team was fair, AMCU confirmed there are no procedural challenges in this dispute.*

⁸⁵ (2023) 44 ILJ 1005 (LAC).

- ...
- (33) *The obvious critical issue to be decided in the present case is whether the employer, by seeking to introduce a new roster system, is implementing a change to the terms and conditions of employment of the individual applicants or whether it amounts to no more than a work practice.*
- (34) *In terms of the contracts of employment for all the employees in this case, there is a clause headed 'Normal working hours' which in summary confirms a forty-four hour week from a Tuesday to a Monday; there is a requirement to work continuous rotating shifts; the manager/supervisor would advise of their actual working hours and shifts; a ten percent shift allowance is included in your weekly wage; the actual working hours may differ from department to department and is dictated by operational requirements; actual working hours may extend beyond the normal working hours due to operational requirements and objectives and deadlines. Nothing is stated that would bind the employer to retain the shift time or cycles. The introduction of the new shift roster, in light of the above is a workplace practice and does not constitute terms and conditions of employment but in terms of the contract entered into between the parties is a work practice. No other document regulating the relationship such as collective agreements containing such a provision was placed before me. No additional terms can be implied from the parties' conduct or from custom and practice in the workplace was placed before me. A shallow attempt was made a case that because the Blue Team had been working the same shift pattern since 2016 a practice had developed. As such, the employer had the right to change the practice, which they did over an extended period of time. There was no vested right for the employees to retain their shift times in perpetuity.*
- (35) *In light of the above, I find on a balance of probabilities that the employer was not compelled to reach agreement with the employees regarding the introduction of the new shift rosters on 9 January 2019. It was, as stated, a prudent courtesy to have spent time in consultation and discussion with the employees and their representatives. It was not disputed that there was more than one union at the employer, none of*

which unions had a recognition agreement with the employer. It should never have taken over a year to introduce the shift changes which after research done showed that on a slower rotational shift, there was more rest time for the employees. The change was also made due to high injury and absenteeism rates. There is no contractual right for the employees to work a specific shift in perpetuity. The changing of shift times is a work practice and the employer was entitled to have unilaterally introduced such changes although much consultation and discussions took place. The employees were not able to demonstrate that the changes affect their contractual rights."

- [35] The evidence that served before the arbitration proceedings established that the third respondent engaged the employees over a protracted period of time in respect of a new shift pattern. In the course of those engagements, the parties also dealt with absenteeism rates, the incidence of injury on duty, as well as rest time between shifts on a new shift system. The evidence established that the new shift system involved more rest time for the employees, and the early signs (data) indicated fewer injuries in a slow-rotating shift system relative to a fast-rotating system.
- [36] In the arbitration award itself, the commissioner, in her summary of the evidence, refers to the evidence of Mkhangelì and the claims that the employees had not agreed to the new shift pattern.
- [37] The commissioner at paragraph 32 of the award records "*Much was said at arbitration regarding the workers / AMCU not having agreed to the new shift patterns introduced with effect from 9 January 2019*". The commissioner determined that the third respondent was not compelled "*to reach agreement with the employees regarding the introduction of the new shift rosters on 9 January 2019*".⁸⁶
- [38] The evidence before the commissioner included the employment contracts of the employees, the testimony of Aaris and Mkhangelì as to the provisions of the employment contracts and the version of Mkhangelì that the employees had

⁸⁶ Arbitration award, paragraph 35

been working a shift system for several years, that the third respondent needed the agreement of the employees to change the shift system and that the employees had not agreed.

[39] The established facts include that:

- 39.1 The employees had no contractual or other basis to insist on working a particular shift pattern.
- 39.2 The third respondent was not precluded by the employment contract or any collective agreement from introducing a new shift pattern.
- 39.3 The introduction of a new shift pattern with effect from January 2019 did not amount to a change in material terms and conditions of employment.
- 39.4 The third respondent had the right to change the shift pattern.
- 39.5 No agreement (as alleged by the employees) is required to introduce a new shift pattern.
- 39.6 The introduction of the new shift pattern was prompted by the third respondent's operational requirements.

[40] Against the weight of those established facts is the version of Mkhangelili and the contention on behalf of the employees that no agreement had been reached between the third respondent and the employees and their representatives in relation to the new shift pattern and that such an agreement was required. The evidence that served before the commissioner establishes that no such agreement was required and that the introduction of a new shift pattern with effect from January 2019 did not amount to a change in the material terms and conditions of employment.

[41] The commissioner's observations and findings on this score, as recorded in the arbitration award, are properly grounded in and supported by the evidence that served before the arbitration proceedings.

[42] The commissioner in the arbitration award further records the following:

"(36) *The blue team (all the employees in this case) returned to work on 9 January 2019 and due to the circumstances prevailing on that day they had not been required to work their scheduled nightshift. The blue team worked the nightshift on 10 January 2019 at which stage, after discussions held, the employer held the view that like the other teams the blue team would be working on the new roster from 10 January 2019 onwards. The testimony of Mzamo was that the blue team intended not to comply with the new rosters and hence were absent on 11 and 12 January 2019 without permissions and without notifying the employer. Their absence was due to a refusal to work the new shifts as rostered. Such absence was unauthorised and uncommunicated as is required by the company policy. Hence employees were in breach of the policy of the employer. In the circumstances, the employees are found on a balance of probabilities to be guilty of charges 1, 2 and 3.*"

[43] The established facts in the evidence that served before the arbitration proceedings include that:

- 43.1 Prior to the annual shutdown on 12 December 2018, all Melt Shop employees were informed of the new shift roster and that it would be implemented from 9 January 2019.
- 43.2 On the morning of 9 January 2019, the employees who comprised the Blue team, along with other employees, returned to the third respondent's premises but did not work. The employees informed the management that the reason they were not working was that they did not agree with the new shift roster.
- 43.3 On 9 January 2019, management yet again met with the representatives of the employees and discussed their concerns. No new concerns that had not already been raised and responded to were raised by the employees. Management informed the representatives of the employees that the new shift roster of 2019 was applicable and that a failure to adhere to the new shift roster would result in disciplinary action.
- 43.4 Following those engagements and subject to certain conditions, the employees comprising the Blue team were not required to work the night

shift on that day, as they had been at the premises since 07h00 and had been too tired to commence the night shift at 19h00.

43.5 The third respondent had instructed the employees who comprise the Blue team to comply with the new roster, had done so again on 9 January 2019 and had informed them that disciplinary action would be taken in the event that they did not comply.

43.6 On 10 January 2019, all shifts were worked by the teams, including the Blue team, *'as per the new 2019 shift structure'*.

43.7 As from 10 January 2019, the Orange and Purple teams have continuously worked the 2019 shift structure *'without fail'*.⁸⁷

43.8 In a letter dated 10 January 2019 and issued to the Blue team, the third respondent yet again recorded, *inter alia*, the new shift structure for 2019 and the respects in which the 2019 shift structure is beneficial to employees.

43.9 The 10 January 2019 letter advised the employees that not adhering to the 2019 shift schedule would result in disciplinary action.

43.10 In respect of employees who work a shift after 18h00, the third respondent provides transport to the workplace. Such transport was arranged for employees comprising the Blue team on 11 and 12 January 2019. On both those days, the employees refused the transport arranged.

43.11 The employees who comprised the Blue team did not adhere to the new roster and did not present themselves for duty in accordance with the new roster on 11 and 12 January 2019.

43.12 Notwithstanding the third respondent's instruction, the Blue team refused to work on 11 and 12 January 2019.

⁸⁷ Transcript, page 124, lines 15 - 18

[44] In the circumstances, the observations and findings of the commissioner that the employees are guilty of unauthorised absence in that they refused to work the shifts on 11 and 12 January and a breach of company policy, are well grounded in the evidence that served before the arbitration proceedings and are properly supported by that evidence.

[45] The commissioner in her arbitration award also records the following:

"(37) The refusal to abide by the instruction in the workplace practice change amounts to gross insubordination. This is so given the number of times the employees were instructed to work according to the new rosters effective from 1 January 2019. The employer had also given all workers an opportunity to raise any concerns they had with the change in the shift cycles and those concerns which were raised had been addressed... the actions of the employees and their approach towards to the changes being made, which were lawfully allowed to be changed for a very valid reason, amount to gross insubordination. In the circumstances I find on a balance of probabilities that all the employees in this case are guilty of charges 4 and 5."

[46] The established facts in evidence that served before the arbitration proceedings include that:

46.1 The third respondent had, over time, addressed various concerns raised by the employees in relation to the new shift pattern and by December 2018, no new concerns that had not been addressed were raised.

46.2 The benefits of the new system were demonstrated and documented.

46.3 The third respondent had on a number of occasions informed the employees that they were required to work the new shift pattern.

46.4 The third respondent did so prior to the shutdown in December 2018 and specifically during November 2018, on 4 December 2018 and did so again on 9 January 2019.

46.5 On 9 January 2019, the employees were advised that non-adherence would lead to disciplinary action.

- 46.6 On 10 January 2019, the employees were again advised that non-adherence would lead to disciplinary action.
- 46.7 Notwithstanding the repeated instructions, the employees who comprised the Blue team refused to abide the instruction to work the new shift system and did so repeatedly.
- 46.8 The instruction to work the new shift system was not in breach of the employees' employment contracts or the terms and conditions of their employment more generally.
- 46.9 The third respondent's instruction to work the new shift pattern was clear, documented and repeatedly communicated.
- 46.10 The employees were steadfast in their refusal to work the new shift system, and that refusal was perpetrated with an awareness that disciplinary action would follow.
- 46.11 The employees disregarded the third respondent's instruction and authority; this disregard included the refusal of the transport provided by the third respondent on 11 and 12 January 2019.
- 46.12 The employees' disregard of the third respondent's instructions went further. On 13 January 2019, being a day that they were not scheduled to work, the employees arrived at the workplace purportedly to work in accordance with the prior shift pattern.
- 46.13 By 13 January 2019, the employees knew that the third respondent had discontinued the prior shift pattern and had implemented a new shift pattern.

[47] The employees' conduct was deliberate, willful and sustained. On any reasonable assessment, the characterisation or determination as to gross insubordination is not one untethered from the established facts as to the conduct of the employees who comprised the Blue team. In the circumstances, the commissioner's finding, including paragraph 37 of the arbitration award, that the

conduct of the employees amounts to gross insubordination is properly grounded in and supported by the evidence before the arbitration proceedings.

- [48] The contention that the dismissals were unfair on the basis that the new shift pattern had not been agreed with the employees and that the refusal to work the new shift pattern did not amount to misconduct is not sustainable.

Personal circumstance and mitigation

- [49] At the arbitration proceedings, the applicants elected not to present oral evidence beyond that of Mkhangel. Mashologu explained the reason for this. In this respect, the transcript records the following:

"MR M MASHOLOGU: *Ja, exactly, they have the same version. I cant run away from that, they have the same version that look, we didn't agree with this roster. We had a roster that was agreed with, we've agreed with the Employer that we will carry on working this roster and then we carried on working that roster, nothing has change in each every, what we were just coming here for each year, is what they've said but what I am trying to say is that, they all have one version, they all have one version, they, whereas there's some differences where you find that Mzamo's testimony was like, I can't answer for those and/or that."*⁸⁸

- [50] Before the commissioner, the employee's case did not include evidence as to the personal circumstances of the employees who comprised the Blue team. The sole witness, Mkhangel, did not give evidence as to his personal circumstances or such evidence which could be considered mitigatory factors. The applicant's submissions in argument in the arbitration proceedings also do not canvass the personal circumstances of the individual employees.

⁸⁸ Transcript, page 687, lines 13 to 21

- [51] The date on which the employees commenced employment is recorded in the table at paragraph 5 of the arbitration award. This does indicate length of service. However, length of service in and of itself is not mitigatory.
- [52] In the arbitration proceedings, the employees do not acknowledge any wrongdoing. The evidence does not include any factors which would indicate remorse. On the facts before the arbitration proceedings, an alleged genuinely held belief that the third respondent could not change the shift system without agreement is not mitigatory.
- [53] In these circumstances, the commissioner can hardly be criticised for failing to have regard to the individual circumstances of the employees and for failing to have regard to mitigating factors.
- [54] The evidence that served before the commissioner included the impact of a disruption, such as employees not reporting for a shift, on the third respondent's operations. The Blue team, in defiance of the third respondent's instruction, refused to work two consecutive night shifts. The consequences of the employees' refusal to work the allocated shifts were hardly neutral. On the evidence, in addition to the obvious and severe disruption of operations, the consequences of the employees' unauthorised absence and gross insubordination included significant financial loss suffered by the third respondent. On any reasonable assessment, this serves to underscore the impact of the grave misconduct of the employees.
- [55] Absent any acknowledgement of wrongdoing, no evidence which indicates remorse and no evidence as to mitigation, the commissioner's determination that the dismissals were fair, in other words, that dismissal was a fair sanction, is properly grounded in and supported by the evidence before the arbitration proceedings.

Assessment of the grounds of review

- [56] The commissioner was required to determine whether the dismissal of the employees was fair. As noted above, on day one of the arbitration proceedings, the commissioner observed that the dispute before her *'is an alleged unfair*

dismissal' ⁸⁹dispute and further informed the parties that the third respondent bears the onus of proving that the dismissal of the applicants was fair. The arbitration award specifically records that the commissioner was "*required to determine on a balance of probabilities whether the dismissal of the employees who were in the Blue team was fair*".⁹⁰

[57] The commissioner was indeed required to determine whether the employees who comprised the Blue team were guilty of the misconduct alleged against them and in respect of which they were dismissed. The commissioner did so. The commissioner expressly refers to the allegations of misconduct against the employees, including unauthorised absence from work and gross insubordination.⁹¹ The commissioner determined that the employees were guilty of the misconduct, including unauthorised absence from work and gross insubordination. In the circumstances, it cannot reasonably be contended that the commissioner '*failed to consider the central dispute ...*' '*whether the Individual Applicants were guilty of the misconduct alleged against them and whether they had been found guilty by the employer*'.

[58] It is contended that the commissioner misconceived the nature of the enquiry. The dispute before the commissioner was an alleged unfair dismissal dispute. Oral and documentary evidence (including video footage) was presented over several days. The parties made submissions in argument.⁹² The commissioner considered the evidence that served before the arbitration proceedings and the parties' submissions in argument. The commissioner then issued an arbitration award. The contention that the commissioner misconceived the nature of the enquiry is not sustainable.

[59] The commissioner surveyed the evidence and determined that the employees who comprised the Blue team were guilty of unauthorised absence in that they refused to work on 11 and 12 January 2019, breach of company policy and gross

⁸⁹ Transcript, page 9, lines 10 - 13

⁹⁰ Arbitration award, paragraph 6

⁹¹ Arbitration award, paragraph 6

⁹² Arbitration award, paragraph 8

insubordination. In her arbitration award, the commissioner and in dealing with her determination that the conduct of the employees amounts to gross insubordination, specifically records *"this is so given the number of times the employees were instructed to work according to the new shift roster effective from 1 January 2019. The employer had given all workers the opportunity to raise any concerns they had with a change in the shift cycles and those concerns that were raised had been addressed. ... the actions of the employees and their approach towards changes being made, which were lawfully allowed to be changed for a very valid reason, amount to gross insubordination"*.⁹³ It is readily apparent that the commissioner appreciated the difference between insubordination and gross insubordination. As noted above, the commissioner's determination as to gross insubordination is firmly rooted in the established facts in the evidence before the arbitration proceedings.

[60] The contentions that the commissioner misconstrued the concept of insubordination, that *'the commissioner did not even enquire as to whether the individual applicants were guilty of insubordination or gross insubordination'* are not sustainable.

[61] As demonstrated above, the evidence that served before the arbitration proceedings established that the conduct of the employees in refusing to abide by their employer's instruction to work in accordance with the new shift pattern was willful, deliberate and persisted in. In addition, the evidence established that the conduct of the employees was severely disruptive and caused the third respondent to suffer significant financial loss. An alleged *bona fide* belief that the employer could not change the shift pattern without agreement does not serve to undo or disturb the weight of the established facts. Accordingly, the contentions that the commissioner did not assess the gravity of the insubordination and that the commissioner committed a material error in fact and law in relation to the determination of gross insubordination are not sustainable. The commissioner's determination as to gross insubordination is properly grounded in the evidence and is consistent with the ordinary principles of our law.

⁹³ Arbitration award, paragraph 37

- [62] The commissioner in the arbitration award records, *inter alia*, that: “A shallow attempt was made to make a case that because the blue team had been working the same shift pattern since 2016 a practice had developed. As such the employer had the right to change the practice which they did over an extended period of time. There was no vested right for the employees to retain their shift times in perpetuity”.⁹⁴
- [63] The commissioner determined, *inter alia*, that “There is no contractual right for the employees to work a specific shift in perpetuity” and that “The employees were not able to demonstrate that the changes affected their contractual rights”.⁹⁵ As noted above, these findings are properly grounded in and supported by the evidence that served before the arbitration proceedings.
- [64] In the arbitration award and when summarising the evidence, the commissioner refers expressly to the version that the employees and their representatives had not agreed to the new shift roster.⁹⁶ In addition, when summarising the evidence of Mkhangel, the commissioner includes the version that the employees did not agree to work the new shift system.⁹⁷ The fact that the commissioner determines that the employees were indeed guilty of the misconduct (including unauthorised absence from work and gross insubordination) does not have the consequence that the commissioner ignored ‘the reasons why the individual applicants failed to report for work’. In the commissioner’s assessment, the employees were consulted, and such concerns as the employees had raised during the consultations were addressed; the employees had no contractual right to a specific shift system.⁹⁸ The commissioner’s assessment, as recorded at *inter alia* paragraph 37 of the arbitration award, is properly grounded in and supported by the evidence that served before the arbitration proceedings. As is evident from the arbitration award, the commissioner did not accept the version and contentions on behalf of the employees comprising the Blue team that the third

⁹⁴ Arbitration award, paragraph 34

⁹⁵ Arbitration award, paragraph 35

⁹⁶ Arbitration award, paragraph 32

⁹⁷ Arbitration award, paragraphs 23 and 26

⁹⁸ Arbitration award, paragraph 35

respondent had to reach agreement with them and their representatives on a new shift system. The established facts in the evidence provided every proper basis for the commissioner to do so.

- [65] It is contended that the commissioner '*overlooked and ignored the facts of the matter and the reasons why the individual applicants did not follow the instruction to work in accordance with the new shift pattern*'.
- [66] The established facts include that the employees' employment contracts do not stipulate shifts, specifically record "*the actual hours of work may differ from department to department and as dictated by operational requirements*", that '*Your Manager or Supervisor will, inform you of your actual working hours and shifts that you will be required to work*'. As demonstrated, the commissioner considered the version and contentions that no agreement had been reached between the third respondent and the employees and their representatives in relation to the new shift pattern and that such an agreement was required. The commissioner determined that no such agreement was required. That determination is properly supported by the evidence. The contention that the commissioner '*overlooked and ignored the facts of the matter and the reasons why the individual applicants did not follow the instruction to work in accordance with the new shift pattern*' is not sustainable.
- [67] It is also contended that the commissioner ignored the fact that certain individual applicants returned to work on 9 January 2019 and were prepared to work in accordance with the old shift system, and yet further that the commissioner ignored that the individual applicants did not have the intention not to work but always displayed an intention to work but in terms of the long established shift pattern. This contention is not sustainable. Properly put, on the evidence that served before the arbitration proceedings, the persistence in wanting to work in accordance with a shift pattern that the third respondent had discontinued underscores the employees' refusal to abide by the third respondent's instruction and their disregard for the third respondent's authority. On the evidence before the arbitration proceedings, the fact that certain individual employees were apparently prepared to work in accordance with the discontinued shift pattern is not exculpatory.

[68] Similarly, the contention that the commissioner failed to give sufficient weight to the fact that it had been the practice of the third respondent and the employees to work on the old shift pattern for several years is unsustainable. The established facts in the evidence that served before the arbitration proceedings include that the third respondent had a valid operational requirement to introduce a new shift system, had consulted the employees, including the employees who comprised the Blue team, over a protracted period of time, had documented the reasons for the new shift system, had documented the benefits to the employees including more rest time and the early data as to fewer injuries on duty and reduced absenteeism of a slow rotating shift system, that the employees had no contractual or other basis to insist on working a particular shift pattern and that the introduction of a new shift pattern with effect from January 2019 did not amount to a change in material terms and conditions of employment. On any reasonable assessment, the weight of the established facts arising from the evidence, which evidence included the provisions of the employment contracts, quite properly displaced any notion that the employees had some basis in 'established practice', let alone a right, to work the prior shift system in perpetuity. An alleged *bona fide* belief does not serve to undo or disturb the weight of the established facts.

[69] The commissioner determined that the *'manner in which the employees approached the situation was adversarial and confrontational'*.⁹⁹ As noted above, the evidence that served before the arbitration proceedings established that the conduct of the employees in refusing to abide their employer's instruction to work in accordance with the new shift pattern was willful, deliberate and persisted in. That conduct was severely disruptive and caused the third respondent to suffer significant financial loss. In the context of protracted consultation and the provisions of the employment contracts, that conduct evidenced a disregard for the third respondent as the employer. The commissioner's determination that the employees were adversarial and confrontational is supported by and grounded in the evidence that served before the arbitration proceedings.

⁹⁹ Arbitration award, paragraph 39

- [70] There is simply no proper basis for the contention that the commissioner failed to properly consider the reasonableness of the shift pattern.
- [71] It cannot reasonably be contended that the commissioner's determination as to the employees being guilty of misconduct, including gross insubordination, is one that no reasonable decision-maker would reach.
- [72] The issue is not whether this court would come to a conclusion different to that of the commissioner. Rather, the issue is whether the commissioner's determination that the employees were indeed guilty of misconduct, including unauthorised absence from work and gross insubordination, is properly grounded in the evidence before the arbitration proceedings. As noted above, the commissioner's determination is indeed supported by and grounded in the evidence that served before the arbitration proceedings.

Dismissal as an appropriate sanction

- [73] It is contended that the commissioner did not properly apply the then-applicable Schedule 8 of the Code of Good Practice in determining, *inter alia*, whether dismissal is an appropriate sanction and that the commissioner failed to properly consider the length of service and that a final written warning would have been a more appropriate sanction, as dismissal was too harsh.
- [74] In *De Beers Consolidated Mines Ltd v CCMA & Others*¹⁰⁰ (*De Beers*), the Court held that:

"...Long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it."

and

"Long service is not as such mitigatory. Mitigation, as that term is understood in the criminal law, has no place in employment law. Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should

¹⁰⁰ [2000] 9 BLLR 995 (LAC) at para 22.

*be, a sensible operational response to risk management in the particular enterprise."*¹⁰¹

[75] Further, the court held that:

*"It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrong doing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken."*¹⁰²

[76] In *Theewaterskloof Municipality v SALGBC (Western Cape Division) & Others*¹⁰³ (*Theewaterskloof*), the Court noted that, whilst item 3 (2) of the Code of Good Practice: Dismissal, contained at Schedule 8 of the LRA, endorsed the concept of corrective discipline:

*"...progressive discipline is premised on a corrective purpose and outcome. If no correction is likely to be obtained or if the employment relationship is in any event irretrievably broken down, the scope for graduated discipline will likewise fall away."*¹⁰⁴

[77] The Court in *Theewaterskloof* found in this instance that, because the employee had:

*"...elected to hold himself on a confrontational course. There can be very little room for the notion of corrective discipline in this situation. Where an employee refuses to demonstrate any acceptance of wrongdoing, indicates no degree whatsoever of remorse, makes no move to correct what he has done, and stands firm with an attitude of opposition towards his employer, then such employee through his own conduct undercuts the applicability of corrective or progressive discipline."*¹⁰⁵

[78] The evidence before the commissioner did not include any acknowledgement of wrongdoing, nor did the evidence include matters that are genuinely mitigatory.

¹⁰¹ Ibid at 22.

¹⁰² Ibid at 25.

¹⁰³ [2010] 11 BLLR 1216 (LC).

¹⁰⁴ Ibid at paras 17 – 19.

¹⁰⁵ Ibid at 20.

- [79] As noted above, the confrontational and adversarial approach of the employees relates to the established disruptive conduct, prior to their dismissal, in willfully disregarding their employer's instructions and authority. The contention that the commissioner failed to consider "*that there was no intimidation during the attendance of the EFF members at the company premises and placed too much emphasis on such attendance in determining that dismissal was an appropriate sanction*" is simply not sustainable.
- [80] The commissioner's determination that the dismissals were fair (an appropriate sanction) is entirely consistent with the ordinary principles of our law. Accordingly, it cannot reasonably be contended that the commissioner's determination that the dismissals were fair was one that no reasonable decision-maker could reach.
- [81] An assessment or '*fair reading*' of the commissioner's award against the backdrop of the evidence that served before her, as contemplated in *Makuleni*, does not yield the result that the commissioner's conclusions are '*untenable*'.
- [82] In the circumstances, the commissioner's arbitration award is not susceptible to review, whether on the grounds contended for by the applicant or at all.

Order

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


R Van Voore
Acting Judge of the Labour Court Of South Africa

Appearances:

For the Applicant: Adv A Cook

Instructed by: LDA Incorporated Attorneys

For the Third Respondent: Adv G Leslie SC

Instructed by: Guy & Associates

LABOUR COURT