LABOUR APPEAL COURT

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN.

Reportable

Case no: CA14/2016

In the matter between:

DRS DIETRICH, VOIGT & MIA	**Appellant**
and	
BENNET CM N.O	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
THULASISWE THULANI NGCOBO	**Third Respondent**

Heard: **11 September 2018**

Delivered: **27 February 2019**

Summary: Review of an arbitration award - Employee dismissed for falsifying his overtime claim forms. The CCMA - finding that the employee was not guilty of dishonest conduct but negligent - substituting the sanction of dismissal with an award of retrospective reinstatement and a 12-months written warning for negligence.

On review to the Labour Court- finding that the award was not susceptible to review and fell within the band of reasonable decision-makers. Consequently- finding no basis to upset the commissioner's assessment of the fairness of the disciplinary sanction meted out to the employee.

On Appeal to the Labour Appeal Court- finding that the Labour Court's decision refusing to review and set aside the arbitration award was beyond reproach. The Appeal - dismissed with costs.

Coram: Phatshoane ADJP, Sutherland JA and Murphy AJA

JUDGMENT

PHATSHOANE ADJP

[1] This is an appeal against the whole of the Judgment and order of Labour Court (*per* Rabkin-Naicker J) handed down on 08 March 2016, dismissing with costs the application to review and set aside the arbitration award dated 01 July 2014 issued under Case No: WECT6702-14 by Commissioner C.M Bennett ("the commissioner"), the first respondent, under the auspices of the Commission for Conciliation Mediation and Arbitration ("the CCMA"), the second respondent. The appeal is with leave of the Labour Court.

[2] Both parties filed their Heads of Argument outside the time allocated to them by the Registrar of this Court. The Heads of Argument for Mr Thulasizwe Thulani Ngcobo, the third respondent ("the employee"), were supposed to have been filed on or before 19 December 2016. They were only filed on 05 September 2018, some 20 months and 12 days late. In the Heads of Argument submitted for Drs Dietricht, Voight & Mia (Pty) Ltd t/a Pathcare, the appellant ("Pathcare"), mention is made that condonation shall be sought in a separate application but this did not happen. In explaining the delay in filing his Heads of Argument, the employee says that he intended seeking *pro bono* representation as he was unable to cover the costs of the appeal. Only on 04 September 2018, seven days before this appeal was argued, did he instruct his current attorneys of record to oppose the appeal. The delay of some 20 months is quite excessive. Be that as it may, I can conceive of no prejudice in granting condonation. Both sets of heads of argument were considered for purposes of disposing of this appeal.

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[3] The Notice of Appeal by Pathcare was served timeously on 16 August 2016 but was filed with the Court on 17 August 2016, just one day out of time. Condonation is also sought for the late filing thereof. The application is unopposed. It is trite that a slight delay and a good explanation, which has been given in this case, may help to compensate for the prospects of success that are not strong.[1] On this basis, I am of the view that the application for condonation of the late filing of the Notice of Appeal should succeed. To hold otherwise will be manifestly unfair.

[4] The factual matrix giving rise to this litigation is largely not contentious. The employee served as the Head of Department for DTP Print and Design Studio as at 01 July 2010. During December 2012 he was tasked to work on a Basic Haematology Project of Pathcare with the late Professor Jacobs, the Head of Basic Haematology Research Group. The assignment would have to be performed outside the normal working hours. Although the employee was not entitled to claim overtime, because his salary was more than the threshold set by the Minister of Labour, he was given approval to claim this at his normal hourly rate for every hour of overtime worked as opposed to the prescribed one-half times (1.5) the wage ordinarily paid to employees that are contractually entitled to claim overtime in terms of the Basic Conditions of Employment Act, 75 of 1997("the BCEA").[2]

[5] Pursuant to a concern raised by Ms Elandi Bishop, the employee's line manager, regarding the overtime claims that were submitted to her for approval by the employee, an internal auditor and forensic investigator of Pathcare, Mr Carl Huebsch, was requested to conduct an investigation into the employee's overtime claims for a period of 13 months commencing in December 2012 and ending January 2014. The outcome of this audit process was that the employee had claimed overtime at an incorrect 1.5 hourly rate as opposed to the agreed 1.0 hourly rate during July, November and December 2013 out of the 13 months

[1] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); [1962] 4 All SA 442 (A).
[2] See section 10(2) of the Basic Conditions of Employment Act, 75 of 1997.

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which were subjected to the audit process. The total of these claims amounted to approximately R7 270.68. Mr Huebsch ascribed the incorrect claims to a dishonest conduct on the part of the employee because the deviations were at intervals and not consecutive.

[6] The investigation further revealed that for the period 05 October 2013 to 11 January 2014, on 13 occasions, the employee failed to "clock out" for the lunch breaks and thus claimed overtime when he was not at the workplace. The total amount claimed was R1 376.92. Mr Huebsch says that the employee did not keep accurate record of the overtime worked even though he was advised to do so by his line manager.

[7] The claim forms were all approved and signed off by the employee's line manager without any queries. On 03 and 08 April 2014 the employee was subjected to an internal disciplinary hearing on two charges of dishonest conduct and/or falsification of overtime claim forms. In the first charge, it was alleged that during the period October 2013 to January 2014, on 13 occasions, he claimed full overtime hours despite having taken lunch breaks or being off the company premises. As a consequence of this, he received overpayment of R1 376.98. The second charge was that during July, November and December 2013 he claimed overtime at an incorrect hourly rate of 1.5 instead of 1.0 which resulted in an overpayment of R7 270.68. It suffices to mention that, prior to his disciplinary hearing, when the overpayment was discovered, the employee refunded it.

[8] The employee was found guilty on the aforesaid charges and dismissed on 10 April 2014. He then referred his alleged unfair dismissal dispute to the CCMA for resolution through conciliation and arbitration.

[9] Only the substantive fairness of the dismissal was in dispute during the arbitration proceedings. In defending himself, the employee intimated that his overtime work was performed over the weekends. He worked for long agonising hours. The refreshments available on the premises were limited causing him to purchase a snack elsewhere and return to the workplace to eat whilst working.

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He admitted that there was a lack of proper record keeping on his part for the time he spent outside the workplace, during his meal intervals, which he did not deduct from his overtime claims. He says that his actions were not dishonest and intentional and had apologised for his transgressions. He admitted that he claimed overtime at the incorrect rate during July, November and December 2013. He attributed this to pure human error for which he apologised. He acknowledged that the repayment he made in respect of the overtime claims in issue did not excuse his conduct. He says that he submitted his claim forms not in any covert manner because this were accompanied by the time sheets which his manager approved. He denied falsifying any of his overtime claim forms.

[10] The commissioner found that the employee claimed overtime at the incorrect rate in the three months already specified. He further found that the employee had claimed payment for the time that he was not at the workplace, that is, during his meal intervals. What Pathcare had to prove, he explained, was confined to whether the breaches of the rule were intentional. The commissioner found that Pathcare failed to discharge its *onus* to prove that the employee acted intentionally. In respect of the allegation that the employee claimed overtime at the incorrect rate he was of the view that, if the employee's actions were intentional, he would not have submitted the incorrect claim forms intermittently but would have repeated this sequentially. Insofar as the allegation that the employee had claimed overtime for the lunch breaks when he was not on the premises is concerned, the commissioner noted that the employee struggled to justify his action. He was of the view that a fraudster would have left less trail of evidential material. He remarked that the employee's argument that he had no means of recording his overtime time was pitiful as he overlooked recording this on his diary. He concluded that the employee *"was merely slapdash or to put it in another way, negligent."*

[11] The commissioner observed that, for the greater part, the employee could not remember where he had been or what he had been doing during his lunch breaks and opined that a fraudulent activity would not have been so badly

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orchestrated. Consequently, he found that Pathcare failed to prove that the employee had acted dishonestly and deliberately falsified his claim forms. He was of the view that the employee's negligent conduct was deserving of punishment short of dismissal. He found no evidence which would have restricted an award of reinstatement and held that Pathcare failed to show that the relationship of trust had been destroyed beyond repair. Accordingly, he retrospectively reinstated the employee into the services of Pathcare with three months back-pay totalling R67 780.84 and substituted the sanction of dismissal with a 12-month final written warning for negligence.

[12] On 25 July 2014 Pathcare brought an application to review and set aside the commissioner's award in terms of s145 of the Labour Relations Act, 66 of 1995, in the Labour Court. The Court found that Pathcare did not prove the intention to falsify the overtime claim forms. It held that the commissioner's finding, that the employee was careless; negligent; and had no intention to defraud Pathcare, was within the band of reasonableness. The Court further found that the employee's line-manager had checked the overtime claim forms before appending her signature thereto and had further recorded in an e-mail that she and the employee had learned a lesson from their mishaps. The Court held that the commissioner's finding, that there was no evidential material to support Pathcare's claim of irremediable breach of trust, was reasonable. It found no basis to upset the commissioner's assessment of the fairness of the disciplinary sanction meted out. As already alluded to, the Labour Court dismissed the review application with costs.

[13] The grounds of appeal can be summed up as follows. It was contended, for Pathcare, that the Labour Court erred in failing to determine that the commissioner's approach to the question whether the employee was guilty of negligence as opposed to dishonesty had no basis in fact and in law. It was argued that the employee deliberately submitted false claim forms. The evidence presented by Pathcare showed intent and wilful behaviour on the part of the

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employee thus he was dishonest and failed to adduce evidence to rebut this, the argument went.

[14] On the question of relief, Pathcare contended that the commissioner failed to exercise proper and judicial discretion in reinstating the employee regard being had to the serious nature of the offence and the relationship of trust which had broken down irretrievably.

[15] The main issue to be ventilated is whether the employee acted intentionally or negligently in submitting his claim forms without deducting the lunch hours when he was not at the workplace or when claiming overtime at the incorrect rate. Put differently, whether the commissioner's conclusion, that the employee was guilty of negligence and not dishonesty, was reasonable.

[16] The employee gave various explanations for his failure to keep proper records of the overtime worked. He, for example, intimated that he submitted his claim forms with the spreadsheets for his manager's approval. He then said at some point he discontinued using spreadsheets and submitted his claim forms with the attendance records which would reflect when he took his lunch. He sought to blame his manager for not properly checking whether his claim forms were correct. He also claimed that the clocking system malfunctioned and had not brought this to the attention of Pathcare because he thought he could keep proper record but erroneously failed to do so. He did not check his payslips for purposes of establishing whether they had any discrepancies and reporting them because his bank notified him through the Short Message Service (SMS) of the amounts of salaries paid into his bank account. He acknowledged having been made sufficiently aware through e-mails to keep proper records of his attendance schedule which he interpreted to mean recording the time he commenced with his work and when his shift ended.

[17] It was contended for Pathcare that the employee's unmethodical poor defences to the allegations of misconduct should have led the commissioner to a

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conclusion that Pathcare discharged its *onus* to prove that he was guilty of dishonest conduct.

[18] With regard to the 13 lunch breaks for which the employee claimed overtime, the employee testified that he was unable to provide explanations for at least 10 of the lunch breaks and had to generalise in his accounts of the events. He said: "*After a certain time I wouldn't be able to recall exactly hence I did give case scenarios that may have impacted - that gave discrepancies to the findings of the auditor.*"

[19] The difficulty with the time-related offence such as the present, when the employee is subjected to discipline months after the occurrence of the incidents, is fallibility of human memory for which he could not be criticised. The commissioner was alive to this. Having had regard to the incoherent and vacillating manner in which the employee could not sufficiently defend his submission of the purported incorrect overtime claim forms, the commissioner made the observation that he struggled to justify his actions.

[20] One troubling aspect of the alleged transgression is that nowhere on the record before us is there any indication that there was a rule which precluded the employee from claiming for his lunch breaks. Mr Lennox, for Pathcare, was hard-pressed to show us the existence of the rule in issue. Instead, he referred us to one of the responses by the employee to a question posed to him during the arbitration where he said: *"We [the employee and his Manager] argued until eventually a mutual agreement was met where I could, where we both agreed on all overtime claims over eight hours will be reduced by 60 minutes whether I went to lunch or not."* This does not answer the question whether a rule existed prohibiting claims for the lunch breaks.

[21] To a certain extent the commissioner misdirected himself in holding that Pathcare was confined to proving whether the breach of the rule was intentional without enquiring or establishing whether there were some regulatory mechanisms in place. Ordinarily in terms of the BCEA an employee must be

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remunerated for a meal interval in which the employee is required to work or is required to be available for work.[3] Whether the employee was barred from claiming for the lunch breaks on the basis of the threshold set by the Minister of Labour in terms of the BCEA was also not clarified at arbitration. The commissioner ought to have found that the employee was entitled to have been exonerated from the alleged transgression due to Pathcare's failure to establish the existence and infraction of the rule in question.

[22] On the allegation that the employee claimed overtime at the incorrect rate for July, November and December 2013 it is important to remember that the employee constantly attributed this to human error. It was therefore incorrect for Pathcare to argue that the finding by the commissioner that the employee made a mistake was not based on the evidence. Neither can it be contended, as Pathcare also sought to do, that the commissioner manufactured a defence for the employee in concluding that his claims were submitted in the fashion described due to a mistake.

[23] In the final analysis, the commissioner determined that the employee did not act intentionally but was negligent. A person will be held negligent where his or her conduct falls short of the standard of the reasonable person.[4] In the workplace context the "reasonable person" would be the reasonable employee with experience, skill and qualifications comparable to the accused employee.[5] The following salutary reminder in *Mkhatswa v Minister of Defence*[6] is instructive:

> 'Whether or not conduct constitutes negligence ultimately depends upon a realistic and sensible judicial approach to all the relevant facts and circumstances that bear on the matter at hand. What also needs to be emphasised is that what is required to satisfy any test for negligence is foresight of the *reasonable* possibility of harm. Foresight of a mere possibility of harm will not suffice.'

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[3] See section 14(3)(a) of the Basic Conditions of Employment Act, 75 of 1997.
[4] South African Criminal Law and Procedure Vol 1 -Jonathan Burchell (Jutastat/e-publications) 4th Ed, 2011 ch2-p57.
[5] John Grogan- Workplace Law (Jutastat/e-publications) 12th Ed, 2017, ch 12-p 237-238.
[6] 2000 (1) SA 1104 (SCA) at 112H para 23.

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[24] In light of the fact that the claim forms in issue were structured in a way that the overtime rates, that is, both the hourly and one and half times rates, were placed in adjacent columns, the commissioner readily accepted that the employee inserted his overtime in the wrong column because the claim forms were not submitted consecutively. It cannot be said that the commissioner's decision that the employee was negligent is not rationally connected to the evidence. Clearly, the employee did not exercise the degree of care which can reasonably be expected of an employee in his position of responsibility when claiming his overtime at the incorrect rate. The conclusion by the commissioner that he acted negligently cannot be faulted.

[25] Turning to the relief granted by the commissioner, it was contended for Pathcare that the award of reinstatement was inappropriate because the employee did not show any contrition and that his continued employment relationship with Pathcare had been rendered intolerable.

[26] In a situation where no evidence had been adduced during the trial or arbitration, as in this case, on the effect of an order or an award of reinstatement, the Court or the commissioner should consider all the factors and circumstances relevant to that form of relief including the gravity of the offence committed by the employee. Equally trite is that that dismissal is a penalty of the last resort because of the harsh consequences it may have on an employee who is dismissed.[7]

[27] I have already concluded that the commissioner's finding, that the employee acted negligently in his completion and submission of the overtime claim forms, was reasonable. Pathcare's argument that the relationship of trust was damaged beyond any restoration cannot be sustained. Mr Huebsch could not comment on whether the relationship of trust had been broken as he was not the employee's manager. He was requested to read into the arbitration record what was allegedly said in aggravation of the sentence during the employee's disciplinary

[7] *Transport & Allied Workers Union of SA on behalf of Ngedle and Others v Unitrans Fuel & Chemical (Pty) Ltd* (2016) 37 ILJ 2485 (CC) at 2539 para 173.

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enquiry. He then read: "*The company cannot continue trusting the employee and the accused has no regard for Ms Bishop as his manager.*" This should be viewed in the context of the manager's e-mail acknowledging that she and the employee had learned a lesson from the incidents and were ready to move forward[8] which, in my view, is a clear indication that continued employment relationship had not been rendered insufferable.

[28] What is also relevant here is that, apparent from the record of the disciplinary hearing, the employee had a clean record. On the basis of my conclusion that the commissioner ought to have exculpated him from the allegation that he claimed for lunch breaks, the award of reinstatement is compellingly inescapable. Having regard to the nature of the offence he committed, I am of the view that, this is a case where a system of graduated discipline, through warnings, would have sufficed.

[29] The commissioner cannot be faulted in having concluded that the offence did not merit the sanction of dismissal. His finding that no evidence of "irrevocable breach" was adduced is unassailable. I am unpersuaded that he exceeded his powers or that he did not exercise his discretion properly. The Labour Court correctly found no basis to upset the commissioner's assessment of the fairness of the disciplinary sanction. The award of retrospective reinstatement with a written warning valid for a period of 12 months for negligence was reasonable in the circumstances of this case.

[30] In conclusion, awards should not be easily interfered with unless the decision was entirely disconnected with the evidence or is unsupported by any evidence and involves speculation on the part of the commissioner.[9] This is not the case here. In the end, the test is whether the decision arrived at by the commissioner is one that a reasonable commissioner could have reached. In my view, on the

[8] The e-mail in question does not form part of the record. However, reference is made thereto in the parties' heads of argument, the arbitration award and the Judgment of the Labour Court. It was undisputed at arbitration that the employee's manager wrote an e-mail to that effect- it is also not clear from the record to whom this e-mail was addressed to.

[9] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at 2802 para 13.

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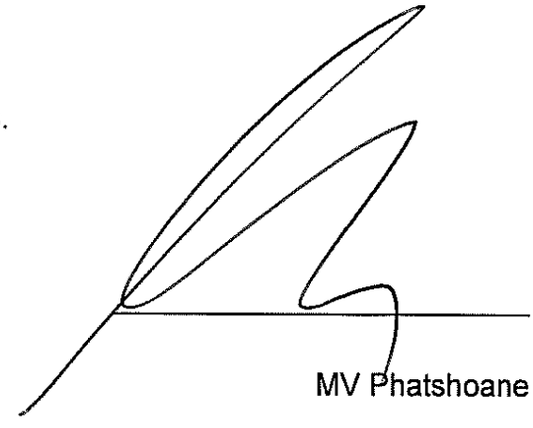
available material, it was. The Labour Court's conclusion that the arbitration award was not susceptible to review is above reproach.

[31] Something must be said about the substandard manner in which the record of this appeal had been prepared and presented to us. The documents referred to in the transcript of the proceedings are not cross-referenced to any of the documents that form part of the record. The documents that served before the CCMA are not contained in any of the three volumes forming the record of this appeal. Instead, a separate bundle, which is not paginated, headed "Disciplinary hearing" forms part of the record making it difficult to align this to what was traversed before the commissioner. This is unacceptable and deserving of censure.

[32] Lastly, Pathcare submitted as one of its ground of appeal that the Labour Court ought not to have granted costs against it in the review. This ground was not enthusiastically pursued. In any event, in awarding costs against a party, the Labour Court exercises a discretion according to the requirements of law and fairness which should not be easily interfered with on appeal. There appears to be no reason to upset that cost order. In respect of the costs of this appeal, I am satisfied that the requirements of law and fairness dictate that they should follow the result. I make the following order:

Order

1. The appeal is dismissed with costs.



MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

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Sutherland and Murphy JJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:	Adv Lennox Instructed by Snyman Attorneys
FOR THE FIRST AND SECOND RESPONDENT:	Adv L Myburgh Instructed by Greenberg & Associates.

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