Consol Ltd t/a Consol Glass v Ker NO & Others
[2002] 4 BLLR367 (LC)

Division: Labour Court, Cape Town
Date: 07/02/2002
Case No: **C429/01**
Before: Waglay, Judge

Flynote

Application in terms of section 145

Commission for Conciliation, Mediation and Arbitration – Arbitration award – Review of – Court will itself correct award, rather than remit it to CCMA, if end result is foregone conclusion, where delay would unjustifiably prejudice applicant, where commissioner has exhibited bias or incompetence, or when court is in position to take decision itself.

Disciplinary penalty – Dismissal – Dismissal for dishonesty justified when employee's dishonesty was calculated, employee failed to take opportunity to rectify dishonesty, and lied about conduct.

Dismissal – Misconduct – Fraud – Employee accepting special pay knowing he was not entitled to it – Dismissal justified.

Practice and procedure – Review – Remission or correction – Court will itself correct, rather than remit award to CCMA, if end result is foregone conclusion, where delay would unjustifiably prejudice applicant, where commissioner has exhibited bias or incompetence, or when court is in position to take decision itself.

Editor's Summary

The third respondent, an employee of the applicant, was dismissed after being found guilty of claiming, and receiving, special pay that was not due to him. He referred a dispute to the CCMA. The respondent commissioner held that, although the employee was aware that he had been overpaid and that his failure to bring this to the attention of the applicant amounted to a "dereliction of duty", dismissal was too harsh a sanction. The commissioner held further that, because the employment relationship had been destroyed, reinstatement could not be ordered. However, he awarded the employee compensation equal to four months' remuneration. In an application for review of the award, both parties agreed that the award should be set aside. The applicant argued that the Court should decide the matter; the respondents contended that it should be remitted to the CCMA to be heard *de novo*.

The Court held that the award was not justifiable. As to whether the matter should be remitted to the CCMA, the Court held that the common law principles relating to the remission of matters to the body under review applied with equal force to reviews under section 145 and under section 158(1)(g) of the Act. The reviewing tribunal will correct an act under review, rather than remit it, where the end result is a foregone conclusion, where a further delay would unjustifiably prejudice the applicant, where the decision-making body has exhibited bias or incompetence; and where the reviewing court is in as

good a position to make the decision itself. There had been no allegations of prejudice or bias *in casu*. However, when faced with the decision to correct or remit, the Court was obliged to have regard to the objective of efficient and effective dispute resolution. The main issue *in casu* was the substantive fairness of the dismissal. The decision required was to decide whether the employee's conduct had been so grossly dishonest as to warrant dismissal for a first offence. As a specialist tribunal, the Court was competent to decide whether the penalty fitted the offence. When dishonesty was calculated and the employee had not attempted to rectify his dishonesty, and lied about his conduct, dismissal was justified.

The award was set aside and replaced with an order declaring the dismissal fair.

Judgment

Waglay J

The third respondent was an employee of the applicant and senior shop steward of the second respondent, the Chemical Energy Paper Printing Wood and Allied Workers Union. The respondent was dismissed by the applicant on 4 September 2000 for misconduct based on charges relating to dishonesty and fraud, after he claimed, and was paid, special leave pay not due to him.

The respondent alleged that that his dismissal was substantively unfair, and the dispute proceeded to CCMA for arbitration on 17 April 2001. The commissioner essentially found the following:

1. The respondent was aware that he had been overpaid.

2. Consequently, his refusal to bring this to the attention of the applicant amounted to a dereliction of duty and, hence, misconduct.

3. The sanction of dismissal was too harsh in light of the following mitigating factors:

   3.1 The misconduct in question was a first offence;

   3.2 The misconduct was a "sin of omission";

   3.3 The chairperson of the disciplinary hearing unfairly took evidence of past transgressions into account.

4. As regards the possibility of reinstatement, the commissioner accepted that the "relationship of trust had broken down" between employer and employee stating:

   "In terms of the LRA, a commissioner is obliged to re-instate where the dismissal is substantively unfair unless the continuation of the employment relationship would be intolerable. As the trust has broken down, I am left with no option but to award compensation for the unfair dismissal."

5. The commissioner accordingly awarded the employee four months' compensation amounting to R20 033,97.

It is significant that the representatives for both the applicant and the respondent were in agreement that the award should be reviewed and set aside, though for different reasons. From reading of the award it is clear that the finding of the commissioner is not rational, or justifiable in relation to the reasons given.

The Code of Good Practice on Dismissal (Schedule 8 of the LRA) states the following:

> "Dismissals for misconduct
>
> (4) Generally, it is not appropriate to dismiss an employee except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable."

In the matter at hand, the commissioner found that, although the employee's misconduct has made a continued employment relationship intolerable, the sanction of dismissal was too harsh. The award is thus clearly not justifiable in relation to the reasons given, and should be set aside on this basis alone.

The next issue to be determined is whether the award should be corrected by this Court or remitted back to the CCMA for rehearing. Applicant argued that it would be appropriate for this Court to dispose of the matter finally, as it would serve no purpose to remit the matter to the CCMA. Where the application to review and correct an award is unopposed or where both parties agree that the reviewing court should substitute its decision for that of the original decision-maker, the court would be more readily convinced that it is in a position to make the decision in question. This is not the case in this instance. Counsel for the respondent analysed the principles of review

and correction generally applicable in administrative law and argued that this Court should not correct the award but remittal to the CCMA should be ordered.

In the unreported matter of *Emcape Thermopack (Pty) Ltd v CEPPWAWU* (case no C509/99), it was held that correction could take place by the reviewing body in four specified circumstances viz:

1. where the end result is a foregone conclusion;
2. where a further delay would unjustifiably prejudice the applicant;
3. where the decision-making body has exhibited bias or incompetence;
4. where the court is in a good position to make the decision itself.

Emcape concerned a review in terms of section 158(1)(g) of the LRA, whereas the current matter is brought under section 145(4)(a) of the LRA.

Counsel for the applicant argued that this distinction is significant, in that section 145(4)(a), contrary to section 158(1)(g) specifically makes provision, where an award has been set aside, for the Labour Court to "determine the dispute in the manner it consider appropriate".

This distinction however takes the matter no further. I agree with the reasoning in *Emcape* which states:

> "In using the word 'review' in section 158(1)(g) of the LRA it is reasonable to infer that the drafters of the legislation intended the word to be understood broadly and to incorporate the various ancillary powers which make judicial review a practical remedy" (at paragraph 21).

In addition, it should be noted that section 158(1)(a) empowers the Labour Court to "make any appropriate order", including, but not limited to, the enumerated powers that follow in subparagraphs (i)–(vii). The position is therefore broad enough to include the power to correct an arbitration award on review, where appropriate.

There is no material difference between the provision of section 145 and section 158(1)(g) as regards the power of the Labour Court to correct an arbitration award set aside on review. The factors set out in *Emcape* are thus relevant to the determination of whether, in the instant matter, it is appropriate to correct the arbitration award.

Considering the factors set out in *Emcape* no evidence was led as to any unjustifiable prejudice to the applicant as a result of any further delay in proceedings. Further, no allegations of bias or incompetence were put before this Court. This leaves two factors to consider.

With regard to whether or not the result is a foregone conclusion, it was argued by the applicant that the result in this instance is a forgone conclusion as the facts clearly show that the conduct of the respondent amounted to theft or fraud; that his excuse was patently false and that the only justifiable finding in this matter is that the dismissal was substantively fair.

This is not what is intended by the wording of the phrase "forgone conclusion". If the factors under consideration are viewed as a whole, it is clear that what is envisaged is the type of situation where the finding of a decision-making body is set aside on some or other ground, and the action of setting aside leads to the unassailable conclusion that some other order is appropriate. In this matter, the mere fact that both parties agree that the award should be set aside, though with diametrically opposed outcomes in mind, should be sufficient to indicate that the result is in no way a "forgone conclusion". This matter could not be determined merely from the fact of having to set the award aside. An in-depth consideration of the merits and all the circumstances would be required before a decision could be made by this Court. This factor therefore weighs in favour of remittal to the CCMA.

The applicant then contended that this Court, as a specialist body dealing with labour disputes, is in an eminently suitable position to determine the matter at hand and should therefore do so. The respondent argued that this Court should not interfere with the legislative framework of the LRA, which has allocated certain matters to be disposed of by the CCMA. To do so, it argued,

would be to deny the respondent's right to a fair hearing and defeat the principles of justice and fairness underlying the LRA.

The contentions of the respondent suffer from several fatal logical flaws. The framework of the LRA does permit the Labour Court to correct awards of the CCMA, as set out above. Further, the policy reasons underlying the divide between Labour Court and CCMA jurisdiction are centred on the need for efficient and effective dispute resolution machinery. This purpose will not be served if the Labour Court fails to assume jurisdiction where appropriate or necessary to make a final determination on a matter.

Turning to the facts of the present case it is clear that there are circumstances militating against this Court exercising its power to replace the award which has been set aside. The main issue for consideration is the substantive fairness of the dismissal. The decision-maker is required to determine whether or not the conduct of the employee was so grossly dishonest as to warrant dismissal for a first offence.

All the evidence that the parties wished to lead has been led, the full record of the proceedings is before the Court. There is no question of credibility, *vis-à-vis*

demeanour of witnesses or the impressions of the arbitrator. The Court can therefore not only arrive at a decision on the merits but as a specialist court it can determine whether or not the misconduct committed justifies dismissal. On a balance of factors and the circumstances of the present matter I believe this is an appropriate matter in which the court can correct the decision of the arbitrator.

Having regard to the evidence there is little doubt that the dismissal was the appropriate sanction for the misconduct. While I am prepared to accept that misconduct in which dishonesty is an element should not as a matter of course lead to dismissal, where the dishonesty is calculated, when opportunity is not taken to rectify the position, when evidence led is found to be false and the person committing the wrong holds an important position within the workplace, dismissal may be the only appropriate sanction.

In this case not only was there no doubt about the fact that the misconduct was committed, the employee's continued denial that he was aware of the overpayment which must be regarded as false and the fact that he held an important position within the workplace, *inter alia*, justifies the sanction of dismissal.

Finally, with regard to costs, applicant has placed substantial arguments why costs should follow the result. I am however not satisfied that this is a matter in which an order of costs is equitable.

In the result I make the following order:

1. The award issued by the CCMA under its case no WE37477 is hereby reviewed and set aside and replaced with the following:

   "The dismissal of the employee was not unfair."

2. There is no order as to costs.

For applicant:

HC Niewoudt of Deneys Reitz

For respondent:

J Whyte of Chennells Albertyn

Cases referred to

Emcape Thermopack (Pty) Ltd v CEPPWAWU, unreported case no C509/99 (LC)