REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case No. D772/10

In the matter between:

HULAMIN LIMITED	**APPLICANT**
and	
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	**FIRST RESPONDENT**
COMMISSIONER H M GROBLER N.O.	**SECOND RESPONDENT**
C P VAN ROOS	**THIRD RESPONDENT**

Heard: 10 December 2013

Delivered: 28 March 2013

Summary: Review application following a dismissal dispute – alleged that arbitrator exceeded terms of reference – determination of the fairness of sanction requires arbitrator to consider nature and ambit of the misconduct – also required to identify the offence of which employee had been convicted – therefore

arbitrator did not exceed terms of reference – review application dismissed with costs.

JUDGMENT

CRAMPTON AJ

[1] This is a review application in terms of section 145 of the Labour Relations Act, No 66 of 1995 ("the LRA"). Third Respondent ("the Employee") was dismissed by Applicant ("the Employer") during February 2010. She referred a dismissal dispute to First Respondent ("the Bargaining Council"). This dispute was arbitrated by Second Respondent ("the Arbitrator") who found, in an award dated 5 July 2010, that the Employee had been unfairly dismissed and was entitled to retrospective reinstatement. The Employer now applies for that award to be reviewed and set aside.

[2] At the outset of the proceedings before me, Mr Lawrence, who appeared for the Employer, stated that he intends to argue that the Employee's right to enforce the award has now become prescribed under the Prescription Act, No. 68 of 1969 ("the Prescription Act"), since more than three years have passed since the award was granted. He referred to Labour Court authority that, he claims, supports this proposition. It was, accordingly, suggested that the review application is now academic. I am not sure that I agree with Mr Lawrence's proposition as regards prescription, nor the case(s) upon which it is based. A claim to enforce the award, while there was a pending review application, would almost certainly have been met by a dilatory defence based upon section 145(3) of the LRA. The claim would, therefore, have been stayed pending the outcome of the present review application. In such circumstances, it seems doubtful that the Employer can now argue that, while the review application was pending, it was obliged to "pay immediately" any debt deriving from the award. (cf**.** *Umgeni*

Water and Others v Mshengu[1]). The parties may also wish to consider this court's decision in *Cellucity (Pty) Ltd v CWU obo Peters*[2]; where it was held that Cellucity's similar reliance on prescription constituted an "unscrupulous tactic" that "should be frowned upon by the court". Be that as it may, the issue of prescription does not arise in the papers before me. There is also no indication that the Employee intends to abandon any right that she may still have to enforce the award. The defence of prescription, which, in terms of section 17 of the Prescription Act, must be pleaded, can only be raised if and when she attempts to do so. I cannot make a finding on that defence before it has been pleaded and I do not purport to do so. In the meantime, since no court has found that the Employee's right to enforce the award has become prescribed, the review application is not academic.

[3] Most of the facts relevant to this review application are contained in the following outline of the disciplinary events leading up to the Employee's dismissal.

[3.1] The Employee was charged by the Employer with three counts of misconduct. These charges were worded as follows:

"Charge 1:"You were absent from work without permission or a valid reason from 8 October 2009 to 12 October 2009, inclusive.

Charge 2:It is alleged that during the period May to October 2009 you have been leaving your place of work and company premises without permission from Management and been paid for time not worked.

Charge 3: It is alleged that whilst working night shift from 22h00 to 06h00 on 22 October 2009 to 23 October 2009, you failed to carry out your normal duties of

[1][2010] 2 All SA 505 (SCA) at [5];(2010) 31 ILJ 88 (SCA) at para 5.
[2][2014] 2 BLLR 172 (LC)

collecting scrap and loading floor scrap, thereby causing the Camps Drift Remelt to run out of scrap and to use pig iron to prepare the charges'.

[3.2] The Employee pleaded "guilty" to charge 2 and "not guilty" to the other two charges.

[3.3] At an internal disciplinary enquiry, it was found, by the chairperson, Mr Mseleku, that the Employee was guilty of all three charges. It was consequently ruled at the disciplinary enquiry that the Employee should be dismissed.

[3.4] The Employee lodged an internal appeal against the findings of the chairperson.

[3.5] At this appeal:

(a) The Employee's conviction on charge 1 was confirmed but the sanction reduced. The appeal chairperson, Mr Aldworth,stated that he would recommend the sanction of a final written warning on charge 1.

(b) On charge 2, the conviction and sanction (of dismissal) were both upheld; save that the appeal chairperson reworded the charge to read as follows:

'Unexcused absence from workplace during period from May to October 2009 and being paid for the time not worked'.

(c) On charge 3 the appeal was upheld and the Employee's conviction on that charge was set aside.

The outcome of the appeal was, therefore, that the Employee was dismissed for her guilt on charge 2 – that being the charge in respect of which the Employee had pleaded guilty.

[3.6] The appeal chairperson stated the following concerning his decision in respect of charge 2:

'By her own admission, the employee admits these absences from the workplace, but not the consequence of the actions. The explanation that these were needed in order to take showers or to collect food outside the premises may be true, but cannot be condoned. Some of the incidents are as high as forty minutes and the explanations offered cannot be used to condone this length of absence. Unfortunately, ignorance cannot be accepted as an excuse and "time fraud" is viewed as an extremely serious offence by the company. As such, the original finding of dismissal is upheld'.

[4] By the time that the dismissal dispute came before the Arbitrator, the issues were, therefore, relatively speaking, narrowly defined.

(a) The stated reason for the Employee's dismissal was that she was found to be guilty of the misconduct described in charge 2, as reworded by the appeal chairperson.

(b) The employee had pleaded guilty to that charge. There could, therefore, be no dispute but that she was guilty of the misconduct described in charge 2. (In my view, the appeal chairperson's rewording of the charge made no material difference to its meaning, provided that it is accepted, as indeed it was by the appeal chairperson, that the charged pertained to sporadic absenteeism. It was never intended to be alleged that the Employee was absent for a continuous period from May to October 2009.)

(c) Ostensibly, therefore, all that an arbitrator was required to decide was whether the Employee's admitted guilt of the misconduct described in charge 2, was "a fair reason", as contemplated in section 188(1)(a) of the LRA, for her dismissal.

(d) Barring any agreement to the contrary, an arbitrator might also have had to determine whether the dismissal had been effected in accordance with a fair procedure as required by section 188(1)(b).

[5] There was, however, a complicating feature. It was not alleged in charge 2, either as it was originally worded or as it came to be re-worded by the appeal chairperson, that the Employee was guilty of fraud or, indeed, of any offence involving dishonesty. Nor did the Employee plead guilty to any offence involving fraud or dishonesty. To the contrary, she maintained throughout the proceedings that her misconduct was "unintentional and undeliberate (sic)". However, when the appeal chairperson came to rule on the sanction to be imposed for the Employee's guilt on charge 2 (as reworded), he implied that she was guilty of an offence known as "time fraud".

[6] Concepts such as "fraud", "time fraud", and "dishonesty" were only raised, in the disciplinary proceedings, in relation to charge 2, after the Employee had pleaded guilty to that charge. It does not appear that it was ever put to the Employee, during any form of cross-examination in the disciplinary proceedings, that her misconduct amounted to so-called "time fraud" or that she had been dishonest in any respect. During the disciplinary hearing, the concept of fraud was first raised by the Employer's representative only after all evidence had been led and at the stage when the representative was making his closing arguments as regards guilt on the three charges. At this stage, he stated that the Employee 'knew that exiting the plant without clocking the card-reader machine, was unacceptable and tantamount to fraud'. Later in the proceedings, when addressing the chairperson on the question of sanction, he stated that: 'this behaviour of not being present on company premises was fraudulent'.

[7] The concept of "time fraud" was first mentioned by the chairperson in disciplinary enquiry. This was only after he had already convicted the Employee on charge 2. At the stage that he was ruling on sanction, he purported to "align [the

Employee's] misconducts (sic) to the company disciplinary code [in order to] arrive at the appropriate sanction". He then referred to clause 4.2 of the applicable disciplinary code. This provision stipulates that "time fraud or claiming payment of wages for normal hours or overtime not worked" is "misconduct that could lead to summary dismissal".

[8] Therefore, when the dismissal dispute came before the Arbitrator, it was by no means certain that the Employee had pleaded guilty to or been properly convicted of the offence of "time fraud", or, indeed, of any offence involving fraud or dishonesty. She had been convicted on charge 2 (as reworded) which, as I have stated, contains no reference to fraud, time fraud or dishonesty.

[9] An arbitrator, presented with the dismissal dispute, was, therefore, required, in addition to the matters stated at paragraph [4] above, to decide whether the Employee had been properly convicted of "time fraud", or of any offence involving fraud or dishonesty. It was and is not possible to determine the fairness of the sanction without first determining that question and, therefore, the nature and gravity of the offence that required to be sanctioned.

The Arbitration

[10] At the outset of the arbitration, the Arbitrator discussed with the parties the issues in the dispute. It appears from the record that it was then agreed between the Arbitrator and the parties that the primary issue for determination was the fairness or otherwise of the sanction of dismissal.

[11] It also appears to have been agreed that facts were not in dispute. Consequently, it appears to have been agreed (although, as I mention below, this is not common cause) that the matter should be determined without *viva voce* evidence and on agreed facts. The Employer's bundle, which includes a record of the

proceedings in the disciplinary enquiry, was admitted on the basis that the contents of the bundle were not in dispute.

[12] Although it was stated, at the outset, that the matter would be dealt with "by way of legal argument and addressing the sanction only", during the proceedings, a fair amount of factual material was allowed to be presented, mostly by the Employer, from the bar.

The Award

[13] In her award, the Arbitrator took issue with the Employer's contention that the Employee was guilty of "time fraud". As she put it:

'It is common cause that [the Employee] swiped her card leaving a clear and undisputed record of her movements from her work station to the gate, out of the premises, to the change room/showers and back to her work station. None of the elements contained [in the definition of the common law crime of fraud were present]. These elements include the unlawful making of a misrepresentation, the intention to defraud and extortion of the truth. To the contrary, she had provided her employer with a detailed record of her movements at all times'.

Accordingly, she found that it was "wrong in fact and law" for the Employer to find the Employee guilty of "time fraud".

[14] She also directed certain criticisms against the procedures that the Employer had followed. Consequently, she found that the "record" that came before the appeal chairperson (which was the same record that was included in the Employer's bundle in the arbitration) was defective. This, accordingly to the Arbitrator, tainted the credibility of the appeal process. As she stated:

'It is not possible to determine from [the reasons and analysis of the appeal chairperson] how much emphasis he placed on the first record, or on [the Employee's] stated case, what he accepted and what not'.

[15] For these and other reasons, the Arbitrator found that the dismissal was "both procedurally and substantively unfair". She could find no reason not to award retrospective reinstatement. That was, accordingly, the relief that she granted.

The Review Application

[16] The founding affidavit in the review application is a lengthy document. The grounds of review are set out in a paragraph that contains more than sixty sub-paragraphs and that stretches over some twelve pages. In my view, however, the essence of Employer's case can be reduced to the following:

[16.1] Firstly, the Employer challenges the approach that was adopted by the Arbitrator whereby she dispensed with *viva voce* evidence. It is alleged in the founding affidavit that this approach was "imposed" upon the parties. The deponent to the founding affidavit, who represented the Employer in the Arbitration, also makes the following allegation:

> 'if I had any idea that [the Arbitrator] would [in her Award] have sought to engage in a consideration of the merits of the matter and would have involved herself in seeking to criticise the manner in which the disciplinary enquiry chairperson and/or appeal chairperson derived their respective findings, I would definitely, on the Applicant's behalf, have insisted that the matter proceed in a trial fashion where witness evidence would have to be called and tested'.

[16.2] Secondly, it is contended that, having agreed or ruled that the issues should be confined to "an assessment of the issue of sanction", the Arbitrator then considered matters that were outside of those stated terms of reference. It is accordingly alleged that the Arbitrator "exceeded her powers".

[16.3] Thirdly, the outcome of the award is criticised for multifarious reasons and it is submitted that the Arbitrator's decision is not one that could have been made by a reasonable decision-maker.

I turn to consider each of these three legs of the Applicant's case.

Did the Arbitrator, in dispensing with *viva voce* evidence, commit a reviewable irregularity?

[17] There are, in my view, three aspects to this question:

(a) Was the Arbitrator entitled, in the circumstances of the matter, to dispense with *viva voce* evidence?

(b) Did the parties (more particularly the Employer) agree to the Arbitrator's approach in dispensing with *viva voce* evidence, and, if so, is the Employer bound by the consent of its representative at the arbitration?

(c) Has the Employer shown that it was prejudiced by the said approach that was adopted by Arbitrator?

Was the Arbitrator entitled to dispense with *viva voce* evidence?

[18] The Arbitrator was required to perform a dispute resolution function prescribed in terms of the LRA. She was, therefore, required to conduct the proceedings in a manner calculated to give effect to the objectives of the LRA.As far as concerns CCMA arbitrations, an arbitrator's rights and duties, in this regard, are crisply set out in section 138(1) of the LRA, which provides that a CCMA arbitrator "may conduct the arbitration in a manner that [he or she] considers appropriate in order to determine the dispute, fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities".

[19] The Arbitrator was not sitting as a CCMA commissioner. However, the provisions of section 138 are intended to give effect to the objectives of the LRA, more

particularly the objective to promote the effective resolution of labour disputes *(Naraindath v CCMA and Others*[3]*)*. A bargaining council arbitrator cannot, therefore, be faulted for adopting an approach that is similarly designed to facilitate a prompt resolution of the substantial merits of the dispute with the minimum of legal formality.

[20] It was, therefore, entirely appropriate for the Arbitrator to take the time, at the outset of the arbitration, to determine the issues and then, if it appeared that there were no factual disputes, to propose that a procedure be adopted that is less cumbersome and time-consuming than trial procedure.

[21] I am, therefore, of the view that the approach that the Arbitrator adopted towards the factual material was appropriate and certainly reasonable.

Did the Employer's representatives agree to the said approach and, if so, was that agreement valid and effective?

[22] Perhaps out of an abundance of caution, Mr Lawrence was reluctant to concede, that the Employer's representative, Mr Madlala, had consented to the approach that was adopted by the Arbitrator. Such caution is unwarranted. It is clear from the record, which the Employer has not disputed, that Mr Madlala did consent to the approach that was proposed by the Arbitration. The Arbitrator asked him: 'Can I have confirmation from you that you are prepared to deal with this matter by way of legal argument and addressing the sanction only?' To which Mr Madlala responded: 'Yes, I am okay'. It cannot, therefore, be said that this approach was imposed upon the Employer.

[23] In the alternative, Mr Lawrence argued that the Employer should not be bound by such consent because Mr Madlala is a so-called "layman".

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[3] *(2000*) 21 ILJ 1151 (LC) at paras 20-27.

[24] The Employer does not make out any such case in its founding affidavit. To the contrary, Mr Madlala is described in the founding affidavit as a "senior industrial relations specialist". It also appears from the record that he was accompanied at the arbitration by one Wendy Majola, who was said to be a senior human resources official employed by the Applicant. It, therefore, appears from the papers that Mr Madlala and Ms Majola are not laypersons, but professionals in the field of industrial relations. One does not have to be a qualified legal practitioner to represent parties in a Bargaining Council arbitration. Indeed, in the system that prevails under the LRA, it may be that an industrial relations specialist, such as Mr Madlala, has more experience in managing CCMA and Bargaining Council arbitrations than the average junior counsel.

[25] Furthermore, the Employer is a public company which, as appears from the papers before me, is a sizable operation with elaborate and sophisticated human resources systems. It has the resources to ensure that it is competently represented in arbitrations, such as the one in question, and there is nothing before me to suggest that it was, in fact, not competently represented.

[26] There is, therefore, in my view, no reason why the Employer should not be bound by decisions that Mr Madlala made, on its behalf, during the course of the arbitration.

Was the Employer prejudiced by the approach adopted by the Arbitrator?

[27] It is not sufficient for an applicant in a review application to disclose only a misdirection or a flaw in the proceedings that are challenged. Not every irregularity constitutes "a gross irregularity" for the purposes of section 145 of LRA. The Applicant must establish, at least, that the irregularity was sufficient to deprive that party of "a fair trial of the issues". *Woolworths (Pty) Ltd v CCMA and*

Others[4]. Furthermore, as has now been clearly established by the Supreme Court of Appeal in *Herholdt v Nedbank Ltd and Another; 2013 (6) SA 224 (SCA)* the focus in a review application should be on the reasonableness or otherwise of the outcome. One is less concerned with the correctness or otherwise of the methods or processes used by the particular arbitrator to get to that outcome. Thus, the mere possibility of prejudice is not sufficient to warrant interference on review. *(Herholdt at para 17*[5]*)* A review applicant, therefore, bears the onus to establish, at least, on a balance of probabilities, that the alleged misdirection is sufficient to taint the outcome of the arbitration to the extent that it cannot be said that the outcome represents a reasonable result.

[28] In the present case, it is alleged, by Mr Madlala, that if he had been told that the Arbitrator was going to "consider the merits", he would have insisted "that the matter proceed in a trial fashion".

[29] This allegation, however, does not withstand scrutiny. The Arbitrator had "to consider the merits" in order to determine the nature and ambit of the misconduct that was sanctioned. Not only ought this to have been obvious to Mr Madlala, but it was. He addressed the Arbitrator at length about nature and ambit of the alleged misconduct and, in support of his arguments, he was allowed to mention facts and to give "evidence from the bar". He obviously knew that "the merits" were, to some extent, relevant to the question of sanction.

[30] It does not appear that Mr Madlala was denied any opportunity to present facts and information to the Arbitrator. At the end of his address, he stated that he had "nothing further" to add. Nor has the Employer, indicated in its founding affidavit in the review application, that there was any specific factual material that was omitted and that could, if presented in the arbitration, have altered the outcome.

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[4] [2010] 5 BLLR 577 (LC)
[5] Supra

[31] The Employer has, therefore, in my view, not discharged the onus of showing that the outcome was materially and unfairly affected by the agreement to dispense with *viva voce* evidence.

[32] It is true that the Arbitrator did not identify, during the proceedings, what I have referred to as the "complicating feature", that is: the question whether the Employee had in fact been convicted of "time fraud" and/or whether it was fair to sanction her as though she had been convicted of that offence. The Arbitrator's omission in this regard is understandable. An arbitrator, who may well have received, that morning, the relevant file and/or bundles, cannot be expected to immediately grasp with pure accuracy all issues that might be relevant in a particular dispute. She was also not obliged to forewarn the parties of each and every issue that she might have to consider. (Cf. *Thompson v SABC;*[6]*)*.

[33] It also appears from the record that Mr Madlala presumed, incorrectly, that the Employee had been convicted of and dismissed for fraud. The Arbitrator did not challenge or question this presumption. Ideally, she should have taken the opportunity to debate with Mr Madlala the question whether the Employee had been convicted of "time fraud". This might have led him to reassess the Employer's case. Ultimately, however, the Arbitrator cannot be blamed for the fact that the Employer has misconceived its case. Conversely, if the Arbitrator had adopted the Employer's erroneous presumption and allowed this to influence the outcome of her award, that could very well have amounted to a reviewable irregularity.

[34] Furthermore even if the question as to whether the Employee had been properly convicted of "time fraud" had been raised and brought to the fore, this would not, in my view, have required a different approach towards the presentation of evidence. The question whether the Employee was in fact convicted of "time

[6]2001 (3) SA 746 (SCA) at para 7.

fraud" was one that had to be determined with reference to the record in the disciplinary enquiry, in respect of which record there was no dispute. It would not have assisted the Employer, in the arbitration, to lead extraneous evidence, that had not been presented in the disciplinary enquiry, to prove any alleged dishonesty. Such evidence would not alter the fact that the Employee had not been charged with or convicted of any offence involving dishonesty. Of course the arbitration was a hearing *de novo*. However, a misconduct dismissal dispute in terms of section 191 of the LRA is always an enquiry into the fairness of the "reason for the dismissal". In circumstances where an employee is dismissed following a disciplinary enquiry, the reason for the dismissal will invariably be the employee's guilt of the misconduct for which they have been charged and convicted. It is, therefore, doubtful that, in such circumstances, an employer can lead evidence in a section 191 arbitration to prove that the employee was guilty of an offence of which he or she was not convicted. In any event, such considerations do not arise in this application, because there is no suggestion that the Employer intends or intended to reformulate the charge and nor is it alleged in this application that the employer had available, at the arbitration, any new evidence that was not presented at the disciplinary enquiry.

[35] I, therefore, have no difficulty with the approach that was adopted by the Arbitrator in terms of which *viva voce* evidence was dispensed with. I am also satisfied that I have before me all the information that is required to assess the reasonableness of the outcome of the arbitration.

Did the Arbitrator exceed her terms of reference?

[36] It is alleged that, because the Arbitrator stated that she was required only to determine the issue of sanction, she was not entitled to "go into the merits". To use terminology that is employed in the founding affidavit: the Arbitrator, so it is alleged, was not entitled to embark upon a "complete re-assessment and interrogation of the merits of the matter as well as the procedure". Elsewhere in

the founding affidavit it is stated that she exceeded her terms of reference by engaging in a "qualitative assessment of:

(a) the merits of the matter and in particular the findings derived by the Disciplinary Enquiry Chairperson and/or the Appeal Chairperson;

(b) the relative probabilities of the versions that had been proffered before the Disciplinary Enquiry Chairperson and/or the Appeal Chairperson;

(c) the culpability of the Third Respondent as was established by the Disciplinary Enquiry Chairperson and/or the Appeal Chairperson in relation to the second Charge;

(d) the procedural regularity and fairness of the disciplinary and appeal processes."

The Employer cites two case authorities in support of this alleged ground for review, namely: Reunert Industries (Pty) Ltd t/a Ruetech Defence Industries v Naicker and Others[7]; and Oracle Corporation SA (Pty) Limited v CCMA and Others[8].

[37] Insofar as the terms of reference were limited by the Arbitrator, she explained the approach as follows:

'The Applicant will set out reasons why she believes that she should not have been given the sanction of dismissal following the findings of the Appeal hearing, and she will, during her address, explain what she believes will have been a more appropriate sanction. Thereafter, Mr Madlala will address the issues raised by Applicant, and explain why he believes that dismissal is the only appropriate sanction in the circumstances'.

[7](1997) 18 ILJ 1393 (LC)
[8][2005] 10 BLLR 982 (LC).

[38] The issues were not defined any further, and, at no stage, did the Arbitrator state or suggest that she would not consider "the merits", insofar as this was necessary to determine the fairness of the sanction.

[39] In order to determine the fairness of the sanction:

39.1 The Arbitrator had to consider and determine what misconduct the Employee had been convicted of.

39.2 She therefore had to address the question whether or not the Employee had been convicted of "time fraud" or of any offence involving dishonesty.

39.3 Once she had established the misconduct of which the Employee had been convicted, she was required to assess the blameworthiness of that misconduct for the purposes of determining whether the sanction of dismissal was fair.

[40] An arbitrator cannot allow him or herself to be misled by inappropriate labels that an employer chooses to use to describe misconduct. Indeed, in considering the fairness or otherwise of a sanction, an arbitrator should not defer to the views of the employer. *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*[9]. The Arbitrator, therefore, had to question the Employer's use of the term "time fraud" so as to assess whether this was an appropriate label for the misconduct that, it was common cause, had been committed.

[41] Even if the Arbitrator were to find that the Employee was in fact properly convicted of the offence of "time fraud", she still had to consider the nature and extent of the "fraud" in order to determine the fairness of the sanction. Fraud covers a wide spectrum. Indeed, if I accept the Employer's arguments as to what constitutes "time fraud", the spectrum, in this case, may even be wider than usual. As I understand the Employer's arguments, its conception of "time fraud"

[9]2008 (2) SA 24 (CC) at para 79.

is broad enough to include the example of an employee who secretly reads a magazine during time for which she is being paid and is required to work. If that is so, then it surely does not follow that such an employee should, for purposes of sanction, be treated the same as an employee who commits fraud by embezzling millions of rands from his employer.

[42] All of the matters to which I have referred in the previous three paragraphs were, in the circumstances of the present case, germane to the issue of sanction. Such matters were, therefore, within Arbitrator's terms of reference.

[43] What the Arbitrator was not entitled to do was to revisit the question of whether the Employee was guilty of the misconduct described in charge 2. She did not do so.

[44] The two cases upon which Mr Lawrence relies are not inconsistent with what I have said above. In *Reunert Industries (Pty) Ltd* it was found that the parties had agreed to limit their dispute to the question whether the employer had proved, on a balance of probabilities, the employee's guilt. Assuming that the employee's guilt was properly established, it was not in issue that the sanction of dismissal was fair. It was, therefore, found that the arbitrator exceeded the terms of reference when, having found that guilt was established, he proceeded to find against the employer on the ground that the sanction was too harsh. The present case is, however, different because all of the issues that I have mentioned above had to be considered to enable the Arbitrator to assess the fairness of the sanction of dismissal. What was common cause was that the Employee was guilty of charge 2. The Arbitrator, however, still had to determine the nature and ambit of that misconduct in order to assess the fairness of the sanction.

[45] The case of *Oracle Corporation SA (Pty) Limited* is closer, on its facts, to the present case. In that case, like the present, the arbitrator was required to determine sanction and not guilt. However, in *Oracle Corporation SA (Pty) Limited* it was found to have been common cause that the employee was guilty of

dishonesty. It was accordingly held that the arbitrator was not required or entitled to make a contrary finding to the effect that the employee was not guilty of dishonesty. In doing so, the arbitrator had exceeded his powers and committed a gross irregularity. The present case, however, is distinguishable because the element of dishonesty was not admitted or common cause. Not only that, but the Employee was not charged with and, so it could therefore be argued, not convicted of any offence involving dishonesty. The Arbitrator, therefore, had to determine (not the Employee's guilt) but whether the misconduct, of which she had been convicted, involved an element of dishonesty.

[46] I am not as convinced that it was necessary for the Arbitrator to consider all the procedural matters that she did. That is, however, not to say that procedural questions were not relevant to the issue of sanction. The procedure adopted by the disciplinary chairperson, at the stage that he was considering the question of sanction, whereby he sought to "align" the misconduct described in the charge to an offence described in the disciplinary code, was problematic because it arguably resulted in him punishing the Employee for an offence that she had not been convicted of. Insofar as this was a problem, it was not corrected at the internal appeal.

[47] In my view, it is arguable that this flawed procedure does not just taint the procedural fairness of the dismissal. It raises substantive questions as to the fairness of the sanction of dismissal. On the other hand, I am not certain that it was necessary for the Arbitrator, in order to determine the fairness of the sanction, to find that the dismissal was procedurally unfair. However, since the focus in a review application should be upon the outcome of the award, the Arbitrator's finding on the issue of procedural fairness, can only have relevance, in this application, if that finding contributed to the outcome of the award. As I explain below: it did not.

[48] To conclude on this subject: although it might not have been necessary for the Arbitrator to consider all the matters that she did, she did not exceed, in any material respect, her terms of reference. Apart from anything else, her reasons were provided to justify the issue that she was required to determine: the fairness of the sanction. Whether or not those reasons provide a sound basis for her decision on that issue, is a question that might be relevant to the reasonableness or otherwise of her ultimate conclusion. That is the question that I consider next.

The reasonableness of the outcome of the award

[49] In determining whether an arbitrator's award is one that could have been made by a reasonable decision maker, a review court may consider the reasons provided by the arbitrator in question. "That assists the court to determine whether the result can reasonably be reached by that route." ie the route chosen by the arbitrator. However, even if a review court does not accept the arbitrator's reasoning, "it must still consider whether, apart from those reasons, the result is one that a reasonable decision-maker could reach in the light of the issues and the evidence". *Herholdt at [12].*

[50] I do not have much difficulty with the reasons that the present Arbitrator employed to justify her award. Indeed, apart from certain things that she had to say about internal appeal procedure, I find myself in general agreement with her reasoning. For the purposes of this review application, however, it is sufficient that, in my view, a reasonable decision-maker could have employed the following reasoning to reach the same conclusion.

50.1 The misconduct for which the employee was dismissed is that stated at charge 2. That is the misconduct with which she was charged, to which she pleaded guilty and of which she was convicted by both the disciplinary chairperson and the appeal chairperson. Furthermore, the appeal chairperson specifically identified the misconduct described in charge 2, as reworded by him, as the misconduct for which the Employee was dismissed. The Employee's guilt on charge 2 was,

therefore, the Employer's stated "reason for the dismissal". The Arbitrator had, therefore, to decide whether that reason was a "fair reason" for dismissal as required in terms of section 188(1)(a)(i).

50.2 Charge 2 makes no reference to the offence of so-called "time fraud". Nor does the wording of the charge, either in its original form or as recorded by the appeal chairperson, disclose the elements of fraud or deliberate misrepresentation. It, therefore, does not follow that because the Employee pleaded guilty to and was convicted of charge 2, that she was, therefore guilty of fraud, time fraud or dishonesty.

50.3 The charge was never amended to include any reference to fraud or dishonesty. It would, in any event, have been unfair and improper for the Employer to have attempted to do so after the Employee's conviction on a guilty plea. An employee who pleads guilty does so on the understanding that his or her guilty plea will have benefits and repercussions as far as concerns the sanction that will be imposed. An employer cannot, therefore, on the one hand, take the benefit of a plea of guilty and, on the other hand, argue that the employee is guilty of a more serious offence which the employee has not admitted. That, if one considers the ruling in the appeal, is exactly what the present Employer has purported to do: on the one hand the appeal chairperson mentions the fact that the Employee has "admitted" the misconduct in question. On the other hand, in justifying his decision to dismiss the Employee, he mentions the offence of "time fraud", which is not an offence that is covered by the guilty plea.

50.4 Certainly, the Employer cannot claim to have convicted the Employee of fraud or dishonesty, when, in the disciplinary enquiry, it led no evidence to prove such misconduct and did not ever put such allegations to the Employee.

50.5 It was and is, therefore, unfair for the Employer to sanction the Employee, for her guilt on charge 2, as though she had been found guilty of time fraud, fraud or dishonesty.

50.6 The Employer's reliance, in its justification of the dismissal, on the concept of "time fraud" is erroneous for other reasons. It does not appear that the Employer, or its representatives, properly understood what is meant by the term "fraud". In the arbitration, for example, Mr Madlala stated that "people know when they commit fraud, it is often done intentionally". It seems that he was unaware that fraud can never be committed unintentionally. Similarly, the appeal chairperson, stated that "ignorance cannot be accepted as an excuse" in a case of "time fraud". Obviously, fraud cannot be committed "ignorantly" or even negligently. These examples show that the Employer used the term "time fraud" to refer to something less egregious than fraud which requires intentional dishonesty.

50.7 Clause 4.2 of Employer's disciplinary code, which describes the concept of "time fraud", is a provision that must be interpreted restrictively. An employer is obliged to show that an employee can reasonably be expected to be aware of the rules and standards that the employer intends to enforce in the workplace. (See section 7(b)(ii) of the Code of Good Practice: Dismissal (schedule 8 to the LRA)). An Employer may not discharge that onus if its disciplinary code is reasonably capable of an interpretation that is more restrictive and, therefore, less harsh than the interpretation that the employer intends to enforce.

50.8 As I read clause 4.2 of the disciplinary code, it is intended to penalise an employee who deliberately claims wages or overtime that the employee knows that he or she did not work for; for example: an employee who claims to have worked on a particular Sunday, when in fact he knows that he did not do so. The provision does not, in my view, necessarily penalise (or include within its meaning) an employee who attends work but is unproductive; for example: an employee who spends time at work reading a novel, or, as in the present case, an employee who showers during company time or visits the shops to buy lunch.

50.9 Indeed, it appears from the Employee's submissions before the Arbitrator, that her understanding of "time fraud" is similar to mine. As she stated:

'To me fraud meant that if you give your clock card to someone for them to clock in for you while you weren't at work, that's the fraud I was told of. Bringing in a fraudulent doctor's note to work so that you can get paid, that's the fraud I was told of. Going to the garage to buy food on weekends because the canteen was closed, I never knew that that was fraud. Yet so many of the employees go to buy at the garage. This is the fact that many employees do this, going to the gate to fetch or leave something, we never knew that was fraud'.

50.10 To my mind, this statement shows that the Employee has a better understanding of the legal concept of fraud than the Employer's various representatives. Apart from that, however, the Employee's statement shows that she has and had a different understanding of the meaning of "time fraud" to that that is now advocated by the Employer. In my view, insofar as her understanding represents her interpretation of clause 4.2, it is an interpretation that is preferable to the one that the Employer is attempting to advance. At best for the Employer, however, clause 4.2 of the disciplinary code, being capable of different interpretations, is ambiguous. The disciplinary code, therefore, does not assist the Employer to prove that it has fairly communicated to its employees, including the present Employee, that misconduct, such as that of which the Employee was convicted, constitutes "time fraud" and is, therefore, sufficiently serious to warrant summary dismissal.

50.11 As I understand the Employer's submissions and its founding affidavit, the high watermark of its case for fraud is that the Employee left and re-entered the workplace though access and egress points that were not permitted in terms of the Employer's "Access Control Rules and Regulations". It is, therefore, suggested that she manipulated the system to escape the workplace undetected – not that this was ever put to her in cross examination at the disciplinary enquiry. It does not, however, necessarily follow that, because the Employee used the access and egress points that she did, that she, therefore, intended to defraud the Employer; nor was this established as the most probable scenario.

Indeed, as the Arbitrator pointed out: the fact that the Employee "swiped her card leaving a clear and undisputed record of her movements" would suggest that she was not being dishonest or devious.

50.12 It was, in any event, not proper for the Employer to draw an inference of dishonesty from the Employee's movements, when that inference was not put to the Employee, at the disciplinary proceedings, either in the charge sheet or during any form of cross-examination.

50.13 The Employer presents, as an aggravating factor, the fact that the misconduct was committed over a long period of time. However, this consideration also supports a contrary argument that the Employee was allowed to form bad habits, because she was not pertinently warned that her conduct was gravely wrong.

50.14 The chairperson of the disciplinary enquiry appears to have been alive to the implications of this contrary argument. He, therefore, required the evidence of an additional witness, Sipho Dlamini, "to explain why Management condoned a situation whereby Ms Van Roos abused the company access and egress procedure from May to April 2009 without any corrective measures being taken against her". Dlamini was called after the parties had made their closing submissions on the question of guilt and it does not appear that the Employee was given any opportunity to cross examine him. He gave evidence to the following effect:

'I wasn't aware of this type of misconduct, which Ms VanRoos committed during the time. I only came to know about it when we were looking at her Attendance Record. Initially, we were checking her attendance for October 2009 only, when we came across some discrepancies and as we looked further at the trend during the previous months, we discovered that she had been committing these misconducts since May 2009'.

50.15 Dlamini's evidence, while it may explain why the Employer's failed to take timeous action against the Employee, does not, in my view, address the real problem, which is that, for whatever reason, the Employee was not informed that her actions were wrong and so serious as to attract the sanction of dismissal. This is what the Employer was required to prove to establish that "the employee was aware or could reasonably be expected to have been aware of the rule or standard" that the Employer now seeks to enforce.

50.16 Once it is accept that the employee was not convicted of (and cannot, therefore, be said to be guilty of) fraud or any offence involving dishonesty, it becomes difficult for the Employer to justify the fairness of the sanction of dismissal. In terms of section 3(4) of the "Code of Good Practice: Dismissal" it is "generally not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable."

50.17 This degree of gravity was not established in the present case. Indeed there was clear evidence of the Employee's remorse. As she stated in her submissions before the disciplinary enquiry in mitigation of sentence:

'I want to thank the Panel for the way I was treated. I really appreciated it and I didn't feel intimidated or victimised throughout the whole disciplinary proceedings. Notwithstanding the above, I am a hard working female employee and have been loyally working for this company for approximately three years. I get along very well with my colleagues and I cultivate a culture of team spirit. Therefore, I apologise and am remorsefully for my unintentional and undeliberate misconduct'.

This is the contrite attitude of an employee who has learnt her lesson, who wants to make amends and to co-operate with the employer to repair any rupture in the employment relationship. In such circumstances, a reasonable employer would not consider the continuance of the employment relationship to be "intolerable".

50.18 It follows that the sanction of dismissal was substantively unfair. No reason was presented why, in such circumstances, the Employee should not be reinstated. That was, therefore, the remedy that the Arbitrator was obliged to award by virtue of section 191(2) of the LRA.

[51] I am not certain that I agree with everything that the Arbitrator had to say about procedural matters, particularly her comments on internal appeals. However, I do not consider it necessary to make a finding on her views in that regard. The outcome of the award, that is: that the Employee was entitled to retrospective reinstatement, is reasonable once it is accepted that there is a reasonable basis for a finding that the sanction of dismissal was substantively unfair. It was not necessary for the Arbitrator to make a finding as regards the procedural fairness of the dismissal. Put differently: any such finding did not contribute towards the outcome of the award. It is, therefore, not necessary for a review court to examine the reasoning that the Arbitrator employed to justify her finding that the dismissal was procedurally unfair.

[52] The review application must fail.

Costs

[53] No reason has been advanced as to why the Employer should not be ordered to pay the costs of the unsuccessful review application. The Employer has challenged a reinstatement award. Its actions in doing so will have caused disruption and inconvenience to the life of the Employee, who will, in the intervening period, have been deprived of the income upon which she likely depends. At the same time, she has, no doubt, had to incur costs to protect her rights in terms of the award. In such circumstances, it would, in my view, be inequitable not to order the Employer to pay her costs, considering that I have found the review application to be unjustified.

[54] The review application is, therefore, dismissed with costs.

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Crampton AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

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