



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 385/14

Reportable

In the matter between:

EASI ACCESS RENTAL (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

JANSEN VAN VUUREN, N.O.

Second Respondent

ESTHER PAULINE MOTLAGE NGWENYA

Third Respondent

Heard: 07 October 2015

Delivered: 10 December 2015

Summary: Review application. Commissioner finding that the sanction of dismissal unfair because employer failed to lead evidence of the breakdown in the trust relationship during the disciplinary hearing. Evidence concerning breakdown in the trust relationship led at arbitration hearing which the Commission ignored. *Edcon v Pillemer* considered.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside arbitration award made by the second respondent (the Commissioner) under case number GAJB24361/13 dated 17 January 2013. In terms of that arbitration award, the Commissioner found the dismissal of the third respondent (the employee) to have been unfair.

Background facts

- [2] The employee, who prior to her dismissal was employed as pay roll officer, was charged and dismissed for several acts of misconduct. The charges which were proffered against her reads as follows:

Charge 1:

Dishonesty in that:

The employee broke the trust relationship between the employee and the Company by forwarding confidential information of an employee to a private entity without the employees or company's knowledge, instruction or permission During June 2013 to July 2013.

Charge 2:

Dishonesty in that:

The employee was given a direct instruction to add her personal garnishee to the payroll in August 2013. This was as a result of a prior oversight on the part of the employee. This was not done. The original garnishee order was signed for by the employee in April 2013.

Charge 3:

Improper behaviour in that:

The employee participated in a scheme aimed at lending money to fellow employees for personal gain.

Charge 4:

Gross Negligence in that:

The employee was aware that another employee was defrauded but did not escalate it to her management structure as would have reasonably be expected. The employee brought it under the payroll Administrator's attention I July 2013 and August 2013.

Charge 5

Gross Negligence in that:

The employee forwarded all the payslips of Payroll 001 to Kallie Oberholzer on 12 July 2013, after he requested a copy of his own June 2013 payslip.'

- [3] The employee pleaded not guilty to all the charges except for charges two and five. She was found guilty on all of the charges and was dismissed for those reasons.
- [4] Aggrieved by the outcome of the disciplinary hearing, the employee referred a dispute concerning an alleged unfair dismissal to the CCMA which was ultimately arbitrated upon by the Commissioner. As indicated above, the Commissioner found the dismissal of the employee to have been unfair. It was for this reason that he awarded him compensation in the amount of R141 450.00. The applicant did not agree with the Commissioner's outcome and, accordingly, instituted the present proceedings.
- [5] It is common cause that the employee introduced one of her colleagues, Mr Zwane, to a certain person known as Lebo for the purposes of assisting him with a personal loan. It is apparent that before being introduced to Lebo, Mr Zwane met only with the employee.
- [6] The version of Mr Zwane is that he was, thereafter, informed by the employee that Lebo had approved a loan in the amount of R180, 000.00. He also stated

that he was surprised that Lebo had issued him with a loan when he had not applied for it.

- [7] The employee did not deny having introduced Mr Zwane to Lebo and having given him her telephone number. Mr Zwane telephoned Lebo and arranged to meet at a shopping mall next to Standard Bank. At the meeting, Mr Zwane was introduced by Lebo to a certain Rose who gave him forms to apply for a loan in the amount of R14 000, 00. He testified that he refused to sign the forms.
- [8] Thereafter, Mr Zwane received an SMS message stating that an amount of R26 000, 00 was deposited into his Nedbank account. This was later confirmed by the Bank.
- [9] Mr Zwane was soon, thereafter, approached by the employee who enquired as to whether money had been deposited into his account. The affirmative answer to that question was followed by the advice from the employee that the money was mistakenly deposited into his account and that he should not use it as Lebo will collect it from him.
- [10] Mr Zwane then went to the bank with Lebo where he gave her the amount of R10 000, 00 and the remainder being R15 000, 00 was transferred into the account of another person on the advice of Lebo. The R 1000, 00 was bank charges.
- [11] Mr Zwane was unhappy with what had transpired and more particularly that he had to pay for a loan he did not apply for. It was for this reason that he decided to approach the Bayport Financial Services to enquire as to how the loan came about. He was accompanied on that date by the employee. It then transpired that a fraudulent loan application had been made on his behalf. He then reported the matter to the police which resulted in the arrest of the employee.

The Grounds of review

- [12] In short, the case of the applicant in challenging the arbitration award is that the findings made by the Commissioner on the various aspects of the case is unsupported by the evidence which was properly placed before him. It is contended that the Commissioner committed gross irregularity and misconduct in the performance of his duties.

The arbitration award

- [13] The Commissioner made findings on various charges which were proffered against the employee. He found that there was no rule prohibiting employees from furnishing personal information to "private entities" and that the employee was required to inform the applicant about the requested information before she could furnish it to a private entity. He also found that the employee as a Payroll Officer was not entitled to furnish personal information of Mr Zwane to outside entities without his consent. He also found that Mr Zwane had given the employee permission to furnish his personal information to Lebo.
- [14] The Commissioner concluded his analysis of the facts relating to the first charge by finding that Mr Zwane is to blame for what happened to him and, therefore, the employee was not guilty for the misconduct alleged in that charge.
- [15] As concerning the failure to load her garnishee order onto the pay roll system, the Commissioner found the employee guilty. The employee was also found guilty of charge five relating to her forwarding all payslips to a third party.

Evaluation

- [16] The test to apply when considering this application is whether the decision reached by the Commissioner is one which a reasonable decision-maker could not reach.¹
- [17] In my view, this matter turns around charges number two and five. Infact had the Commissioner properly applied his mind to the facts and circumstances concerning charge five, he ought to have found that the dismissal was sustainable on that charge alone. As indicated above, the employee was found guilty of both charges which respectively relates to the employee's failure to process her own garnishee order and furnishing all payslips to a certain Mr Oberholzer.
- [18] It is apparent from the reading of the arbitration award that the conclusion reached by the Commissioner that the dismissal of the employee was unfair is based on the fairness of the sanction. He found the sanction of dismissal to have

¹ See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

been unfair on two grounds. The first ground is that the dismissal was not warranted because the employee “had not been found guilty of charges three and four”.

[19] In my view, the above reasoning is irrational and shows a misconception of the nature of the dispute which the Commissioner had to resolve. The facts upon which the employee was found guilty of charges two and five are totally unrelated to the three other charges. There is no basis as to how the other charges for which the employee was found not guilty impacts on the sanction which was to be imposed for those she had been found guilty of. This finding by the Commissioner shows a misconception of the nature of the dispute which he was supposed to resolve.

[20] The second ground upon which the conclusion that the dismissal was unfair is based on the finding that there was no evidence to show that the relationship of trust had broken down. The Commissioner relied in this respect on the decision of the Supreme Court of Appeal (the SCA) in the matter of *Edcon Ltd v Pillemer N.O and Others*.² In dealing with the issue of the breakdown in the trust relationship, the SCA in that case held that:

[22] Pillemer was entitled and in fact expected, in the scheme of things, to explore if there was evidence by Edcon and/or on record before her showing that dismissal was the appropriate sanction under the circumstances. This was because Edcon’s decision was underpinned by its view that the trust relationship had been destroyed. She could find no evidence suggestive of the alleged breakdown and specifically mentioned this as one of her reasons for concluding that Reddy’s dismissal was inappropriate. A reading of the award further reveals that in addition to this finding Pillemer also found that in the context of that matter Reddy’s long and unblemished track record was also an important consideration in determining the appropriateness of her dismissal.

[23] In my view, Pillemer’s finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust

² (2009) 30 *ILJ* 2642 (SCA) at paras 22-23.

relationship with Reddy, the decision to dismiss her was correctly found to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her. She did not stray from what was expected of her in the execution of her duties as a CCMA arbitrator.'

[21] The Commissioner further in support of his finding relied in the case of *Lubbe v Roop N.O and Others*,³ where Lagrange, J is quoted as having said:

[16] ... It is now clear that it will normally not be sufficient for an employer simply to make submissions that there has been an irretrievable breakdown in the relationship, unless a clear basis has been laid in evidence to justify such a conclusion. It is also evident that such a conclusion will not be easily drawn simply because of the nature of the misconduct at issue in the case.'

[22] It would appear that the finding of the Commissioner is based on the interpretation that *Edcon* is saying that if there is no direct evidence of the breakdown of trust relationship between the employer and employee then the dismissal should be found to be unfair. This interpretation is based on one aspect of what the Court said in that case. The decision of the Commissioner that the sanction of dismissal was unfair, which was upheld by the SCA was not based only on the absence of direct evidence concerning the breakdown in the trust but included factors such as the length of service of the employee and her clean disciplinary record. This interpretation fails to take into account what the SCA said after formulating the nature of the issue before it on appeal. It is in this respect stated, in that case, that:

'All we know is that Reddy (the employee) was employed as a quality control auditor, no evidence was adduced to identify the nature of her duties, her place in the hierarchy, the importance of the trust in the position that she held or the performance of her work, or the adverse effects, either direct or indirect, of Edcon's operations because of her retention, for example because of precedent for example to others.'⁴

³ (2012) 33 *ILJ* 1695 (LC) at para 16.

⁴ *Edcon (supra)* at para 20.

[23] In my view, the interpretation that says *Edcon* require that, in every case of dismissal, direct evidence of the breakdown in the trust relationship should be led for a dismissal sanction of the employer to stand is incorrect. It is incorrect because it is based on the misconception that the Court in arriving at the decision as it did formulated a legal principle governing the approach to adopt when dealing with the issue of the breakdown in the trust relationship in dismissal cases. It is also incorrect because it overlooks the fact that that case turned purely on its own facts.

[24] In the present case, *Edcon* seems to be interpreted to suggest that evidence on the breakdown in the trust relationship must have been led at the disciplinary hearing. In other words, evidence of the breakdown of trust if presented for the first time at the arbitration hearing should be ignored. This is also incorrect as it is apparent from the reading of *Edcon* that the finding of the Commissioner which the Court upheld was based on the finding that there was no evidence of breakdown in the trust relationship led at the arbitration hearing.

[25] To summarise the above, *Edcon* is not the authority for the often misconceived proposition that in order to sustain its decision to dismiss an employee, an employer must always and without failure adduce direct evidence to show a breakdown in the trust relationship. It is of course important for the employer to lead such evidence because it will assist the Commissioner in the assessment of the fairness of the dismissal. In a case where direct evidence of the breakdown in the relationship has not been led, the enquiry into the fairness of the dismissal by the Commissioner include a determination of whether the breakdown cannot be inferred from the nature of the offence.

[26] In *Department of Home Affairs and Another v Ndlovu and Others*,⁵ the LAC held that:

‘It is obligatory that an employer should produce such evidence (referring to evidence of the breakdown in the trust relationship) to justify a dismissal unless of course that conclusion of a broken employment relationship is apparent from the nature of the offence and/or the circumstances of the dismissal.’

⁵ (2014) 35 *ILJ* 3340 (LAC) at para 16.

[27] The same approach was adopted in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*,⁶ where the LAC after finding that the Labour Court erred regarding the dishonesty of the employee had the following to say:

‘Although the only plausible inference to be drawn from these proved facts is that the first respondent was dishonest, the Labour Court simply failed to comprehend this. Regarding the findings by the Labour Court on sanction, it is implicit in the commissioner’s findings that in view of the nature of the offence, which involved deception and dishonesty and, in particular, the failure of the first respondent to demonstrate any acceptance of wrongdoing or remorse, he considered the employment relationship to be destroyed and dismissal an appropriate sanction. Indeed, the commissioner determined the sanction under the heading: “whether dismissal was an appropriate sanction”. The Labour Court accordingly erred in finding that the commissioner failed to consider whether dismissal was appropriate in the circumstances of this matter.’

[28] In the present matter, the Commissioner found that the trust relationship had not broken down because no evidence was led during the disciplinary hearing.⁷ Having found the employee guilty of the two charges, the Commissioner proceeded to determine the fairness of the sanction of the dismissal. This, the Commissioner had to do by having regard to the totality of the facts, circumstances of the case and the seriousness of the misconduct.

[29] In *Fidelity Cash Management Services v CCMA and Others*,⁸ the Labour Appeal Court held that in considering the fairness or otherwise of the dismissal, the Commissioner would have to answer the question whether the dismissal was in all circumstances a fair sanction.

[30] It is important in this respect to note that the Commissioner found the failure by the employee to process her garnishee order to constitute a serious misconduct. After this, the next enquiry to conduct was whether there was evidence pointing to the breakdown in the trust relationship between the parties. As indicated

⁶ (JA 65/13) [2014] ZALCJHB 495 (15 December 2014) at para 19.

⁷ This reason is reflected also in the comment made by the Commissioner during the hearing which appears page 318 line 10 of the transcript.

⁸ (2008) 29 *ILJ* 964 (LAC).

above, the Commissioner dealt with the question of whether there was a breakdown in trust relationship on the basis that no evidence in relation to this issue was led during the disciplinary hearing.

[31] In my view, the arbitrator in adopting that approach, stating the dismissal was unfair because no evidence of the breakdown in the trust relationship was led, misconceived his duty and adopted an incorrect approach that is not supported by the jurisprudence and thus resulting in his conclusion being unreasonable. It is also because of this approach that there is no rationale connection between the evidence which was before the arbitrator and his conclusion

[32] As stated earlier, it is apparent from the reading of the award that the arbitrator ignored and disregarded the evidence of Mr Du Randt who testified on behalf of the applicant. He ignored the evidence understandably so because according to him the evidence of the breakdown in the trust relationship would count only if it was led during the disciplinary hearing. As mentioned earlier, this is based on the incorrect understanding of the *Edcon* decision. In that case, the SCA agreed with the Commissioner that the dismissal was unfair because there was no evidence of the breakdown in the trust relationship presented during the arbitration hearing. In the present instance, evidence of the breakdown in the trust relationship was presented by the applicant through the testimony of Mr Du Randt who amongst other things testified as follows with regard to this issue:

‘... the fundamental problem was that the trust relationship between the company... Management... and as a whole employees in the organisation (sic) was seriously damaged.’

[33] He further testified after the Commissioner remarked that nobody testified about this issue during the disciplinary hearing that:

‘Okay I can't speak for the hearing (referring to the disciplinary hearing) sir, what I can speak about is the fact that if a person in a payroll capacity is found guilty of supplying personal information to external entities and is found guilty of untrustworthy behaviour that their relationship with me as a Management structure is broken. And it is broken to the extent that is irreparable because a Payroll Officer has a responsibility of integrity towards the organisation... The

decision was I had an irrecoverable situation where I couldn't repay that trust and without trust in that position I cannot have the person doing the job.'

- [34] The disciplinary hearing was conducted by Mr Kent, a practicing attorney, who found the employee guilty of misconduct and recommended that she be dismissed. In recommending dismissal in relation to the failure by the employee to load her garnishee order, Mr Kent took into account the period since the employee signed for the garnishee order. He also took into account the risk which the employee had exposed the applicant to by not loading her garnishee order. The applicant could be faced with a contempt of court proceedings according to him.
- [35] The recommendation to have the employee dismissed was made to Mr Du Randt who made the final decision based on those recommendation to have the employee dismissed.
- [36] In my view, proper regard being had to the evidence which was properly placed before the Commissioner, the conclusion reached does not fall within the band of reasonable decision which a reasonable decision maker could have reached. The evidence relating to failure to load her garnishee order, as the arbitrator correctly, found constituted a serious act of misconduct.
- [37] Even if the finding by the Commissioner that there was no evidence of the breakdown in the trust relationship was to be accepted, he still had to consider the nature of the offence, the seriousness of the misconduct, the nature of the job and position of the employee, the period within which the employee was supposed to have loaded the garnishee order and the serious nature of the risk which his conduct exposed the applicant to.
- [38] In my view, the only reasonable conclusion which the Commissioner ought to have reached had he taken the above into account, assuming that he was correct that there was no evidence of the breakdown in the trust relationship, was that the breakdown in the trust relationship could be inferred from the serious nature of the offence.

- [39] It is also my view that a reasonable Commissioner would have found that it was unfair to expect the applicant to retain the employee in its employ in the context where she had loaded everybody's garnishee orders except for hers.
- [40] To summarise the above findings, it is clear that evidence relating to the breakdown in the trust relationship between the parties in a dismissal case is critical and also is an important element in the assessment of the fairness or otherwise of the dismissal. However, where no evidence has been led regarding the breakdown in the trust relationship, the Commissioner still has to determine whether the breakdown in the trust relationship cannot be inferred from the nature and extent of the misconduct.
- [41] As to the facts of this matter, I find that the Commissioner failed to apply his mind to the testimony of Mr Du Randt, which indicated that the trust on the employee has irretrievably broken down. However, even if that was not the case it is apparent that the breakdown in the trust relationship can be inferred from the nature of the offence together with the position occupied by the employee. The element of trust on the employee was significant by virtue of the position she occupied as a payroll officer. The offence of not loading her garnishee order when she had in fact loaded those of other employees undermined the essence of that trust relationship.
- [42] In light of the above, I find the decision of the Commissioner to be unreasonable and thus failing the decision-maker test.
- [43] I do not, however, believe that it was unreasonable for the employee to oppose the review application and accordingly I do not believe it would be appropriate to allow costs to follow the result.

Order

- [44] In the premises, the following order is made:
1. The arbitration award of the Second Respondent under case number GAJB24361/13 is reviewed and set aside.

2. The arbitration award of the second respondent is substituted with an order to the effect that the dismissal of the Third Respondent was for a fair reason.
3. There is no order as to costs.

E, Molahlehi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate S Collet

Instructed by: Larry Dave Incorporated Attorneys

For the Respondent: MM Letsoalo of Mogwerane & Letsoalo Attorneys