



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR 2971/12

J1609/12

In the matter between

JORDEX AGENCIES

Applicant

and

QUEENDY GUGUBELE N.O

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

JOAN MSIMANGO

Third Respondent

Heard: 14 August 2014

Delivered: 11 March 2015

Summary: The commissioner's decision that the third respondent's dismissal for leaving the workplace early in order to catch the last bus home in breach of a new timekeeping rule taken without regard to her transport needs was not unreasonable. The award was therefore not susceptible to review.

JUDGMENT

LALLIE J

Introduction

[1] The applicant brought an application to review and set aside an arbitration award of the first respondent (“the Commissioner”) in which she found the dismissal of the third respondent both substantively and procedurally unfair and ordered her reinstatement. The third respondent filed an application to have the arbitration award made an order of court. The applications were consolidated and heard together. The parties agreed that if the review application is unsuccessful then the award will be made an order of court, however, should it be successful the other application fall away.

Factual background

[2] The third respondent worked for the applicant as a cleaner from 1 October 2003 until her dismissal on 2 August 2012 for living the workplace without permission. She challenged the fairness of her dismissal at the second respondent (“the CCMA”) where the Commissioner issued the award which the applicant seeks this court to review and set aside. The review application is opposed by the third respondent.

The award

[3] The Commissioner found the third respondent’s dismissal procedurally unfair because his manager allowed her to bring witnesses who were not the applicant’s employees but the chairperson did not allow them to testify on her behalf. Giving reasons for finding the third respondent’s dismissal substantively unfair, the Commissioner found it common cause that the applicant and the third respondent enjoyed a cordial working relationship. Working hours were from 07h30 to 16h30, however, when the applicant changed the workplace to a place further from the third respondent’s home, she was allowed to leave earlier to enable her catch the last bus home at 16h45. Working hours were changed with effect from 1 April 2011 at the request of some employees, excluding the third respondent who was not present when the request was made, to 08h00 to 17h00 in order to

accommodate couriers arriving after 16h30. The Commissioner found it common cause that as a cleaner, the third respondent had nothing to do with couriers. She was not convinced that the third respondent decided out of the blue to leave work early, despite warnings, a dismissal and a subsequent reinstatement. She took cognizance of the fact that the third respondent was allowed to leave early for a period of four years. She found that Ms Van Der Walt ("Van Der Walt") allowed a personal vendetta against the third respondent to cloud her reasonableness. She accommodated the desire of other employees based on their duties but inexplicably refused to allow the applicant to continue working in the manner which accommodated her transport needs for four years. As a manager Van Der Walt knew the third respondent's plight. The third respondent performed her duties well as a cleaner, clocked in early and left earlier than other employees as she had to catch the last bus home.

- [4] The Commissioner considered the provisions of Item 3 of Schedule 8 to the Labour Relations Act 66 of 1995 ("the LRA"), the Code of Good Practice which deals with disciplinary measures short of dismissal to determine whether the applicant had taken corrective measures before dismissing the third respondent. She also referred to Item 7 of the same schedule which she erroneously referred to as Item 3. She found that the rule changing the third respondent's working hours of four years was unreasonable. She was not convinced that accommodating the third respondent had a negative effect on the applicant's operations or work progress. She concluded that the third respondent's dismissal was substantively and procedurally unfair and ordered her reinstatement and a payment of an amount of R2750. 00.

Grounds for review

- [5] The applicant submitted that the Commissioner committed a gross irregularity by finding that Dexter prevented the third respondent from calling witnesses when the evidence before her was that he prevented the presence of outsiders and third respondent's family members from a disciplinary enquiry. Her decision that the dismissal was procedurally unfair and was not based on evidence as the chairperson never refused the third respondent the right to

call witnesses. She committed an error by drawing a negative inference from the applicant's failure to call Harry as a witness having acknowledged that Jordaan is deceased, as Harry and Jordaan are one and the same person. She made an unreasonable finding that the applicant should have counselled the third respondent when warnings and a dismissal had no effect on the third respondent's conduct. The applicant further alleged that the Commissioner committed a gross irregularity by not considering the validity of the rule breached by the third respondent and reached an unreasonable conclusion by finding that the applicant was unreasonable in setting a standard of working time for its employees.

- [6] The applicant submitted that the Commissioner disregarded Van Der Walt's evidence that the applicant could not tailor make its employees' work times to their individual needs and required the whole workforce to work the same hours. She second-guessed the applicant on this score thus exceeding her powers.
- [7] The third respondent submitted that the arbitration award was reasonable and should therefore not to be reviewed and set aside. She attacked most of the grounds the applicant sought to rely on as invalid. She conceded that the Commissioner made an error by not recognising that Harry and Jordaan were the one and same person but submitted that the error was immaterial. She further submitted that the Commissioner's reference to the incorrect item of schedule 8 was not irregular. So was her omission to deal with the validity of the rule which formed the basis of the third respondent's dismissal.

The test for review

- [8] Circumstances in which arbitration awards of CCMA Commissioners may be reviewed are elucidated in the following dictum of *Fidelity Cash Management Services v CCMA & Others*¹

[97] The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached

¹ [2008] 3 BLLR 197 (LAC):

by the Commissioner 'is one that a reasonable decision-maker could not reach'. If it is an award or decision that a reasonable decision-maker could not reach, then the decision or award of the CCMA is unreasonable and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision-maker could reach, the decision or award is reasonable and must stand'. The court further held that the court needs to remind itself that the task of determining the fairness or otherwise of a dismissal is, in terms of the LRA, primarily given to the commissioner. In exercising the power to review the court needs to consider the totality of the evidence before the Commissioner, determine whether the Commissioner dealt with the principal issue, considered the evidence and reached a reasonable decision. In this regard see *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*²

- [9] I have considered the totality of the evidence which served before the Commissioner and the submissions on behalf of the applicant and the third respondent. The applicant submitted that the Commissioner acted unreasonably by finding the third respondent's dismissal procedurally unfair because she failed to put her allegation of procedural unfairness to its witnesses, thus denying the applicant the opportunity to respond to the allegation. The record reflects that in her evidence in chief, Van Der Walt testified that the chairperson informed the third respondent that her husband and her friend could not be witnesses or her representatives because they were not part of the company. She further indicated that the third respondent brought people from outside as witnesses in her case. She added that there was a whole big thing going on between the chairperson and the representative/witnesses that the third respondent had brought with. Although the evidence supports the Commissioner's conclusion that the third respondent was denied the opportunity of calling witnesses she erred in concluding that the denial rendered the dismissal procedurally unfair because the applicant was denied the opportunity of responding to the allegation.

² [2014] 1 BLLR 20 (LAC).

[10] In determining the substantive fairness of the third respondent's dismissal the Commissioner considered whether the rule which the third respondent had breached was reasonable but did not consider its validity. The applicant argued that the failure to consider the validity of the rule rendered the award unreasonable. In *Herholdt v Nedbank LTD*³ it was held that material errors of fact are not sufficient to have an award set aside, but are of consequence if their effect is to render the outcome unreasonable. Her omission to deal with the validity of the rule the third respondent breached did not constitute an error as the validity of the rule was not in dispute. The Commissioner's reference to Item 8 as Item 3 of schedule 8 to the LRA did not affect her decision. The errors therefore did not render the award unreasonable. The Commissioner's error in finding the third respondent's dismissal procedurally unfair has no effect on her decision that the dismissal was substantively unfair. It also does not affect the relief she awarded because section 193 of the LRA permits reinstatement of employees whose dismissal has been found to be substantively unfair.

[11] The applicant further submitted that the Commissioner's finding that the change of working hours without accommodating the third respondent's circumstances was unreasonable. This argument is based on *SAPU and Another v National Commissioner of the South African Police Service and Another* [2006] 1 BLLR 42 (LC) where it was held that an employer is entitled to regulate work practices. What the applicant overlooked is that the power to regulate work practices of members of the Police Service is governed by the South African Police Service Employment Regulations ("the Regulations"). Regulations 30 and 31 provide as follows:

'30. Principles

'Working hours of the service and conditions must support effective and efficient service delivery while, as far as reasonably possible, taking into account the personal circumstances of employees including those of employees with disabilities.

³ [2013] 11 BLLR 1074 (SCA) at para [25]

31. Working Hours

The National Commissioner must determine –

- (a) the work week and daily hours of work for employees; and
- (b) the opening and closing times of places of work and her or his control, taking into account –
 - (i) the needs of the public in the service delivery improvement programme of the service; and
 - (ii) the need and circumstances of employees, including family obligations and transport arrangements’.

[12] The authority the applicant sought to rely on supports the third respondent’s version that the Commissioner’s decision was not unreasonable. It provides that the employer’s power to regulate work practices is not without boundaries. Amongst the factors the employer needs to consider in exercising the power is service delivery. It is common cause that the applicant changed hours of work to accommodate members of its staff who deal with couriers which arrive after 14h30. That part of the applicant’s service delivered does not affect the third respondent. The applicant should have taken into account the third respondent’s personal circumstances, her needs and circumstances, including family obligations and transport arrangements when changing hours of work. It is common cause that the third respondent left the workplace early in order to catch the last bus home. For four years the applicant had arranged working hours to allow her catch the bus. When it acceded to the request of a part of its staff complement to have the working hours changed, it did not take into account the third respondent’s transport needs, forcing her to breach the timekeeping rule in order to catch the last bus home. Based on the very case the applicant sought to rely on and the evidence tendered at the arbitration, the Commissioner’s decision cannot be faulted as being unreasonable because it is one which a reasonable decision-maker could have taken on the evidence before her. The application for review can, in the circumstances, not succeed.

[13] The parties agreed that should the review application be unsuccessful then the application in terms of section 158 (1) (c) of the LRA to make the

arbitration award an order of court should be granted. I have considered the application and I am satisfied that the applicant (who is the third respondent in the review application) has made out a case for the application to be granted.

[14] In the premises the following order is made:

14.1 The application for review is dismissed.

14.2 The arbitration award issued by the first respondent under case number GAJB21394-12 and dated 26 October 2012 is made an order of court.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Beaton SC

Instructed by: De Villiers & Duplessis Attorneys

For the Third Respondent: Mr Goldberg of Goldberg Attorneys

LABOUR COURT