THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR2760/12

Reportable

In the matter between:

MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT **Applicant**

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **First Respondent**

MOLOKO EPHRAIM PHOOKA N.O **Second Respondent**

PSA obo KGARE **Third Respondent**

Heard: **18 February 2016**

Delivered: **25 August 2016**

Summary: **Review application of arbitrator's award where arbitrator did not overturn a plea bargain arrangement reached between the employer and employee.**

Sanction – employer terminated employee's employment, did not agree with sanction in plea bargain arrangement; employee alleging that the employer could not, in law, interfere with finding of chairperson of the internal disciplinary enquiry and that sanction in terms of plea bargain arrangement stands

Appropriateness of the sanction- where sanction in plea bargain arrangement inappropriate in relation to charges; – position of arbitrator

Plea bargain arrangement – whether arbitrator can interfere with plea bargain arrangement reached in the disciplinary enquiry and endorsed by the chairperson

Disciplinary Code – general rule that employer not permitted to interfere with disciplinary hearing outcome where chairperson has power to make final decision- disciplinary code as collective agreement obliges employer to implement decision of chairperson- employer cannot change decision of chairperson

Section 145 review of arbitrator's decision not to be used in order to review the chairperson's ruling on sanction - procedure to be followed by employer to set aside a decision that is irrational and/or irregular that of reviewing the decision of the chairperson of the disciplinary enquiry

JUDGMENT

GOLDEN, AJ

Introduction

[1] This is an application for the review and setting aside of the arbitration award issued by the second respondent ("the arbitrator") under case number GPBC526/12. The applicant first seeks condonation for the late filing of the review application which was approximately six weeks late. I deal with this application before I deal with the merits of the review application.

[2] The deponent to the affidavit in support of the condonation application explains that the arbitration award first needed to be considered including the prospects of taking the award on review after the award was received. A memorandum dated 5 September 2012 was written to the Regional Head of Department in Polokwane, who recommended that the award be reviewed. The recommendation in this memorandum was approved on 6 September 2012. The Department's Acting Chief Litigation Officer approved and authorised the application for review on or about 11 October 2012. The State Attorney was then instructed to launch the application for review. The application was ultimately filed approximately six weeks late.

[3] The general principles applicable to condonation applications were set out in the case of *Melane v Santam Insurance Co Ltd*[1] where the Appellate Division held the following:

> "*In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion save of course that if there are no prospects of success there would be no point in granting condonation*."

[4] In *Transport & Allied Workers Union of SA & others v Unitrans Fuel & Chemical (Pty) Ltd*[2], the LAC confirmed the requirements for condonation: a court must take into account the degree of the delay in complying with the rules, the reasons for the delay, the merits of the matter and whether condonation is in the interests of justice.

[5] In applying the principles in *Melane* and *Unitrans*, I am of the view that a delay of six weeks in the circumstances of this matter is not an egregious delay and find that the explanation proffered for the delay is reasonable. I am also of the view that the issues arising in this matter are such that they deserve proper ventilation and that it would be appropriate to grant

[1] 1962 (4) SA 531 (A).
[2] (2015) 36 ILJ 2822 (LAC).

condonation also for this reason. I accordingly condone the late filing of the review application.

[6] I now turn to deal with the merits of the application.

The Background

[7] The third respondent, Mr Evald Maseletje Kgare ('Kgare"), was employed by the Department of Justice and Constitutional Development ('the Department") as an Administration Clerk at the Magistrates' Court in Thabamoopo, Limpopo Province.

[8] A disciplinary hearing was convened on 16 March 2016 where Kgare was called upon to defend four counts of misconduct which involved inter alia the theft of traffic control documents and bribes. The charge sheet described the charges as follows:

ALLEGATION 1

That you are charged with misconduct in that on or about 30 August 2010, and at or near Magistrate Thabamoopo, you stole traffic control document number 70/33595/34/24…and thereby committing an offence of theft.

ALLEGATION 2

That you are charged with misconduct in that on or about 30 August 2010, and at or near Magistrate Thabamoopo, you stole traffic control document number 70/33596/34/24...thereby committing an offence of theft.

ALTERNATIVE ALLEGATION TO ALLEGATION 1 AND 2

That you are charged with misconduct in that on or about 30 August 2010, and at or near Magistrate Thabamoopo, you stole traffic control document numbers 70/33595/34/24 and 70/33596/34/24, the face value document in possession of the Department of Justice and Constitutional Development, and thereby prejudicing the administration, discipline or efficiency, office or institution of the State.

ALLEGATION 3

That you are charged with misconduct of fraud, in that on or about 30 August 2010, and at or near Magistrate Thabamoopo you misrepresented yourself to Kekana Oomjan by accepting/or demanding an amount of R300 on the basis that it is for payment of the traffic summons and, giving him the original control documents numbers 70/33595/34/24 and 70/33596/34/24 as a receipt knowingly that you took the R300 for your personal gain and the control documents are not proof of payment.

ALTERNATIVE ALLEGATION TO ALLEGATION 3

That you are charged with misconduct in that on or about 30 August 2010, and at or near Magistrate Thabamoopo, while on duty you conducted yourself in an improper, disgraceful and unacceptable manner by accepting an amount of R300 from Mr Kekana Oomjan and thereby prejudicing the administration, discipline or efficiency, office or institution of the State.

ALLEGATION 4

That you are charged with misconduct in that on or about 15 August 2006, and at or near Magistrate Thabamoopo you misrepresented/acted with intent to deceive the Department of Justice and Constitutional Development by failing to disclose that you have previous criminal conviction when completing the application for

employment form and thereby committing an act of misconduct or gross dishonesty.

[9] The charges, needless to state, were very serious.

[10] During the disciplinary hearing, the initiator acting on behalf of the Department, entered into a plea bargain agreement ("plea agreement") with Kgare's union representative in terms whereof Kgare would plead guilty to the charges in exchange for a lesser sanction of three months' suspension without payment of salary. Whether the initiator had the authority to enter into such an arrangement and whether the chairperson of the inquiry who endorsed the arrangement was empowered to do so were not issues raised in the review application before me.

[11] The Department argues that the charges were so serious that no sanction other than dismissal would have been appropriate in the event of a guilty finding, and that the Department's Regional Head would never have agreed to such a plea agreement as it would severely undermine the administration of justice had the Regional Head been approached in this regard before the arrangement was entered into.

[12] The chairperson of the disciplinary enquiry found Kgare guilty of the charges, gave effect to the plea agreement and imposed a sanction of three months suspension without salary in accordance with the terms of the agreement.

[13] Dissatisfied with the sanction imposed by the chairperson, the Department addressed a letter dated 24 November 2014 to Kgare wherein Kgare was informed that the sanction imposed was lenient and that it intended to

approach the Executive Authority to overturn the decision of the Presiding Officer to dismiss him from the public service. Kgare was given an opportunity to submit written representations as to why his employment should not be terminated on account of misconduct.

[14] Kgare failed to make any written representations, and was subsequently dismissed.

[15] According to the Department, Kgare was called upon to make representations as to why the sanction of the chairperson should not be altered, given that the chairperson had not *imposed* an appropriate sanction as was required of him, but had merely *recommended* that the sanction agreed between the parties in the plea agreement be imposed.

[16] Kgare then referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council ("GPSSBC").

[17] Although he was of the view that the charges against Kgare were serious and that they ordinarily would have warranted dismissal, the second respondent ("the arbitrator"), who arbitrated the dispute, concluded that the plea agreement between Kgare and the Department must stand and "that interference therewith was unfair".

[18] The arbitrator concluded that Kgare's dismissal was *procedurally* unfair and given the "unique manner" in which the dismissal was effected, ordered that Kgare be reinstated into his former position on the same terms and conditions that prevailed prior to his dismissal. The arbitrator also ordered that he be paid back-pay and imposed a final written warning

on Kgare valid for a period of twelve months. The arbitrator did not interfere with the three month suspension without pay sanction.

[19] The employer has taken this decision on review. There is no counter review by Kgare against the arbitrator's decision to impose a final written warning in addition to the sanction which the chairperson of the disciplinary enquiry had imposed in terms of the plea bargain.

The Grounds of Review

[20] It is not apparent in terms of what section of the Labour Relations Act 66 of 1995 ("the LRA") the review application is brought. I proceed on the premise that the application is brought in terms of section 145 of the LRA.

[21] The grounds of review are itemised in paragraphs 28 to 34 of the founding affidavit as follows:

21.1 The arbitrator committed misconduct in relation to his duties during the arbitration proceedings by misconstruing the facts before him in that the arbitrator had adjudicated and approached the arbitration proceedings on the basis that the Department had altered the sanction imposed by the chairperson of the disciplinary enquiry whereas the chairperson had merely made a recommendation;

21.2 The arbitrator committed a gross irregularity by ruling that Kgare's dismissal was procedurally unfair, alternatively, that he committed misconduct in relation to his duties by failing to take into account or to consider that it was common cause in the disciplinary enquiry

that the Department had invited Kgare to make representations on why the sanction of dismissal should not be imposed, and that he had declined such invitation;

21.3 The arbitrator committed misconduct in relation to his duties by ruling that the Department had no power to review the sanction imposed by the chairperson of the disciplinary enquiry;

21.4 The arbitrator misdirected himself or committed a gross irregularity during the arbitration proceedings by failing to take into account and/or to consider that the chairperson of the disciplinary enquiry retains a discretion to impose an appropriate sanction, alternatively to recuse himself where a so-called "pre-agreement" had been entered into between the parties;

21.5 The arbitrator further misdirected himself or committed a gross irregularity by ruling that once a pre-agreement had been entered into between the parties, the sanction to impose on the employee ought to be in accordance with the pre-arrangement. The arbitrator failed to take into account or to consider that a chairperson of a disciplinary enquiry who considers "the plea agreement" inappropriate may still recuse himself from the disciplinary enquiry without necessarily endorsing such a sanction;

21.6 The arbitrator misdirected himself or committed a gross irregularity by giving an award which is contradictory in that he found on the

one hand that the employee's transgression deserves a sanction of dismissal, but ordered that the employee be reinstated.

[22] The arbitrator was of the view that Kgare had pleaded guilty on the understanding that he would be given a lesser sanction, that interference with this plea arrangement was unfair and that an agreement freely entered into should be adhered to. This is the basis for his finding that Kgare's dismissal was procedurally unfair.

[23] I deal first with the allegation that the arbitrator had committed "misconduct" in relation to his duties as an arbitrator by misconstruing the approach to be adopted in that the chairperson of the internal disciplinary enquiry had only recommended a sanction. Related to this ground of review is the contention that the arbitrator committed misconduct in relation to his duties as an arbitrator by ruling that the Department had no power to review the sanction imposed by the chairperson.

[24] The starting point of this enquiry is the terms of the Disciplinary Code and Procedures for the Public Service ("the Disciplinary Code"), a collective agreement in terms of section 8(b) of the Public Service Act 1998 ("PSA") which regulates the procedure for disciplinary hearings in the public service.

[25] Paragraph 7.4 of the Disciplinary Code provides that the chairperson must pronounce a sanction if the chairperson finds an employee has committed misconduct.

[26] Section 17(1)(b) of the Public Service Act provides that:

> *'The power to dismiss an employee on account of misconduct in terms of subsection 2(d) shall be exercised as provided for in section 16B(1)'.*

[27] Section 16B(1) of the PSA reads as follows:

> *"16B. Discipline*
>
> *(1) Subject to subsection (2), when a chairperson of a disciplinary hearing pronounces a sanction in respect of an employee found guilty of misconduct, the following persons shall give effect to the sanction:*
>
> *(a) …*
>
> *(b) In the case of any other employee, the relevant head of department."*

[28] Section 16B(1) is cast in peremptory language which provides that the relevant persons (which includes the relevant head of department), *shall* give effect to the sanction [imposed by the chairperson]. There is nothing in the PSA or in the Disciplinary Code which permits the employer to change or substitute the sanction imposed by the chairperson. There is nothing to suggest that such a substitution by the employer is implicit in the wording and context of the PSA or Code. The mere fact that the chairperson "recommended" a sanction in his findings does not detract from the intention and wording of both the PSA and the Disciplinary Code

that the chairperson must pronounce a sanction and that the sanction must be given effect to by the employer.

[29] The jurisprudential nature of the chairperson's power has received the attention of the Labour Appeal Court in two recent decisions.

[30] In *SARS v CCMA & Others ("Chatrooghoon")*[3] the essential issue on appeal was whether SARS, in its capacity as employer, was entitled to substitute a sanction short of dismissal imposed on an employee by an independent disciplinary tribunal appointed in terms of a collective agreement, in circumstances where the collective agreement was silent on the issue of substitution.

[31] The facts are briefly as follows. Chatrooghoon, the employee, was charged with misconduct and pleaded guilty. The chairperson imposed a sanction of suspension without pay for fifteen days plus a final written warning. SARS was of the view that dismissal was warranted and changed the sanction to one of dismissal. The employee was accordingly served with a notice of termination with immediate effect. Aggrieved by his dismissal, the employee filed an internal appeal. The appeal did not yield a different result. He then referred an unfair dismissal dispute to the CCMA. The salient issue before the commissioner was whether the chairperson of the disciplinary hearing had the power to make a recommendation, or whether it was a final decision and, whether SARS had the power to overturn the chairperson's decision as to sanction. The arbitrator concluded that the disciplinary code did not empower SARS to interfere

[3] [2014] 35 *ILJ* 656 (LAC)

with the finding and sanction as determined by the chairperson. This view was endorsed by the Labour Court when the matter was taken on review. The Labour Court found that by unilaterally substituting the chairperson's sanction for that of its own, SARS violated the principles of natural justice and dismissed the review application.

[32] On appeal before the LAC, SARS conceded that if one has regard to the wording of the disciplinary code, then the chairperson's pronouncement on the issue of penalty was indeed a final sanction, and not merely a recommendation.

[33] In its analysis of the case, the LAC held that the wording of the disciplinary code, as a collective agreement, was clear and unambiguous on the point that the decision of the chairperson on the issue of penalty was a final sanction, and not merely a recommendation. The LAC held the following:

> *"The wording of the collective agreement does not only make it abundantly clear that the chairperson's pronouncement on penalty is the final sanction…it also leaves no room for interpretation in favour of the parties having intended to provide in the collective agreement a term granting a right to SARS to substitute its own sanction for a sanction imposed by its chairperson. Whilst it is trite that the duty of trust and confidence on the part of an employee is a term implied by law in an employment contract, I do not think that such implied term extends to include, the right of an employer to substitute its own sanction for that of the chairperson, particularly…where the parties in*

a collective agreement elected expressly to confer on the disciplinary chairperson the sole power to impose the final sanction."[4]

[34] More recently the LAC in *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others*[5] ("Kruger") considered the same question - whether an employer may unilaterally substitute a decision of a chairperson to whom final decision-making authority had been assigned, and impose a harsher sanction. The employee, Mr Kruger, pleaded guilty at the disciplinary hearing. A plea bargain was struck in terms of which the chairperson found him guilty as charged and imposed a final written warning, suspended him without pay for ten days and directed him to receive counselling for the racial abuse he had directed at a colleague. SARS informed Kruger that the chairperson's "recommendation" on sanction had been declined and that his services were terminated with immediate effect.

[35] The question before the arbitrator in *Kruger* turned on whether the employer had the power to change the disciplinary enquiry outcome. Following the LAC's authority in Chatrooghoon, the LAC confirmed that the employer, who is also subject to the disciplinary code, has no power to change the sanction imposed by the chairperson.

[36] The nature of a disciplinary enquiry chair's power is explained by Sutherland JA in *Kruger*[6] as follows. The person appointed to perform that function as internal disciplinary chairperson is clothed with the

[4] SARS *supra* at para 28
[5] (2016) 37 *ILJ* 655 (LAC)
[6] At paras [41] to [43]

persona of the employer, and the chair's decision is that of the employer. An employer that is an organ of state cannot unilaterally repudiate its own decision. Anomalously, an employer that is an organ of State may review itself, an escape mechanism not available to employers in the private sector. With reference to Chatrooghoon, Sutherland JA found that it must follow that the substitution of a sanction is invalid and that this invalidity is more than procedural fairness, as it denotes an unlawful act.

[37] Both *Chatrooghoon* and *Kruger* are on point and are of direct application in the current matter.

[38] The Department did not have the power or authority to interfere in the disciplinary sanction handed down by the chairperson. It must follow that the Department's substitution of the sanction was ultra vires the Disciplinary Code, and therefore unlawful.

[39] The arbitrator who reached a similar conclusion accordingly did not misdirect himself or commit any "misconduct" in relation to his duties as an arbitrator in this respect. There is accordingly no basis to interfere with the arbitrator's decision on this ground. [7]

[40] Instead of unilaterally overturning the decision of its own chairperson the Department should have sought a review of the sanction imposed by the chairperson either in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") or in terms of section 158(1)(h) of the LRA.

[7] The ground of review alleging misconduct on the part of the arbitrator, is understood to mean that of gross irregularity or acting in excess of the powers conferred on him. For a discussion of the concepts see the article of Anton Myburgh SC in Reviewing the Review Test: Recent Judgments and Developments (2011) 32 *ILJ* 1497.

[41] In *Ntshangase v MEC for Finance: Kwazulu-Natal & Another*[8] the appellant was employed by the Department of Finance KZN and was charged with misconduct. A chairperson was appointed in terms of the Public Service Co-ordinating Bargaining Council Resolution 2 of 1999 as the department's representative. In terms of the resolution, the department was obliged to execute the decision of the chairperson. The chairperson imposed a final written warning whereas the department was of the view that the charges warranted dismissal. The department brought a review application to have the chairperson's sanction set aside. It was unsuccessful in the Labour Court. The LAC overturned the decision of the Labour Court. Special leave was granted for the matter to be heard by the Supreme Court of Appeal (SCA). The SCA held that the decision of the chairperson of the hearing, acting *qua* state employer, qualifies as administrative action[9] and that the chairperson's decision could be reviewed on such grounds as are permissible in law which would make the decision reviewable under section 158 (1)(h) of the LRA.[10] Relying on *Pepcor Retirement Fund & another v Financial Services Board & another*[11], the SCA held that the department was not only entitled, but bound to take the chairperson's decision on review, and that it could competently do so in terms of section 158(1)(h) of the LRA which makes clear provision for such a review on such grounds as are permissible in law. [12]

[8] 2010 (3) SA 201 (SCA); (2009) 30 *ILJ* 2653 (SCA)
[9] At para [14]
[10] at para [15]
[11] 2003 (6) SA 38 (SCA)
[12] At para [18]

[42] See also *Hendriks v Overstrand Municipality & another*[13] where Murphy AJA held that the decisions of the LAC and the SCA in *Ntshangase* are weighty authority for the assertion that a determination by a presiding officer appointed under a collective agreement applicable in the public sector is reviewable on grounds of lawfulness, rationality, reasonableness and procedural fairness. Murphy AJA held that such a decision can be reviewed in terms of section 158(1)(h) of the LRA 'on such grounds as are permissible in law'. He went on to say that there is no need to classify the decision as administrative action in terms of PAJA before a review will be competent under s 158(1)(h).

[43] In *Karoo Hoogland Municipality v Nothnagel & another*[14], Sutherland JA in his exposition of the ambit of the doctrine in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[15] referred to *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [16]. In *Kirland*, the majority, per Cameron J, rejected what the Constitutional Court labelled a shortcut by an organ of state to be released from the invalid decision taken by itself by regarding it as non-existent, and held that a review application to declare the decision invalid had to be prosecuted, and upon that being decided, a further decision would have to be taken about what to do about the consequences.

[44] The inquiry however does not end here. The imposition of a dismissal resulted in the referral of an unfair dismissal dispute to the bargaining council by the employee.

---

[13] (2015) 36 *ILJ* 163 (LAC)
[14] (2015) 36 *ILJ* 2021 (LAC)
[15] 2004 (6) SA 222 (SCA)
[16] 2014 (3) SA 481 (CC)

[45] The arbitrator determined that the plea agreement should have been honoured and given effect to by the employer and that interference therewith was unfair. He accordingly found that Kgare was procedurally unfairly dismissed. The reasonableness of the arbitrator's award in this respect adds a further dimension to the enquiry.

[46] Section 145(2) of the LRA provides that an arbitration award may be reviewed if the Commissioner:

(i) Has committed misconduct in relation to the duties of the Commissioner as an arbitrator;

(ii) Committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) Exceeded the Commissioner's powers.

[47] In determining the review application this Court has to apply the test in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*[17]:

> *"In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at the decision, a commissioner is not required to defer the decision to the employer. What is required is that he or she must consider all relevant circumstances."*[18]

[17] 2008 (2) SA 24
[18] Sidumo at para 79

[48] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as amicus curiae)*[19] the SCA made it clear that the review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in Section 145(2)(a) of the LRA, the misconduct committed by the arbitrator, a gross irregularity committed in the arbitration proceedings, or in circumstances in which the arbitrator exceeded his or her powers:

> *"For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."*[20]

[49] In *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration & Others*[21] the LAC summarised the relevant legal framework for review applications under Section 145 of the LRA. The Court must ask the following questions:

[19] 2013 (6) SA 224 (SCA); (2013) 34 *ILJ* 2795 (SCA)
[20] Herholdt at para 25. See also Goldfields Mining *supra* at para 14 with reference to Sidumo
[21] (2014) 35 ILJ 943 (LAC) at para 20

(1) In terms of his or her duty to deal with the dispute with the minimum of legal formalities, did the process used by the Commissioner give the parties a full opportunity to have their say?

(2) Did the Commissioner identify the dispute he or she was required to arbitrate?

(3) Did the Commissioner understand the nature of the dispute he or she was required to arbitrate?

(4) Did the Commissioner deal with the substantial merits of the dispute?

(5) Is the Commissioner's decision one that another decision-maker could reasonably have arrived at based on the totality of the evidence?

[50] The enquiry now turns to whether the arbitrator's decision was rational and reasonable, and one that a decision-maker could reasonably have arrived at.

[51] In my view the arbitrator correctly identified the issues for determination in paragraph 47 of the award: namely whether the employer was permitted to overrule the decision of the chairperson in terms of the Disciplinary Code.

[52] With reference to *County Fair Foods (Pty) Ltd v CCMA & Others*[22] the arbitrator concluded that the Department's interference with the decision of the chairperson was unfair and found that Kgare was procedurally unfairly dismissed. Kgare was indeed procedurally *and* substantively unfairly dismissed given the invalidity of the Department's decision. Given this I find no basis to interfere with the arbitrator's decision.

[22] [2003] 2 BLLR 134 (LAC)

[53] The arbitrator found that the plea agreement must be given effect to on the basis that it was an agreement between Kgare and the Department, and that it was unfair towards Kgare for the Department to have resiled from this agreement when it dismissed Kgare.

[54] The plea agreement itself is less relevant to the enquiry. The pertinent question that the arbitrator was called upon to decide, was whether Kgare was unfairly dismissed when the Department substituted the sanction for one of dismissal.

[55] This Court in turn is confined to a determination of whether the conclusion of the arbitrator, that Kgare was unfairly dismissed, was reasonable. It cannot find that the determination was an unreasonable one – Kgare pleaded guilty to the misconduct with which he was charged on the basis of the plea arrangement and the chairperson of the enquiry accepted this. What was before the arbitrator and is now before this Court is the decision of the employer to override that decision of the chairperson (which it did not have the power to do) and not the decision of the chairperson himself.

[56] The Department's complaint all along has been that the sanction imposed by the chairperson was inappropriate. It did not however seek to review that decision as it ought to have done at the time if it was dissatisfied with the decision. Instead it now seeks to do so via Kgare's referral of his unfair dismissal claim.

[57] The grounds of review are all in effect aimed at reviewing the decision of the *chairperson*, and not that of the arbitrator, which this Court has held for the reasons set out herein is not reviewable.

[58] The Department is seeking to achieve through a review of the arbitrator's decision that which it would have asked for had it followed the route of taking the decision of the disciplinary chairperson on review.

[59] Such a review would have raised entirely different issues to those raised in this review of the arbitrator's decision.

[60] This Court is not empowered to review and set aside the appropriateness of the sanction imposed by the chairperson in the absence of any direct review of that decision. The main review challenge is manifestly aimed at this result, which is not permissible.

[61] The arguments upon which the remaining grounds of review are premised may be deployed to challenge a review of the chairperson's decision, a decision separate and distinct from the arbitrator's decision. These arguments cannot be deployed to leverage the Department to achieve the same result it had initially achieved unlawfully.

[62] The charges levelled against Kgare were clearly on the face thereof very serious and would, if established after a disciplinary hearing, probably have warranted dismissal. They may however have been admitted by Kgare for expedient or practical reasons and the lenient sanction may have been proposed and agreed to by the initiator because of an absence of proof. These issues, with others, would have been relevant to a determination of the decision of the chairperson. Since that was not the focus of the review application they have not, and cannot be determined.

[63] The rule of law requires the Department to have followed the proper process in order to review the chair's sanction. It did not do so and cannot now use in effect the employee's referral of his dispute to the Bargaining Council and the subsequent review of the arbitrator's decision to achieve that end.

[64] In *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty)Ltd & another*[23], the LAC, with reference to *Oudekraal* and *Kirland*, stated that the challenge to have irregular decisions set aside springs deeply from the rule of law.[24]

[65] In Kirland, Cameron J held:

> *'The fundamental notion — that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside — springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality.'*[25]

[66] The same principle requires proper procedures to be followed in order to set such conduct aside.

[67] The review application is accordingly dismissed.

[68] I consider it in the interest of fairness that there be no order as to costs.

[23] (2016) 37 *ILJ* 128 the (LAC)
[24] at para [18]
[25] at para 103

Order

[69] I accordingly make the following order:

(a) The review application is dismissed.

(b) There is no order as to costs.

GOLDEN, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: The State Attorney, Pretoria

For the Respondent: AM Carrim Attorneys