
**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT SOUTH AFRICA HELD AT, JOHANNESBURG**

**JUDGMENT**

Reportable

Case no: JR3104/12

In the matter between

**NATIONAL NUCLEAR REGULATOR** **Applicant**

and

**COMMISSION FOR CONCILIATION,** **First Respondent**

**MEDIATION AND ARBITRATION**

**WILLEM KOEKEMOER NO** **Second Respondent**

**MIKE BLUMENTHAL** **Third Respondent**

**Heard:** **07 July 2015**

**Delivered:** **11 May 2016**

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**JUDGMENT**

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PHALA, AJ

Introduction

[1] This is an application to review and set aside the award made by the Second Respondent in his capacity as a Commissioner of the Commission for Conciliation Mediation and Arbitration.

Background facts

[2] The Applicant employed the Third Respondent on the 19 March 1984 as a Senior Assessor Nuclear Safety.

[3] The Applicant dismissed the Third Respondent on the 23 February 2012 following a disciplinary hearing where he faced amongst other allegations of not adhering to the Applicant's normal working hours, unauthorised absence from work and failure to comply with a reasonable instruction from his superior.

[4] The normal working hours of the Applicant are from 07h45 Monday to Friday to 16h30 and all employees of the Applicant are bound by this rule including the Third Respondent.

[5] During the course of the Third Respondent's employment and at least prior to November 2007, he reported for duty at the workplace which is at the Head Quarters of the Applicant.

[6] From November 2007, the Third Respondent's vehicle allegedly broke down and the problem could not be resolved. The Third Respondent had no Transport to get to work, as he did not buy another vehicle. He therefore relied on a car he borrowed from a neighbor and could only report for duty on Mondays, Wednesday and Thursdays in the afternoons just after 15h00.

[7] On the 09 June 2010, the former CEO issued an instruction by way of email setting out the normal working hours. A copy of the email was sent to all employees, Third Respondent included, on the 14 June 2010

[8] The purpose of the email was *"for accountability and being able to know when to expect people in the office, it is important to declare the working hours*".All employees of the Applicant who are not part of EXCO or MANCO were required to comply with the normal working hours which were fixed as 7h45-16h30. The email from the former CEO specifically stated '…..no one can have flexible time that makes them to be in the office after 8h30am at any given point'. The former CEO further reiterated that '[he] expect staff members below these levels to adhere to given time lines and observe punctuality'.

[9] The Third Respondent was not a member of EXCO and neither was he a member of MANCO. Consequently, the normal working hours i.e. 7h45-16h30 as stated in the former CEO's email applied to him.

[10] All the employees of the Applicant complied with the instruction except the Third Respondent. His explanation was that he had no transport to get to work..

[11] Dr. Jean Joubert, the Third Respondent's line Manager at the time, had discussions with the Third Respondent on many occasions concerning his failure to adhere to the directive of the former CEO but the situation did not improve. Some of the discussions took place prior to the issue of the directive by the former CEO.

[12] On the 5 June 2010, Third Respondent replied in writing to the complaints referred to in paragraph 11 above.

[13] Instead of coming up with a possible solution to ensure compliance with the directive, Third Respondent's reply was not satisfactory.

[14] The Third Respondent was then issued with a written warning on the 24 December 2010 in line with the disciplinary code of the Applicant and the written warning was valid for a period of 6 months

[15] The Applicant continued to have discussions with the Third Respondent and it was proposed during these meetings that Third Respondent should consider using public transport. His response to the proposal was made on 21 January 2011 wherein he stated that *"Your suggestion that I catch a taxi, and by so doing might possibly put my life in danger constitutes unfair labour practice'*.

[16] Third Respondent allegedly persisted with his conduct and a final written warning valid for twelve months was issued to him on 21 September 2011.

[17] In terms of the final written warning, the Third Respondent was instructed to report for duty at 7h45 from 26 September 2011. He was further advised that should he commit a similar offence within the validity of the warning, a much harsher sanction would be imposed.

[18] Despite a clear instruction that he must report for duty at 7h45 on 26 September 2011 and that non observance will result in a harsh sanction, Third Respondent failed to report for duty on 27 September 2011, 4, 11, 24, 25 and 28 October 211, 1, 4 and 8 November 2011. Furthermore, he continued to report late for duty on 3, 6, 10, 26, 27, and 31 October and on 2, 3, 7, 9 and 10 November 2011.

[17] The Applicant concluded that the Third Respondent had no intention to comply with the directive and as such, he was summoned to attend a disciplinary hearing on the 12 December 2011 to answer to the following allegations;

17.1 Charge 1: Failure or refusal to comply with a lawful instruction from the superior.

17.2 Charge 2: Absenteeism for three or more consecutive working days without permission.

17.3 Charge 3: Reporting late for duty.

17.4 Charge 4: Repetition of offence for which a written warning was issued

[18] The Third Respondent was found guilty on all the charges and his services with the Applicant were accordingly terminated on 23 February 2012 after a properly constituted disciplinary hearing.

[19] The Third Respondent referred an alleged unfair dismissal dispute to the Commission for Conciliation Mediation or Arbitration and the outcome was sent to the parties on the 12 November 2012.

Arbitration award

[20] The Second Respondent found that the dismissal of the Third Respondent was procedurally and substantively unfair and in doing so made the following findings:

> [21] 'It could be said that to be present at your workplace to report for duty on time, or stated differently, to attend at your workplace within normal working hours , are rules to be adhered to. Similarly instructions in this regard are to be adhered to. It could be added that written and final written warnings being issued in this regard are especially to be adhered to. It is trite that it is reasonable and valid rules. It could also be accepted that the applicant was aware of these rules.'
>
> [22] However, the Second Respondent found that' the applicant in this case had an explanation for his limited attendance at the office. This reason for not attending at his office originated since 2007 and remained his explanation throughout until the date of his dismissal. Considering the totality of the circumstances the explanation by the applicant appears to be reasonable. For the two and a half years before the email of the former CEO issued on 14 June 2010, the written warning issued on 24 December 2010, the final written warning issued on 21 September 2011, and at the time the applicant was ultimately dismissed, the explanation of the applicant's personal circumstances remained the same.'

[23] Based on the observation above, the Second Respondent found that'.....I could not find any reason why I could not accept the applicant's explanation for his limited attendance at his workplace'.

[24] The Second Respondent further observed that in certain job categories, it is imperative for employees to be at their places of work to be able to perform their duties. In other categories of work, actual attendance is not imperative. He then went on to find that there was no evidence before him that the applicant had to be at his workplace to be able to perform his duties. The testimony of the applicant that he was fully equipped to perform his duties from home was not contested or questioned, and the applicant performed his duties above the scale of acceptance. At all relevant times, the respondent was aware of where the applicant was when he did not attend at his office. A pattern of limited attendance was established by the applicant over a period of two years and at least to some extent accepted by his previous superiors.

[26] Having made the observation above, the Second Respondent found that:'

> ….I could not derive at a conclusion that the applicant had any ulterior motive for only attending at his office in the limited way he did. I could not deduce from the presented evidence and that the applicant acted in an insubordinate way.'

[27] The Second Respondent also made the following finding that:

> 'The applicant was subjected to performance appraisals for the past four years and no evidence was before me that he was ever confronted with poor work performance and that it was required of him to attend at his workplace. Similarly, no evidence was before me that he was confronted with the fact that his limited attendance at his office at these performance appraisals over this time span and that it was unacceptable I believe, taken on a balance of probabilities, that the respondent waived is right to take disciplinary action against the applicant. This waiver was already established in 2010, even before the email of the CEO and the subsequent warnings. .After considering the totality of the circumstances, I could not derive at a conclusion that the dismissal of the applicant was substantively fair."

[28] With regard to procedural fairness, the Second Respondent found that

> 'Applicant initially contravened a secondary offence by not attending at his workplace within normal working hours. Applicant presented a reasonable explanation which, was initially accepted. The respondent permitted a special dispensation to develop pertaining to the attendance of the pattern of the applicant. This established dispensation was not interfered with by the email of the CEO. The said email was in general and if it was aimed towards the applicant. It was not in evidence before me. The respondent did not act against the applicant from a disciplinary point of view within a reasonable time period. The respondent did not prove that it acted in terms of its own policy of progressive discipline.'

The review application

[29] The Applicant's grounds for review were the following:

29.1 Second Respondent failed to properly apply his mind to the material evidence that was before him.

29.2 Second Respondent ignored relevant considerations that were properly before him;

28.3 Second Respondent committed a gross irregularity in the conduct of the arbitration proceedings.

28.4 Second Respondent took into account irrelevant material.

Submissions

[30] The Applicant submitted that the Second Respondent relied on a book authored by Grogan wherein he stated that:

> "Employees have a fundamental duty to render service, and their employer has a commensurate right to expect them to do so. A basic element of this duty is that employees are expected to be at their workplace during working hours, unless they have adequate reason to be absent.'

[31] Having relied on this authority, common sense dictated that given the overwhelming evidence that Third Respondent was aware of the stipulated normal working hours, Second Respondent was duty bound to find that the rule has been breached.

[32] The Second Respondent accepted that the Third Respondent committed a 'secondary offence' by not attending at his workplace within the normal hours. He should have found the Third Respondent guilty of the charges, after making the observation that '…normal working hours are rules that are to be adhered to and instructions in this regard are to be adhered to'.

[33] The Second Respondent was duty bound to consider the explanation tendered by the Third Respondent and to determine whether the sanction was appropriate. Moreover, the existence of the email of June 2010 was not in dispute but the Third Respondent failed to comply with the directive of the CEO and stated that he could not afford to buy a vehicle. The Third Respondent is a qualified engineer and at the time, he was earning R67 053.06.

[34] It was a material term of the Third Respondent's to report for duty at 7h45 on a daily basis. That he was equipped to work from home was immaterial as well as the so-called above average performance.

[35] The Applicant was not obliged to lead specific evidence that the Third Respondent was required to be at the office to perform his duties. The Applicant, as the employer, was entitled to set reasonable standards for employees as it did with regard to working hours.

[36] The observation by the Second Respondent that the modern workplace has changed and that employees could perform their tasks from almost anywhere on the planet is irrelevant to the subject under discussion. *In casu*, there was a clear rule precisely to regulate working hours.

[37] Having found that the rule was reasonable, the Second Respondent stated that the explanation by the Third Respondent was also reasonable; he did not have any ulterior motive and was not insubordinate. In coming to that

conclusion, the Second Respondent was swayed by sympathy and took into account the financial situation of the Third Respondent and as a result failed to give proper consideration to the reasons for imposing the normal working hours.

[38] The normal working hours were communicated to the Third Respondent on 14 June 2010 and this was not disputed. The objective was to exercise control on the working hours and to ensure that employees could account for their whereabouts and could only be absent with permission. The finding that the former CEO did not interfere with the established dispensation is therefore not supported by evidence.

[39] The Second Respondent also failed to take into account that Dr Joubert, the Third Respondent's immediate superior, had several meetings with the Third Respondent. Furthermore, he was issued with a written warning and final written warning as proof that the Applicant did not condone the conduct of the Third Respondent.

[40] It should also be noted that disciplinary action was taken immediately after the Applicant became aware that the Third Respondent was defiant.

[41] The disciplinary charges had nothing to do with the Respondent's conduct prior to the email of the former CEO. The Second Respondent relied heavily on the pattern created in 2007 and his mind was so clouded with the issue that he could not even see beyond it.

[42] The so-called "pattern" was put to a stop in June 2010 and, as a result, the Third Respondent was duty bound to comply with the directive.

[43] The Second Respondent ignored the evidence that established that the Third Respondent was instructed to report for duty at 7h45 from the 26 September 2011 following the written warning issued on the 21 September 2011. Furthermore, it was specifically stated that should he be found guilty of further misconduct while the warning is in force, a more serious penalty will be imposed. Had he considered this piece of evidence, he would not have found there was no progressive discipline.

[44] In fact the award reveals that the Second Respondent found that the written warning that was issued on 21 September 2011 was not preceded by a warning. In arriving at this conclusion, Second Respondent clearly ignored the provisions of the disciplinary code. In terms of clause 6.2.4 of the disciplinary code, a copy of any warning should be kept on the Human Resources file, even after expiry thereof so as to serve as a record of the employee's disciplinary history. Consequently, the warning that was issued in December 2010 formed part and parcel of the Third Respondent's disciplinary record.

[45] As a result of the facts outlined above, the conclusion of the Second Respondent that the Applicant has waived its right to take disciplinary action against the Third Respondent has no factual basis.

[46] The charges against the Third Respondent had nothing to do with his performance. This issue appeared to have played a role in the Second Respondent's mind that the Third Respondent was subjected to performance appraisals for the past four years and the issue of attendance at his office was not raised. But it not the case the Third Respondent had to meet.

[47] Having found that the dismissal of the Third Respondent was procedurally and substantively unfair, Second Respondent proceeded to make a costs order against the Applicant without giving any reasons for such an order. The Applicant's conduct was in no way frivolous and vexatious. The evidence demonstrated that as a reasonable employer, had to take disciplinary action against any of its employees who fail to observe compliance with the rules.

[48] The Applicant embarked on a process of progressive discipline and a properly constituted hearing eventually led to the dismissal of the Third Respondent.

[49] The Applicant remained professional throughout the arbitration at the CCMA and did not apply for postponement. On the contrary, the Third Respondent caused the delay in the finalization of the matter because he kept on changing representatives and it became necessary to postpone the arbitration. Accordingly, awarding of costs against the Applicant was without merit.

[50] In summation, it is submitted that if Second Respondent had applied his mind to all of the above considerations which he has ignored, he may have come to a different conclusion. Accordingly, his award is vitiated with irregularities and stands to be reviewed and set aside.

[51] The Third Respondent argued that on the 14 June 2010 ,Joubert sent a general email to all employees regarding working hours following an email to from the Chief Executive Officer ("CEO") which email read;

> 'Dear ECM Colleagues
>
> Please take note of the email chain below about working hours for NNR staff members. Especially the email from the CEO at the bottom of the email chain below. NNR staff members not part of MANCO or EXCO are requested to adhere to the following arrangement extracted from the CEO's mail
>
> Normal NNR working hours 7:45 to 16:30 pm.
>
> If we have put 8 hours work as required it means that you can take a lunch break of 45 minutes in this time arrangement.
>
> Thank you
>
> Jean'

[52] The Third Respondent submitted that, properly construed, the email of 14 June 2014, as referred to above on which all the charges rest, does not amount to an instruction to the Third Respondent that he may no longer work from home as per the dispensation.

[53] During his evidence, Joubert expressly stated that he could not dispute that the Third Respondent was working longer hours than merely the normal prescribed hours from home.

[54] The Third Respondent did not miss any deadlines as a result of working from home and was also never taken to task for any poor performance. In fact, in order to produce tremendously detailed reports such as the ones he produced he had to work in excess of 8 hours a day.

[55] The evidence before the Second Respondent clearly indicated that the Applicant was fully aware of the Third Respondent's predicament of being unable to commute to work on a regular basis because his vehicle was broken. The Applicant put up with the situation from 2007-2010 without taking any action against him. The Third Respondent worked from home and he was not guilty of either insubordination or other allegations leveled against him such as late coming, poor time keeping or negligence as he was performing his duties satisfactorily from home.

[56] **Waiver**- The Third Respondent commenced working from home late 2007, early 2008.

[57] The Third Respondent was issued with a written warning on 24 December 2010.

[58] Joubert contended that he had given the Third Respondent a warning for time keeping prior to 24 December 2010; he could not point to such a warning and could not explain why it was not in the bundle. The only reasonable inference to be drawn was that the warning did not exist.

[59] No formal disciplinary steps were taken against him until 24 December 2010 which would have equated to a period of approximately 3 years.

[60] The letter which the Applicant claimed was the instruction to the Third Respondent was given on 14 June 2014. The written warning was handed on 24 December 2010 after a period of six months and eight days had elapsed. It begs the question as to why insubordination was not included in the warning.

[61] It was also submitted that by virtue of the length of time that had elapsed before the Applicant instituted disciplinary action against the Third Respondent, the Applicant evinced a clear intention not to proceed with disciplinary action against the Third Respondent and acquiesced to the prevailing state of affairs. The Third Respondent's reason for not being able to attend work every day of the week had not changed since 2007/2008. There were therefore, no new circumstances which had come to the fore justifying a change in stance by the Applicant.

[62] An employer who waits for a lengthy period of time before instituting disciplinary action against an employee may be held to have waived its right to institute such disciplinary action.

[63] The Second Respondent found that the dismissal of the Third Respondent was substantively unfair because there was no proof that he was willfully absent from work or had in any way been insubordinate coupled with the fact that the Applicant waived its right to institute disciplinary action against the Third Respondent.

[64] The Third Respondent submitted that on the conspectus of the evidence and facts, the findings reached by the Second Respondent are the only reasonable findings that could have been made.

[65] It has been established by the Supreme Court of Appeal that clear evidence must be led of a breakdown in the employment relationship before the sanction of dismissal or summary dismissal will be found to be fair/or justifiable[11]

[66] **Procedural Fairness**The Second Respondent found there was no evidence to support the allegation of insubordination, therefore, he had to determine whether the Third Respondent was guilty of poor time keeping and late coming.

[67] In terms of the Disciplinary Code and Procedure of the Applicant, these were secondary offences and a verbal, written and final written may be issued before the penalty of dismissal after recurrence. Therefore, the Applicant did not apply progressive discipline in respect of poor time keeping allegations.

[68] The Applicant allowed a written warning to lapse without taking any further action against the Third Respondent. It only evinced the intention not to proceed with disciplinary action against him. It effectively abandoned the initial disciplinary process.

[69] The final written warning was given on the strength of the lapsed written warning which was irregular.

[70] In light of the afore-going, the final written warning was clearly defective and ill-conceived.

[71] The Chairperson of the disciplinary hearing should not have relied on the defective written warning in arriving at the sanction of summary dismissal.

[72] The Third Respondent argued that the Applicant also asked for a prayer to substitute the decision of the Second Respondent but failed to deal with the factors giving the Court the right to finally determine the matter. The factors were:

1. Is the result a foregone conclusion and would be a waste of time to require the Commissioner to reconsider the decision

2. Remission would cause further delay that would prejudice the Applicant.

3. The Commissioner has exhibited bias.

4. The court is in as good a position as a Commissioner to decide the matter.

[73] The Third Respondent also argued that the issue of costs was justified because the Applicant failed to lay a basis for the dismissal of the Applicant. The dismissal was brutally unfair and capricious.

[74] The Third Respondent's legal representatives argued the matter successfully for an order of costs which related to the Applicant delaying and failing to produce documents which were subpoenaed etc.

<u>The relevant test for review</u>

[75] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[1] Navsa, AJ held that

> '*in the light of the constitutional requirements (in sec 33(1) of the Constitution) that everyone has the right to administrative action that is*

[1] [2007] 12 BLLR 1097 (CC).

> *lawful,* Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse section 145 of the LRA.'

The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following:

> 'Is the decision reached by the commissioner one that a reasonable decision maker could reach.[12]

[76] In *CUSA v Tao Ying Metal Industries and Others*[13] O Regan, J held:

> 'It is clear ...that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[77] The test was restated and clarified in the recent decision of the Supreme Court of Appeal ("SCA") in *Herholdt v Nedbank Ltd.*[2] albeit that the outcome of this case before the SCA turned on the facts, the SCA decided the legal issues regarding the proper review test of the CCMA arbitration awards at the invitation of the parties.

[78] The Labour Appeal Court, in *Fidelity Cash Management Service v CCMA and Others,*[3] specifically interpreted the *Sidumo* test. The Court held :

> 'To this end, a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside.'

[79] Van Niekerk, J in *Southern Sun Hotel Interests (Pty) Ltd v CCMAand Others,*[4] held that:

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[3](2008) 29 *ILJ* 964 (LAC) at para 92.
[4](2010) 31 *ILJ* 522 (LC) at para 17.

> 'If a commissioner fails to take into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that is nonetheless capable of justification.'

[80] It is against the principles above and test that the award of the Second Respondent must be finally determined especially considering the grounds of review as articulated by the Applicant.

Evaluation

[81] The Applicant employed the Third Respondent on 19 March 1984. It is common cause that the Applicant dismissed the Third Respondent following a disciplinary hearing. The Third Respondent was aggrieved and referred a dispute to the First Respondent, which appointed the Second Respondent to arbitrate the dispute after unsuccessful conciliation. The Second Respondent found the dismissal to be procedurally and substantively unfair, furthermore, he ordered the Applicant to pay costs.

[82] It should also be common cause that the Third Respondent's vehicle broke down in and about 2007. From that point, the Third Respondent did not report for duty in terms of the contract of employment from 7h45. Although the papers of both parties did not deal in detail with the issue, it appears that there was some form of accommodation or indulgence afforded to the Third Respondent. The Third Respondent referred to the situation as a "dispensation".

[83] In terms of the Concise Oxford Dictionary of Current English[5] dispensation means 'exemption from a penalty or duty'. The pertinent question was whether the parties understood the exemption from a material term of the contract to subsist for indefinite period and ultimately having the effect of changing the terms and conditions of employment.

[5] 9th Edition 1995.

[84] I deliberately raise this issue because the argument of the Third Respondent appears to be that the Applicant did not take disciplinary action for a period of three years and he did not fathom the motivation for acting in 2010.

[85] The Applicant submitted that even if the Third Respondent was correct, the situation somewhat changed on 14 June 2010 following email addressed to all employees, Third Respondent included.

[86] The Third Respondent did not dispute the existence of the email but argued that it was couched in general terms, it was not an instruction and furthermore it did not change the dispensation.

[87] Unfortunately, I hold a different view, the email was very specific. Firstly, it specified accountability, it emphasised the importance of working hours, the categories of employees who qualified for flexible hours and that everyone else was to report at 7h45-16h30. The email stated that no one can have flexible time that makes them to be in the office after 8:30am at any given point. Finally, employees in those categories were expected to observe punctuality.

[88] The assertion of the Third Respondent that the email did not change the dispensation was misplaced. The so called dispensation came about as a result of a misfortune. The Applicant bend over backwards to accommodate the Third Respondent after his vehicle broke down. The parties did not enter into a new agreement that the Third Respondent was to work from home from 2007.

[89] The Second Respondent dealt with the issue in one sweep and he stated the following in the award:

> 'The applicant in this case had an explanation for his limited attendance at the office. This reason for not attending at his office originated since end 2007 (sic) and remained his explanation throughout until the date of his dismissal. Considering the totality of the circumstances the by the applicant appears to be reasonable.'[6]

[6]Index to Pleadingsat p40, para 75.

[90] The Second Respondent clearly conflated issues. The issue of the Third Respondent's misconduct did not arise until 2010. The CEO's email put the Third Respondent as well as other employees on terms with regard to hours of work. The Third Respondent appeared to have elevated the status of an indulgence to that of a material change in the terms and conditions of employment. The Second Respondent seemed to be of the view that because the issue arose in 2007, the Applicant was now precluded from taking action against the Third Respondent in particular after 14 June 2010.

[91] If indeed the Applicant condoned the conduct of the Third Respondent then the discussions that took place beyond 14 June 2010 would not have been necessary.

[92] Prior to the email of 14 June 2010, the Third Respondent addressed a very comprehensive letter to Joubert ostensibly following a discussion and the purpose was to address the issue of no transport and to place some facts on the table. It is unnecessary to repeat the whole content but I shall refer to relevant portions only.

[93] The Third Respondent stated:

> 'Let's now deal with the "thorny issues" of the core business. There seems to be a misconception among some members of our executive that time spent at the office is essentially linked to core business. For Admin Staff who have their facilities 'office' or premises based, quite possibly but for technical staff there is NO LINK whatsoever-especially AG Department personnel, since most of us, have a comprehensive (office) setup at home. (You may disagree with me on this one)
>
> It is critical that the NNR Executive needs to understand this (sic).
>
> Instead of a paranoid obsession with office presence, I would like to see NNR Executive become obsessed with improving core business performance in the following ways.
>
> If the NNR Executive is concerned about office attendance, then it must install a good quality Electronic Time Keeping System – there are literally hundreds on the market. Introduce at the same time a comprehensive FLEXITIME

System then if there are complaints about "comings and goings" there is at least a LOCUS STANDI in terms of SA Labour Law.'[7]

[94] On 21 January 2011, he again addressed another letter to Joubert and stated:

'As mentioned MANY times before—and I don't know why you keep insisting that I repeat it---I DON'T have my own transport at the moment, so I CANNOT be at the office at the nominal starting time.

The detailed explanation which I forwarded to you over SIX MONTHS ago dated the 05 June 2010, was never responded to by you (nor by knox) for that matter therefore your time to now start arguing pros & cons is now over—the 30 day limit is long past!

Your raising of the situation again & again—when I have on three separate occasions explained when i am likely to obtain a vehicle and under what circumstances, constitutes harrassment!

The impression that you give me that I am not believed, constitutes prejudice!

Your suggestion that I catch a taxi and by so doing I might possibly put my life in danger constitutes unfair labour practice.

My request that you help me motivate a HIRED CAR, especially when I have offered to pay for the petrol and has been rejected by yourself on two separate occasions constitutes lack of cooperation/bad decision making and unfair labour practice, since I made a reasonable request to try rectify the situation.'[8]

[95] The Third Respondent demonstrated, through the letters, that he had several discussions with the Joubert over his failure to report for duty at the office.

[96] However, it is instructive that despite the applicant's claim of a "dispensation", the tone of his letters reveals the level of anger he had against the Executive for demanding that he report to the office in terms of the contract of employment.

[7] Index to bundle of documents at31-32.
[8] Index to bundle of documents atp34.

[97] All this evidence was before the Second Respondent and he clearly did not take it into account. It is also a mystery how the Second Respondent came to a conclusion that the explanation of the Second Respondent was reasonable in the light of the tirade by the Third Respondent.

[98] The Third Respondent argued that the Applicant waived its right to take disciplinary steps against him. The Second Respondent accepted this argument and made the following finding:

> 'Similarly, no evidence was before me that he was confronted with the fact of his limited attendance at his office at these performance appraisals over this time span and that it unacceptable. The applicant's contention that he was actually performing from home more hours than normal working hours. I accepted as a more probable version considering his performance rating. I believe, taken on a balance of probabilities, that the respondent waived its right to take disciplinary action against the applicant. This waiver was already established in 2010, even before the e-mail of the CEO and the subsequent warning.'[9]

[99] The Second Respondent took into account irrelevant evidence and in the process, misdirected himself. The Third Respondent was charged for misconduct and not poor performance. The fact that he was subjected to appraisals and found to be a top performer was insignificant.

[100] The finding that the Applicant waived its right to take disciplinary action was misconceived. The charges dealt with the period after the 14 June 2010 and did not include the period between 2007 to 2009, that much is very clear from the evidence.

[101] The issue of waiver does not even arise in this case. The Third Respondent was admonished and the letters referred to above confirmed that Joubert took him to task early in June and the CEO then issued email to buttress the point.

[102] Following the letter from the CEO, the Third Respondent was handed a written warning on the 24 December 2010 valid for six months. The final written was then issued on the 21 September 2011. Although the Second

[9] Index to pleadings at p41 para 82.

respondent did not make any specific finding about the warnings under substantive fairness, he dealt with the warnings under procedural fairness.

[103] The Second Respondent concluded that:

> 'The written warning issued in December 2010, was in any case not preceded with (sic) a verbal warning in terms of the respondent's Disciplinary Code and Procedure. The written warning lapsed during June 2011 and when the final written warning was issued in September 2011, it was not based on a previous written warning.
>
> The respondent did not prove that it acted in terms of its own policy of progressive discipline.'[10]

[104] The Second Respondent's approach was that the Applicant was precluded from relying on the lapsed written warning which with respect was incorrect. In the Labour Appeal Court case of *National Union of Mineworkers obo Selemela v Northam Platinum Ltd,*[11] the Court quoted the case of *Gcwensha v CCMA and Others*[12] with approval and found that:

> 'An employer or commissioner is always entitled to take into account the cumulative effect of previous acts of negligence, inefficiency and/misconduct. To do otherwise would be to subject and employer to the duty to continue employing a worker who regularly commits a series of transgressions at suitable intervals, failing outside the periods of applicability of final written warnings.
>
> The court found further that the final written warning will have added importance if the conduct to which it relates is of the same nature as the conduct the employee is subsequently charged with in the disciplinary enquiry.'

[105] It is clear that an employee who demonstrates a propensity for committing misconduct cannot escape the consequences of his or her conduct simply because a past warning has expired. Disciplinary action under the Labour

[10] Index to pleadings at p42, para 88.
[11] (2013) 34 ILJ 3118 (LAC) at para 38.
[12] [2006] 3 BLLR 234 (LAC).

Relations Act 66 of 1995, as amended, ("LRA") is not a rigid process which fails to take into account the various parties' interests.

[106] The Second Respondent totally misconstrued the case of the Applicant and in the process committed a reviewable irregularity. The Second Respondent failed to take into account material evidence before him and, furthermore, he gave undue emphasis to irrelevant evidence.

[107] It is notable that the Second Respondent ordered the Applicant to pay costs at the arbitration. The Third Respondent has already submitted that if the court was of the view that the order of costs could not be sustained, it could be excised from the arbitration award. In fact, on the day the matter was argued ,Mr. Short, for the Third Respondent, effectively abandoned the argument after I had expressed a view that there appeared to have been no basis for ordering costs against the Applicant.

[108] The Applicant prayed amongst other things that the award of the Second Respondent be substituted with an order that the dismissal of the Third Respondent was both procedurally and substantively fair.

[109] The Third Respondent argued that the Applicant failed to address the factors which give rise to the matter being finally determined,*viz*:

(i) Is the end result a foregone conclusion and it would be merely a waste of time to order the CCMA to reconsider the matter.

(ii) A further delay would cause unjustified prejudice to the parties.

(iii) The CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again

(iv) The Court is in a good position as the CCMA to make the decision itself

[110] It is my considered view that factors (i) (ii) and (iv) exist in this case as a matter of course.

[111] it is an established principle that costs should follow the result but I am of the view that the Third Respondent was *bona fide* in opposing the review application.

[112] In the circumstances, I make the following order:

[1] The arbitration award issued by the Second Respondent under the auspices of the First Respondent is reviewed and set aside and substituted as follows:

"The dismissal of the Third Respondent is procedurally and substantively fair."

[2] There is no order as to costs.

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Phala, A J

Acting Judge of the Labour Court of South Africa.

Appearances

For the Applicant: Advocate T Manchu

Instructed by: Olivia Manchu

For the Third Respondent: D Short (Attorney)