Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 463/2016

In the matter between:

ROBOR (PTY) LTD **First Applicant**

and

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL **First Respondent**

AHMED CACHALIA *N.O.* **Second Respondent**

TERRENCE SINGH **Third Respondent**

Heard: 22 March 2016

Delivered: 08 April 2016

Summary: (Review - arbitrator's findings on the seriousness of the misconduct and inappropriateness of dismissal as a sanction unsustainable on the evidence-test of gross negligence misconstrued and contributing to irrationality of the outcome)

JUDGMENT

LAGRANGE J

Background

[1] This is an unopposed application to review and set aside an arbitration award of the second respondent. In his award, the arbitrator had found the third respondent, Mr Singh ('Singh') guilty of negligence causing a loss of approximately R 42,002 to the applicant and of a gross violation of the employer's IT email policy.

[2] Singh had been previously warned about his excessive email usage. The arbitrator decided that Singh's failure to pick up that his subordinates were being paid for work they were already paid for, which he should have noticed if he had checked the financial allocations he was supposed to check, did not amount to gross negligence.

[3] The arbitrator's reason for deciding that Singh's negligence was not gross was that he considered gross negligence to refer to "a complete neglect to do things correctly" and he doubted "very much" whether Singh was grossly negligent in the performance of his duties because his engineering capability functions were rated at 94.7 and 95% and his running of the maintenance department was fine. The arbitrator concluded: "It was only his failure to adequately analyse the cost allocation that the respondent had a problem with. In my view this is not gross."

[4] The arbitrator decided that in the circumstances, it was appropriate to reinstate Singh but without backpay for the nine months he had been out of his job. Although he considered that a final written warning would have been appropriate in view of being out of work for nine months it would serve no purpose to impose one. The considerations relied on by the Commissioner in deciding to penalise Singh only by way of denying him backpay rather than dismissing him were the following:

4.1 Even though he caused the company a loss of R 40,000 it was the first mistake he had made in 30 years of service which counted strongly in his favour. Given that Singh was a supervisor, a final written warning would have been sufficient for this misconduct.

4.2 The offences were not as serious as suggested by the employer.

4.3 The trust relationship had not broken down irretrievably.

4.4 Dismissal was too harsh a sanction considering that it was the first time he was guilty of negligence and it was only the second time he was guilty of abusing the IT policy.

4.5 Although the offences were cumulatively serious they were not enough to warrant dismissal.

The review

[5] In the applicant's founding affidavit a wide array of grounds of review are cited but many of them lack any factual specificity and are simply stated in the abstract. A founding affidavit must contain the facts on which the applicant relies even in a review application. The court is not bound to consider submissions which are made without the factual basis for those submissions being set out in the affidavit. Accordingly, I have confined myself to those grounds of review which are based on specific factual averments in the founding affidavit.

[6] Firstly, a pillar of the applicant's case is the apparent disjuncture between the arbitrator's findings of serious misconduct and his failure to impose the sanction of dismissal. Apart from arguing that the misconduct complained of, on the face of it, warranted dismissal, the applicant takes issue with the arbitrator's finding that the trust relationship had not broken down, which was one of the factors underpinning his decision to reinstate Singh. It contends that its evidence before the Commissioner was that there was a complete breakdown of trust and that Singh's dereliction of duties which caused the financial loss meant that he could no longer be trusted as a supervisor and maintenance manager. The applicant also points out that Singh showed no remorse for his conduct which was a material factor the arbitrator failed to consider in deciding that reinstatement was appropriate.

[7] To emphasise the seriousness of Singh's breach of the first charge, the applicant points out that in finding Singh guilty of breaching the IT policy, the arbitrator had effectively found him guilty of sending 3495 private emails with 12,645 attachments, which were not work related. He had been reprimanded in December 2012 for his abuse of the email system. At

the time it had been highlighted that he had sent 480 emails in the course of one week. He acknowledged in writing that he was wrong and undertook to stop the practice immediately. Despite this undertaking, and despite being in a supervisory position, Singh simply continued to send an excessive amount of non-work related emails. His defence at the arbitration was that, he should have been warned again that his emails had reached excessive levels before he was called to an enquiry. He also contended that the company should have blocked his email access but did not dispute the fact that he required email access for the performance of his duties.

[8] The applicant also argues that the Commissioner had misdirected himself by applying the incorrect test for gross negligence when he decided that it must amount to a complete neglect to do things correctly. The correct approach the arbitrator should have applied was to determine whether Singh had exercised the standard of care and skill that could be expected of someone with his skill and experience and that his failure to do so had caused a loss to the employer, which was gross in this instance. What makes negligence gross is either the fact that it is persistent negligence or that it is particularly inexcusable. The R 42,000 loss had been occasioned because Singh had failed to ensure that the applicant was not charged for services provided by the in-house maintenance team. The production manager who testified for the applicant attributed this excessive additional cost to Singh's failure to go through the maintenance costs being incurred on a daily basis. Singh's defence was not that he had done this but simply that the figures provided by the company could not be trusted. The production manager believe that Singh's failure to monitor matters properly was partly related to the time he was spent sending private emails. There was no complaint about the fact that the machinery he was responsible for was running at 95% capacity, it was the fact that unnecessary costs had been incurred in maintaining that machinery.

[9] During the course of the arbitration, evidence was presented that Singh ought to have been aware that service costs were being incorrectly charged to the company on the information that was made available to him

on a weekly basis. Singh's ultimate line of defence on this issue was that it should have been brought to his attention that his reports were inaccurate.

[10] The most recent LAC authorities dealing with the review of arbitration awards contain the following dictums which parties should take cognizance of in framing review applications. In ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)***[1], the SCA clarified the test regarding procedural latent irregularity as a ground of review:

> "[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(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**."[2]

(emphasis added)

[11] In ***Head of the Department of Education v Mofokeng and others***[3] the LAC reinforced the approach to be adopted:

> "[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. **Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must**

[1] (2013) 34 *ILJ* 2795 (SCA)

[2] At 2806

[3] [2015] 1 BLLR 50 (LAC)

be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry**. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result**. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. **If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable.** By the same token, **an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues,** with the result that the award may be set aside on that ground alone**. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination**."[4]

(emphasis added)

[4] At 60-61.

[12] I agree with the applicant that the arbitrator did not properly address the question why it would be appropriate to reinstate Singh when there really was no evidence to suggest that firstly, he took responsibility for his conduct, but seemed to be of the view that the fault lay with senior management for not bringing issues timeously to his attention. Secondly, there was no evidence to contradict the production manager's evidence that the trust relationship had broken down. Thirdly, the arbitrator illogically brushed over the fact that Singh had acknowledged his previous reach of the IT policy and undertaken not to repeat it, but had simply continued his excessive usage of the facility and somewhat disingenuously suggested that what the company should have done was to cut off his access to the service. The arbitrator also took no cognizance of the fact that Singh was a foreman occupying a position of authority. Thus, even if the arbitrator felt that dismissal was substantively unfair, he simply failed to consider whether it was appropriate to simply reinstate Singh as a remedy. In the light of the factors mentioned, it is difficult to understand how any arbitrator could conclude that reinstatement was the appropriate remedy.

[13] On the primary question of whether the arbitrator acted unreasonably in finding that dismissal was not an appropriate sanction, his approach seems to have been based primarily on downplaying the seriousness of the misconduct concerned. Thus, he baldly stated that the misconduct was not as serious as the employer contended, yet confusingly in his conclusion decided that cumulatively Singh's misconduct was serious.

[14] The only reasons the arbitrator appears to advance for the non-serious character of the misconduct in relation to the breach of the IT policy is that it was only the second occasion this had happened, but he did not appear to consider that nothing suggested that Singh was likely to amend his behaviour in the future given the way that he behaved after accepting that his previous usage of the email facility was in breach of the policy and he had to stop. In respect of the loss of R42, 000 he seems to take the view that this should be seen in the context of 30 years' service during which he committed one mistake, which diminished its significance. There is no basis on which the arbitrator could say that a loss of R40, 000 was not significant. The implicit reasoning of the arbitrator to the effect that this

amount was not significant when compared to 30 years of service is simply illogical. Moreover, the failure to prevent this loss was not the result of one mistake but of an ongoing failure to monitor maintenance charges over a period of months, which was part of his ordinary duties. The arbitrator appears to have misconstrued the evidence in that regard.

[15] The arbitrator also appears to have misconstrued the charge of gross negligence by implicitly suggesting that it should relate to a complete neglect to do things correctly. It seems that the reason for the arbitrator approaching the charge of negligence in this way is that there was no dispute that the machinery Singh was responsible for was running at full capacity meaning that he was performing part of his functions properly. There is no logical reason why a particular act of negligence will not be construed as serious cause an employee does perform other duties properly. What is at issue once it is established that an employee was negligent in a respect, is how serious that negligence was. In this case, the negligence relating to the avoidable costs was a result of a course of conduct over a few months on the part of the applicant and the loss was significant. It is difficult to see how anyone could not construe such negligence as gross. As a result of the arbitrator misconstruing the approach, he diminished the seriousness of this charge. Had he not done so he would have found it very difficult to avoid the conclusion that Singh's conduct in relation to the incurrence of maintenance costs was an act of gross negligence. This in turn makes his conclusion that the cumulative effect of Singh's conduct was not serious enough to warrant dismissal more untenable as a reasonable outcome.

[16] In the circumstances, I am satisfied that on the evidence before the arbitrator his conclusion that it was not appropriate to dismiss Singh for the misconduct he was guilty of was not a conclusion that a reasonable arbitrator could reach on the evidence before him.

Order

[17] In light of the above, the arbitration award issued by the second respondent on 20 February 2014 under case number LP 1707-13 is reviewed and set aside.

[18] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: C J Geldnenhuys

THIRD RESPONDENT: In attendance