THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR2833/18

In the matter between:

TELKOM SA SOC LIMITED **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER LEN DEKKER N.O. **Second Respondent**

SOUTH AFRICAN COMMUNICATIONS UNION (SACU) **Third Respondent**

WILLIE RAHL **Fourth Respondent**

Heard: **6 July 2021**

Delivered: **16 August 2021 (In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 16 August 2021.**

JUDGMENT

REDDING, AJ

[1] The fourth respondent in this matter Mr Rahl was employed by Telkom SA SOC Ltd (Telkom) for 36 years, from 1982 to 2018. He was a supervisor in the Open Serve business. He was dismissed on 5 February 2018 for gross dereliction of duty.

[2] Telkom preferred five main charges against Mr Rahl. They all related to failures on his part to supervise and manage his subordinates properly. The first related to overtime mismanagement (he permitted employees to claim for overtime not due), secondly, failures in dispatch management, thirdly, failures in fleet management, fourthly TBI process management failures and fifthly the inappropriate time management of his subordinates.

[3] In the disciplinary enquiry conducted by Telkom he was found not guilty of several charges; in respect of the charges where he was found guilty he was issued a sanction of a final warning or the sanction of dismissal. The sanction of dismissal applied to two of the overtime mismanagement charges, one of the dispatch management charges, all the fleet mismanagement charges and both of the time management charges.

[4] Mr Rahl referred a dispute concerning the fairness of his dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). At the CCMA arbitration Telkom led a single witness, Mr Senoamadi, the disciplinary enquiry chairperson; and Mr Rahl testified in support of his application for relief. A bundle of common cause documents was referred to.

[5] The Commissioner found that the dismissal of Mr Rahl was both procedurally and substantively unfair. He issued an award reinstating Mr Rahl retrospectively

with a written warning valid for six months. The basis for the finding of substantive unfairness was that dismissal was not the appropriate sanction. The nub of the Commissioner's award is to be found at paragraph 31 in which he states:

> "31. The general conclusion that is reached, taking into account the totality of the evidence presented, is that there was no malice on the part of the applicant. In some respects, his managerial control duties could have been exercised more diligently, but he faced technical and practical difficulties in performing his control functions. He should not have been dismissed, but at most a Written Warning should have been issued and the applicant should have been given the opportunity to take corrective action…"

[6] The Commissioner's reasoning in reaching his conclusion is not altogether clear. However, it would appear that he found that Telkom had failed to establish a fair basis for dismissing Mr Rahl on the grounds of gross negligence or dereliction of duty. This may be deduced by his finding that Mr Rahl acted without "*malice*". The concept of dereliction of duty (and the allied concept of gross negligence) implies deliberate or wilful action on the part of the employee. The term "*malice*" implies the same. It appears, therefore, that the Commissioner found that it had not been established that Mr Rahl's failures were deliberate or wilful, which was the basis for the charge.

[7] Gross negligence has been the subject of judicial commentary. In *Transnet Ltd t/a Portnet v MV 'Stella Tingas*[1] Scott JA defines the concept as follows:

> "... [T]o qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a

[1] [2003] 1 All SA 286 (SCA) at 290-1

> total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity."

[8] It was common cause that the disciplinary code provided that in respect of misconduct which constituted gross negligence or dereliction of duty the appropriate disciplinary action for a first offence was dismissal. On the other hand, the non-compliance with company rules or procedures was stated to warrant a final written warning for a first offence and dismissal for a second. The code therefore clearly indicated that gross negligence or dereliction of duty was regarded far more seriously than negligence or non-compliance with rules and policies. The finding by the Commissioner that Mr Rahl's conduct fell short of the employer's ultimate sanction of dismissal was influenced by the employer's own assessment of the degrees of gravity of the misconduct.

[9] The Commissioner found that Mr Rahl had failed to comply with his duties diligently and that this nevertheless constituted misconduct. This misconduct was not so serious as to warrant the sanction of dismissal. He considered that it warranted the sanction of a written warning. This was reflected in the award in which the Commissioner ordered Mr Rahl to be retrospectively reinstated on a written warning valid for six months from the date on which he reported for duty.

[10] Telkom seeks to review and set aside the Commissioner's award. It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry, or arrived at an unreasonable result.[2] A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her[3].

[11] Mr Mbuyisa, for Telkom, argued that the decision was unreasonable. He submitted that the Commissioner had downplayed the significance of the charges against Mr Rahl, he had failed to have sufficient regard to the fact that

[2] See: *SA Rugby Union v Watson and Others* (2019) 40 ILJ 1052 (LAC) at para 25).
[3] Ibid.

Mr Rahl had refused to recognise that he had fallen short or committed an act of misconduct and been overly influenced by Mr Rahl's many years of service.

[12] From the authorities it is now clear that a review court is not so much concerned with the reasoning of the CCMA arbitrator in coming to his or her decision as the reasonableness of the decision. The main question is whether the arbitrator's finding that the sanction of dismissal was too severe and therefore unfair is so unreasonable that a reasonable arbitrator could not reach that result on the evidence before him or her. This is a not an insubstantial hurdle.

[13] In my judgment Telkom has failed to clear the hurdle. The evidence presented by it at the arbitration did not go so far as to establish deliberate or wilful misconduct, a dereliction of duty or even gross negligence. It established that there was strong documentary evidence which indicated that Mr Rahl's subordinates had claimed overtime which was not owing or used their work vehicles in a manner not permitted by Telkom's policies. These failures by Mr Rahl's subordinates were not detected by him. Telkom had argued that by using reasonable diligence and the use of the IT tools available to him he could and should have detected the abuses by his subordinates. Mr Rahl delivered several explanations for why monitoring the employees' overtime and vehicles was difficult, but failed – in the Commissioner's estimation – to demonstrate that he was not guilty of any misconduct at all.

[14] On reading the record I could find little evidence that Mr Rahl had deliberately failed to monitor the employees properly. His failure could not be described as extreme negligence or a total failure to take care. At worst, he appeared to have been overwhelmed by the responsibilities imposed upon him which had increased by the assignment of certain pilot projects to his team. As the arbitrator remarked, he should have been more diligent.

[15] In the circumstances, I am unpersuaded that the Commissioner's decision is unreasonable or that he failed or misconceived the nature of the enquiry before him. The application for review must therefore fail.

[16] In his answering affidavit Mr Rahl averred that the Commissioner in his award had failed to provide full compensation to him in respect of salary lost during his suspension and after his dismissal. He submitted that the Court should change the Commissioner's award to provide backpay for the full period of dismissal. However, this submission fell short of an application to cross-review the Commissioner's award and there was no notice of motion in which such relief was sought by him. During the hearing his representative, Mr Botha indicated that reliance was being placed on that submission.

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

Order

1. The application for review is dismissed;
2. There is no order as to costs

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A Redding

Acting Judge of the Labour Court of South Africa

Appearances:

On behalf of the Applicant:
Instructed by:

On behalf Respondent:
Instructed by: