Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C536/2020

In the matter between:

SUPREME POULTRY (PTY) LTD	**First Applicant**
AND	
SEABATA DAVID RADIBOKE	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER DINEO PALESA SELELANE	**Third Respondent**
ANNA MARIA FOURIE	**Fourth Respondent**

Date of Set Down: 31 August 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the

Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 11 October 2023.

Summary: (Review and cross review – condonation for late filing of cross review – arbitrator misdirected in basing her reasoning on an argument abandoned by the employee – arbitrator failing to consider issue of prejudice in deciding procedural fairness of dismissal - arbitrator's finding of substantive and procedural unfairness set aside).

JUDGMENT

LAGRANGE J

Introduction

[1] This is an opposed review application brought by the Applicant (the employer) to set aside the arbitration that was handed down on the 16 October 2020 by the Third Respondent, in terms of which she reinstated First Respondent, Mr S Radiboke. In turn, he has also brought a cross review application for which he needs condonation as it was filed eight months later than it should have been.

[2] The First Respondent was accused and dismissed for gross misconduct in the form of dishonesty and non-compliance to the company policy, viz:

> "Over a period of time, … you allegedly claimed overtime for the hours you did not actually work. In so doing you have acted dishonestly by claiming remuneration you were not entitled to."

Background

[3] For the purposes of contextualising the review, a brief summary is set out below.

[4] Mr Radiboke started working at Supreme Poultry (Pty) Ltd ('Supreme') on 1 January 2006 and was dismissed on 3 December 2019. He was employed as a Quality Assurance Poultry Meat Examiner.

[5] Five specific charges Mr Radiboke was allegedly guilty of, and for which he had been dismissed, were:

5.1 Mr Radiboke claimed for 59 hours of overtime he did not perform in June 2019,

5.2 On 17 August 2019, Mr Radiboke entered the gate without clocking in and claimed 8 hours overtime whereas he worked for less than 8 hours,

5.3 Mr Radiboke claimed 8 hours of overtime of which he only worked 3 hours and this was on 31 August 2019,

5.4 On 14 September 2019, the Mr Radiboke bypassed the company's procedures by performing overtime duty without it being approved,

5.5 Mr Radiboke requested another employee to assist him on the 31st of August 2019 without consulting the head of department.

The arbitrator's award

[6] The Arbitrator found that Radiboke had indeed broken the rule with regards to dishonesty and was aware of the rule. The rule was important as it came down to an employment relationship which was based on trust. She held that traditionally dishonesty in the workplace has been seen as an offence serious to warrant dismissal because it could render the employment relationship intolerable.

[7] Nonetheless, the arbitrator decided that Mr Radiboke's dismissal of the respondent was procedurally and substantively unfair. Firstly, the arbitrator held that Supreme had been inconsistent in dismissing Mr Radiboke because the Heads of Department and the shift manager who had requested and approved the overtime hours were "spared". The employer had failed to rebut the "allegation of inconsistency". Even though Mr Radiboke could not account for the 59 hours over time in question, those hours had been approved by relevant managers who had signed for their approval. Secondly, the Code of Good Practice: Dismissal[1] recommended dismissal only for "gross dishonesty", but not all acts of dishonesty rendered the employment relationship intolerable and warranted dismissal. Thirdly, when considering mitigating factors an employer was now

[1] Schedule 8 Of the Labour Relations Act, 66 of 1995 (' the LRA').

required an employee's conduct had damaged the working relationship but had in fact destroyed it. Fourthly, the arbitrator concluded that Mr Radiboke had a clean disciplinary record from the fact that he testified that he was confused during the disciplinary enquiry because it was the first time he had faced one. Lastly, Supreme failed to lead evidence in support of the charge that his conduct was also in breach of company policy or procedures.

[8] In finding that Mr Radiboke's dismissal was procedurally unfair, the arbitrator found that he had believed he only had to defend himself against a charge relating to overtime he was paid for 31 August 2019 and was unprepared for dealing with charges relating to other dates. The enquiry proceeded instead of Mr Radiboke being given an opportunity to prepare for the additional dates. The arbitrator acknowledged that supreme argued that he could have asked for a postponement but did not. Even so, she implicitly found that his failure to do so did not relieve Supreme of the duty to postpone the hearing.

[9] The Arbitrator also ordered the reinstatement of the respondent with retrospective effect to the date of his dismissal.

Late filing of the cross-review application

[10] It is correct as Supreme argued that a cross-review application is just another term for a review application when the opposing party also seeks to set aside an arbitrator's findings and that it should be filed within the same time frame as any other review application[2].

[11] In this instance, the cross-review application was only filed eight months after receiving the award and he was late in filing his answering affidavit. The explanation for the excessive delay is basically twofold: numerous difficulties in finalising insurance authorisation for payment of legal fees and the fact that there was no reason for him to have filed a cross-review

[2] See *SA Broadcasting Corporation Ltd v Grogan NO & Another* (2006) 27 *ILJ* 1519 (LC) at paragraphs [15] and [16]; *Singh v First National Bank and Others* (D 397/2011) [2014] ZALCD 44 (9 September 2014) at paras [19] to [25], and *Ekurhuleni Metropolitan Municipality v SA Local Government Bargaining Council & Others* (2022) 42 *ILJ* 825 (LAC) at paragraphs [37] and [38].

application had it not been for the possible implications of Supreme's review application.

[12] I agree it would have been pointless for Mr Radiboke to file his review application to set aside the finding of dishonesty in circumstances where he could not obtain better relief than he obtained if successful, save that his integrity might have been restored. That alone does not justify the excessive delay which extended far beyond the time an answering affidavit should have been filed in opposition to the employer's review application. The delay is poorly justified and ordinarily would not warrant condonation being granted. However, because of the evaluation of the merits of Supreme's review application, the question of the cogency of the arbitrator's finding of dishonesty ought to be addressed in the interests of justice. For this reason the late filing of the cross-review should be condoned.

Grounds of review

The employer's grounds of review

[13] Supreme asks that the arbitration award should be reviewed, set aside and replaced with an order that the Mr Radiboke's dismissal was indeed substantively and procedurally fair. It relies on the following grounds of review -

13.1 The arbitrator failed to take account of the fact that Mr Radiboke's representative agreed that if Mr Radiboke was found guilty of the misconduct dismissal would have been an appropriate sanction.

13.2 In finding that Mr Radiboke's conduct did not amount to gross dishonesty, the arbitrator ignored that he had claimed for overtime not worked on several occasions.

13.3 The arbitrator misconstrued the principles governing inconsistent treatment and her reliance on this finding led her to a conclusion no reasonable arbitrator could have reached.

13.4 The arbitrator misconstrued the criteria for a finding of gross dishonesty by failing to appreciate that claiming for undue overtime

goes to the heart of the employment relationship, particularly in circumstances where the proper recording of overtime worked relies on the honesty of the employee.

13.5 Despite finding Mr Radiboke guilty of dishonesty, when determining the appropriate sanction, the arbitrator failed to consider that:

13.5.1 he did not show any remorse for his misconduct, and

13.5.2 that Mr Radiboke had committed the same misconduct on numerous occasions from June to September 2019 when considering the importance of his clean disciplinary record.

13.6 The arbitrator misdirected herself in determining the substantive fairness of the dismissal based on inconsistency when Mr Radiboke's representative had expressly disavowed any reliance on inconsistency and that it was neither raised in evidence nor argument at the arbitration as an issue. In consequence, Supreme was denied a fair hearing.

13.7 Moreover, even if it had been legitimate to consider the consistency of disciplinary treatment, the arbitrator failed to take account of the fact that:

13.7.1 all employees who had claimed for inflated overtime hours were dismissed and the heads of department were disciplined by being issued with final written warnings valid for 12 months;

13.7.2 the sanction for employees who had benefited financially from the inflated overtime was the same, namely dismissal, and

13.7.3 the arbitrator failed to appreciate that inconsistency of treatment is not conclusive of the question of whether disciplinary action is substantively fair.

13.8 The arbitrator could not reasonably have found that Mr Radiboke believed he was only required to address payment for overtime on 31 August 2019, when it was clear from the notice of the disciplinary enquiry that the allegation he had claimed for overtime not worked

concerned a period of time and not a single instance. Consequently, she ought not to have concluded that he was procedurally prejudiced.

13.9 Furthermore, the arbitrator failed to consider whether Mr Radiboke suffered any material prejudice at the disciplinary enquiry given that he was represented and did not raise any concerns of this kind at the time. More particularly, no request had been made for additional time in circumstances where his representative had asked for and had been granted additional time to peruse documents.

13.10 In finding that Mr Radiboke did not breach any of the company policies and procedures the arbitrator simply ignored evidence that he had sometimes entered the premises without clocking in and had asked another employee to replace him on overtime duty without obtaining authorisation from his head of department, which were clear breaches of company policy and procedure.

[14] In his cross-review application, Mr Radiboke states that his application was only necessary because the court would otherwise have to accept as undisputed the arbitrator's finding that he was guilty of dishonesty, when determining the review application. He argues that he could not have been found guilty of dishonesty because his superiors authorised and approved all his overtime claims by signing them off. Moreover, he did not claim for any overtime he did not work. As required, he had simply recorded the overtime hours he worked which his superiors had confirmed. The arbitrator ought to have realised that it was for the employer to prove that he was not requested to work overtime and did not work the hours actually claimed, and yet no evidence was led by the employer in this regard. Moreover, the arbitrator found that the overtime he worked was requested and approved by his superiors, and that the Quality and Food Safety Manager could not personally testify if the hours had been approved or not. In consequence, he contends that it was incomprehensible that the arbitrator could have concluded he had dishonestly claimed overtime.

Evaluation

Applicable review principles

[15] The review application falls to be determined in accordance with the principles established in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[3], and elaborated on in decisions of the Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[4]. In *Herholdt* the SCA held:

> "[12] … the [Constitutional] court enunciated an unreasonableness test that differed from the test adopted by this court, namely, whether the award was one that a reasonable decision maker could not reach. That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."

and further stated:

> "[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

[3] 2008 (2) SA 24 (CC)

[4] (2013) 34 *ILJ* 2795 (SCA)

> 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."

(emphasis added and footnotes omitted)

[16] The following dictum in *Head of Department of Education v Mofokeng & Others*[5] is also relevant in this matter:

> [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 enquiry. 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 enquiry, 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."

(emphasis added and footnotes omitted)

Determining issues not in dispute

[17] At the start of the arbitration Mr Radiboke's representative equivocated somewhat on whether consistency of treatment was an issue. It was common cause that five other employees charged at the same time with

[5] (2015) 36 *ILJ* 2802 (LAC)

dishonesty relating to overtime claims had also been dismissed. Mr Radiboke stressed that that the two heads of department were not dismissed and that this showed that the employer had been inconsistent in the imposition of sanctions. However, when the arbitration hearing reconvened on 6 October 2020, and the employer's representative tabled minutes of disciplinary hearing in other cases in which the employees were charged and dismissed for the same misconduct as Mr Radiboke, Mr Radiboke's representative expressly disavowed any reliance on inconsistency. In explaining Mr Radiboke's stance on consistency at that point in the arbitration hearing, his representative acknowledged that the two individual managers who had not been dismissed had been charged with different misconduct. Thereafter, consistency fell away as an issue. This is confirmed by the fact that no argument was presented on Mr Radiboke's behalf based inconsistent sanctions or any other form of inconsistency. It was irregular and a misdirection on the part of the arbitrator to base a pillar of her award on an issue that was no longer relied on by the employee[6].

[18] Accordingly, the arbitrator's finding of inconsistent treatment cannot form a rational basis for her award. This brings into focus whether the finding that Mr Radiboke acted dishonestly is assailable on review.

Was the finding of dishonesty a finding no reasonable arbitrator could have reached?

[19] In Mr Radiboke's cross-review, he essentially contends there was no basis on the evidence presented, on which the arbitrator could have found that he did not work all the overtime hours he claimed and nor could the arbitrator have found that he was not authorised to work on those occasions.

[20] Having regard to the evidence of Ms B Molale, the Quality and Food Safety Manager, she testified with reference to the month of June 2019 that Mr Radiboke had claimed he had worked 59 hours overtime, but when she checked this claim against the forms authorising overtime, for each

[6] See *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2007) 28 *ILJ* 1114 (LC) at paragraphs [25] to [29].

day, she could only account for 19 hours of authorised overtime. Mr Radiboke claimed that the hours he actually worked were recorded by him on a piece of paper which he gave to his head of department. He did not call anyone to corroborate this, nor could he produce this document. Mr Radiboke was paid for 59 hours overtime, when the company records did not show that any more than 19 hours was authorised. The discrepancy between the record of authorised overtime and the overtime claimed could only be disputed by Mr Radiboke on the basis of what he claims he wrote on a piece of paper, which was not produced or confirmed by the person he claims he submitted it to.

[21] The other argument advanced on his behalf was that his head of department and superiors would not have signed off for the overtime hours he had actually claimed, if they had not checked that he had in fact been authorised and had worked those hours. It was common cause that the heads of department had been charged and found guilty of not verifying the hours actually worked, so it is clear that the employer had not accepted their *ex post facto* endorsement of the overtime hours actually worked.

[22] What was before the arbitrator was evidence of a significant discrepancy between Mr Radiboke's authorised overtime and what he claimed he had worked. He could not produce evidence other than his own say-so that he had worked the additional hours which were not pre-authorised. Consequently, on the available evidence, it was not unreasonable for the arbitrator to conclude that the balance of probabilities favoured the employer's claim that he was paid for overtime not worked. It follows that he could not have been unaware of being paid more than three times the amount of overtime he probably worked, and his retention of the overpayment was dishonest, quite apart from whether he had exaggerated the overtime worked.

[23] I am satisfied therefore that the arbitrator's finding that Mr Radiboke had acted dishonestly was not a finding that no reasonable arbitrator could have reached, and the cross-review of this finding must therefore fail.

Substantive fairness of the dismissal

[24] As the arbitrator's finding that Mr Radiboke had acted dishonestly in claiming overtime payment in excess of the overtime hours he had worked should not be set aside, the only question is whether there was still any basis for the arbitrator to find that dismissal was an inappropriate sanction. It is apparent from the arbitrator's own reasoning in the award that she accepted the misconduct would warrant dismissal and it was conceded by Mr Radiboke that dismissal would have been appropriate sanction for dishonesty. In the circumstances, there is every reason to reverse the finding that his dismissal was substantively unfair.

Procedural fairness

[25] I accept that the charge sheet did not convey all the specific occasions on which Mr Radiboke was alleged to have claimed for unauthorised overtime. I also accept that he was right to assume that at least part of the charge would concern the incident on 31 August 2019 when he left work suddenly to attend to a domestic emergency and consequently did not work all the overtime hours authorised for that day.

[26] It is common cause that the more extensive record of alleged unjustified claims for overtime pay was only set out when the employer's representative set out the case at the start of the disciplinary enquiry. The bundle of documents used in support of the charges was also handed up at the commencement of the enquiry. It was not disputed that Mr Radiboke's shop steward requested time to go through the documents and this was granted. Even if Mr Radiboke did not believe, before the enquiry started, that he would be required to answer to anything more than his overtime claim for 31 August, at the commencement of the enquiry he would have realised it would cover a number of other alleged instances. There was time provided for him and his shop steward to go through the documentation to be used. They did not ask for a postponement to do more preparation, nor did they say they were not ready to proceed. Any disadvantage Mr Radiboke felt he was facing could have been raised and addressed at that stage. Nothing shows he was unable to do so. There was also no appeal lodged on the ground that he had been unable to

prepare for the hearing. Even in retrospect, he did not try to demonstrate what he could have done by way of greater preparation, had he been given notice of the specific details of the complaint beforehand or if the enquiry was postponed.

[27] Whether a dismissal for misconduct is procedurally unfair hinges primarily on the question of any material prejudice the employee has suffered as a result of the act or omission of the employer[7]. In this case it was argued it was the failure to provide greater detail of the charges in the notice of the enquiry which made the enquiry unfair. Once the details of the charge had been spelled out in the opening address of the employer's representative at the enquiry, If the chairperson had then not allowed Mr Radiboke and his shop steward to go through the employer's bundle before the hearing of evidence commenced, or had refused a request for a postponement to allow more time to prepare his defence, that would provisionally indicate that the process had been procedurally unfair. However, there is nothing which showed that Mr Radiboke was unable to address the detailed charges and no request was made for more time to prepare his defence. In the absence of evidence to show that Mr Radiboke's ability to answer the charges was adversely affected, the arbitrator's finding of procedural unfairness cannot be sustained. Had she considered the prejudicial effect of the charge and that there was every opportunity to redress any lack of preparation, she could not have reached that conclusion.

Conclusion

[28] Given the evaluation above, it is not necessary to address any of the remaining grounds of review, which relate to the substantive findings on overtime claims after June. The findings in relation to the excess overtime claimed for June 2019 alone warrant grounds for finding the dismissal substantively fair. In the result the arbitrator's finding that Mr Radiboke's dismissal was procedurally and substantively fair must be set aside and substituted. While the cross review is dismissed and the awards set aside, it cannot be said that Mr Radiboke should have simply been supine and

[7] See *Mondi Packaging SA (Pty) Ltd v Harvey NO & others* (2011) 32 *ILJ* 1161 (LC) at 1167G-J

agreed to abide the outcome. It would not be appropriate in my view to make a cost award in this situation.

Order

1. The late filing of the First Respondent's cross-review is condoned.
2. The findings in the arbitration award handed down by the Third Respondent on 16 October 2020 under case number FSBF6568-19 that the First Respondent's dismissal by the Applicant was procedurally and substantively unfair, together with the award of relief in paragraphs 5 and 6 of the award, are reviewed and set aside.
3. The aforesaid findings in the Third Respondent's award are substituted with a finding that the First Respondent's dismissal was substantively and procedurally fair.
4. There is no order as to costs.

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Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	G Cassells Instructed by Maserumule Attorneys
For the First Respondent	J du Preez Instructed by Kramer Weihmann Attorneys