

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR3479/09

In the matter between:

MOTOR INDUSTRY BARGAINING COUNCIL

Applicant

and

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

First Respondent

TIMOTHY BOYCE N.O.

Second Respondent

ATHINARIAN NAIDOO

Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award issued by the second respondent (the commissioner) on 23 November 2009 under case number GAJB27550-09, in terms of which the commissioner had found that the third respondent's dismissal was unfair because the applicant did not prove that the reason for his dismissal was a fair reason related to his conduct or capacity. The applicant was ordered to pay the third respondent compensation in the amount of R168 000.00 being the equivalent of six months remuneration.
2. The application was opposed by the third respondent.

The background facts

3. The third respondent was employed by the applicant, the Motor Industry Bargaining Council (MIBCO) as a system analyst and database administrator for approximately 24 years. He was earning R28 000.00 per month with R2 000.00 per month allowance. He was charged with the following charges:
 - 3.1 That on or about 26 June 2009 he consumed liquor on the business premises of MIBCO in a secure server room of MIBCO alternatively he was found in possession of liquor on MIBCO premises.
 - 3.2 That over a period, since November 2007 until 26 June 2009 he repeatedly refused to carry out a reasonable instruction, to support project phoenix actively and to stop making negative comments amounting to gross insubordination.
 - 3.3 That over a period, since November 2007 to 26 June 2009, he refused to stop making negative comments about the phoenix project and in doing so actively stirred up hostility between fellow employees.
 - 3.4 That on or about 26 June 2009 he allowed unauthorised access of fellow employees in a prohibited area being the secure MIBCO server room,
 - 3.5 That on or about 26 June 2009 he smoked in a prohibited area and allowed fellow employees to smoke in a secured prohibited area being the MIBCO server room.
 - 3.6 That on or about 26 June 2009 he failed to obey a reasonable instruction given to him by the general secretary on Thursday 24 June 2009 relating to the immediate termination of actions and behaviour showing resistance for the implementation of project phoenix and stirring hostility amongst fellow employees.

4. The third respondent appeared at a disciplinary hearing and pleaded guilty to charge 1. He was found guilty of charges 2 to 5. The sanction imposed in relation to charges 2 to 4 was dismissal. He was given a final written warning in respect of charge 1 and a written warning in respect of charge 5. The chairperson did not address charge 6.
5. On or about 24 August 2009, the third respondent initiated proceedings through the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) which culminated in the arbitration held on 10 November 2009.

The arbitration proceedings

6. The applicant called three witnesses in support of the charges against the third respondent. They were the general secretary, Willem Frederick Schroeder (Schroeder), Lynette Charmaine Hughes (Hughes) - the chief operating officer and Douglas Simpson (Simpson) the client services manager.
7. Schroeder testified that the third respondent was employed by the applicant as a system analyst and data base administrator from 1995. The applicant realised that its computer system (MCIS) no longer met its needs, and during 2007 a feasibility study was done for the development and implementation of a new computer system (Sales Logix). During November 2007 the third respondent was asked to participate in a feasibility study, but he indicated that he was not willing to do so. Although the applicant had appointed external consultants (Antinomy) to drive the process which the applicant had labelled phoenix project, the third respondent was a key role player. During February 2008 he had a meeting with the IT department and the third

respondent about project phoenix. The third respondent did not participate during the meeting and Schroeder asked him what his concerns were. The third respondent told him that he would not participate in the discussion since he had already conveyed his concerns to the IT manager (Mrs Momsen). Schroeder stated that the entire IT team was initially resistant to the new system, but this resistance eventually disappeared. The third respondent's resistance, however, persisted. At a screen review meeting on 23 June 2009, he refused to participate in that discussion. On the morning of 24 June 2009, Schroeder, Momsen and Hughes had a meeting with the third respondent about his resistance to project phoenix. He told the third respondent that it was important for the new system to be successfully implemented, and that he would not tolerate his further resistance to the project. On the afternoon of 26 June 2009, Schroeder found the third respondent, with an IT consultant (du Plooy), and a personnel member (Mr Jackson) in the basement of the applicant's premises and they were consuming alcohol. Later that afternoon, Schroeder stood outside the third respondent's office and overheard a conversation in the office. He heard the third respondent saying that the applicant was wasting money paying consultants huge amounts of money. He also said that the new system would be a failure and that he would not participate in it. Schroeder reported what he had heard to Momsen on 29 June 2009. On 8 July 2009 he spoke to the third respondent, du Plooy and Jackson about the events of 26 June 2009. Du Plooy and Jackson admitted that they had consumed alcohol and smoked in the server room and they also confirmed that the third respondent was not supportive of project phoenix. The third respondent told Schroeder that he had nothing to say to him. The third respondent was offered an olive branch to participate in the project but he rejected the offer. He then decided to institute disciplinary proceedings against him. The third respondent was issued with a final written warning for consuming

liquor on the employer's premises (charge 1), and a written warning for smoking in the server room (charge 5). The chairperson of the disciplinary hearing said that the third respondent's misconduct referred to in charges 2 and 3 amounted to insubordination and that the transgressions to charges 2, 3 and 4 warranted his dismissal.

8. During cross examination Schroeder said that the third respondent was resistant to project phoenix because he refused to participate in the project and he refused to give the applicant alternatives. When the commissioner asked Schroeder whether he conceded that the third respondent was not given direct instructions which he was required to comply with, and whether he conceded that the third respondent was not asked to provide the applicant with alternatives, he replied that he was required to participate in various meetings and he was offered training and did not take up the opportunity. Schroeder said that he was not present at the screen review meeting on 23 June 2009, but Hughes told him that the third respondent could have provided valuable input at this meeting but refused to participate. In response to a question by the commissioner about the third respondent's insubordination, and misconduct, Schroeder said that he was receiving a salary and he had a legal obligation to participate and they wanted his input. During re-examination Schroeder stated that on 24 June 2009 he told the third respondent that he was stirring up hostility towards project phoenix amongst his colleagues. The third respondent did not deny this. Schroeder said that he believed that the third respondent was stirring up hostility to the project when he overheard him speaking to du Plooy and Jackson on 26 June 2009.

9. Hughes testified that Schroeder told her that during a meeting in February 2009, the third respondent indicated that he was not supportive of project phoenix. Hughes was also told by Momsen that the third respondent had said to her that he was not interested in undergoing training in respect of the new system. Hughes said that at the screen review meeting of 23 June 2009, the third respondent looked at the screen and obviously did not want to be there. Instead of contributing at this meeting, he conveyed to the other staff members that he was not supportive of the project. On 24 June 2009, Hughes, Momsen and Schroeder had a meeting with the third respondent. At this meeting, Schroeder told the third respondent that he was not going to tolerate any further resistance by him to the project. Antimony was the consultant who was responsible for developing the new system, but the applicant did its own project management. On 20 May 2009 a written instruction was issued to the third respondent through Deon Brummer, a business systems analyst in the IT department for data extracts. After her email was sent, the instruction was complied with.
10. During cross examination, Hughes agreed that initially the entire IT team had shown resistance to project phoenix. Training in respect of the new system was offered to the IT department, but the third respondent declined this offer. Hughes conceded, however, that the third respondent was entitled to decline the offer to undergo training. There was only one written request made by the applicant to the third respondent regarding data extraction and he complied with this request. Hughes said that at the screen review meeting on 23 June 2009, the third respondent did not respond to a query which had been directed towards him. He would have been the best person to deal with the query.

11. Simpson testified that the third respondent reluctantly participated in project phoenix feasibility study. The third respondent attended 6 to 9 feasibility meetings, but his participation during those meetings was minimal. He tried to involve him during the screen review meeting, but it was like pulling teeth. The applicant required the third respondent's input so that the various concerns could be raised with the developers of the system.
12. The third respondent closed his case without testifying.

The arbitration award

13. The commissioner issued an award dated 23 November 2009. He has set out the evidence led and it is not necessary to repeat it. He said that section 188(1)(a) of the Labour Relations Act 66 of 1995 (the Act) read with section 192(2) of the Act enjoins the employer to prove that the employee was dismissed for a fair reason related to his conduct or capacity. The third respondent did not challenge the fairness of the warnings which were issued to him in respect of charge 1 (i.e. consuming liquor in the applicant's premises) and charge 5 (i.e. smoking in the server room) and nothing further needed to be said about those charges. As far as charge 4 was concerned (i.e. allowing colleagues unauthorised access to the server room) the applicant failed to adduce any evidence to show that the third respondent was guilty of this misconduct, and he was going to disregard it for purposes of his award.
14. The commissioner said about charges 2, 3 and 6, the essence of the alleged misconduct was that the third respondent refused to carry out reasonable instructions, alternatively insubordination and stirring up of hostility amongst fellow employees.

The commissioner said that while it was true that the third respondent was clearly less than enthusiastic about project phoenix, this was a far cry from refusing to comply with reasonable instructions and it certainly did not amount to insubordination. The third respondent was perfectly entitled to express reservations about project phoenix (since he believed that it was not viable), and it was therefore hardly surprising that he failed to participate during various meetings, including the screen review meeting on 23 June 2009. The third respondent after all informed Schroeder as far back as February 2009 that he had already conveyed his concerns regarding project phoenix to the IT manager (Momsen) and it was simply not logical to equate those concerns with a refusal to comply with reasonable instructions and/or insubordination. The commissioner said that there was not a scintilla of evidence that the third respondent refused to comply with reasonable instructions which had been given to him, and he said that he was not satisfied that his unenthusiastic approach to project phoenix, constituted misconduct by him.

15. The commissioner said that the allegation that the third respondent was stirring up hostility towards project phoenix appeared to have been predicated on his general apathy towards the new system, and the conversation which was overheard by Schroeder on the afternoon of 26 June 2009. There was no obligation on him to be supportive of project phoenix, and the above-mentioned conversation did not amount to him stirring up hostility. Schroeder, Momsen and Hughes obviously wanted his input regarding the new system, and they wanted him to support project phoenix, but the fact is that he genuinely felt that the new system would be a failure and that the money which was being paid to the consultants would be wasted. The commissioner said that he did not commit any misconduct by expressing his view in that regard. He

was not satisfied that the applicant had proved that he was stirring up hostility.

16. The commissioner said that it was plain that the misconduct referred to in charges 2, 3 and 6 was not proved by the third respondent on a balance of probabilities. All that the applicant proved was that the applicant wanted him to support project phoenix, and he made it clear that this was not going to happen. The commissioner said that the third respondent's stance may well have exasperated the applicant, and Schroeder in particular, but it did not amount to misconduct which warranted his dismissal. It followed that his dismissal was substantively unfair. He referred to *Sidumo vs Rustenburg Platinum Mines Ltd and Others* (200&) 28 ILJ 2405 (CC).
17. The commissioner said that the third respondent sought compensation for his unfair dismissal. In terms of section 194(1) of the Act, any compensation awarded for an unfair dismissal must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months remuneration calculated at his rate of remuneration on the date of dismissal. In determining an appropriate amount of compensation, he had regard to the circumstances of the third respondent's dismissal, and to his length of service which is approximately 14 years. He also took into account that he did not have an unblemished disciplinary record. He was of the view that compensation in the nature of a solatium amounting to 6 months remuneration, constituted just and equitable compensation.
18. The commissioner found that the third respondent's dismissal was unfair because the applicant did not prove that the reason for his dismissal was a fair reason related to his conduct or capacity. He found that the third respondent did not want to be reinstated

or re-employed and ordered the applicant to pay him compensation in the amount of R168 000.00 being the equivalent of 6 months remuneration calculated at his rate of remuneration (R28 000.00 per month) on the date of dismissal. The compensation was to be paid within 15 days of date of receipt of the award by the applicant.

The grounds of review

19. It was contended by the applicant that the commissioner committed gross misconduct in relation to his duties as a commissioner, alternatively committed a gross irregularity, further alternatively his award is not rationally justifiable having regard to the material properly available to him at the hearing of the matter, and the award is one that a reasonable commissioner could not have reached in the circumstances, in that:

19.1 He made material errors of law, in that he failed to apply the appropriate definition of refusal to obey a lawful instruction and/or insubordination to the facts presented to him. He placed no reliance on the fact that the third respondent elected not to testify, which election warranted an adverse inference to be drawn from the facts.

19.2 He was grossly negligent in performing his duties as a commissioner, alternatively exceeded his powers, in that, *inter alia*, he failed to make an evaluation of the evidence placed before him, particularly in respect of the third respondent's conduct and the refusal to become involved in the implementation of the new computer system. He placed improper reliance on the fact that the third respondent was disenchanted with the new computer system, and was justified in holding this view. He failed to place any or the appropriate reliance on the uncontroverted evidence of the applicant's

witnesses which clearly reflects not only insubordination, but also insolence, particularly in respect of the interactions with Schroeder. He attached unreasonable and irrational weight to the idea that the third respondent was within his rights to be negative and not enthusiastic towards the new computer system.

- 19.3 He made an award that is not rationally justifiable having regard to the material properly available to him at the hearing of the matter in that he misconstrued the applicable legal position. He disregarded evidence properly placed before him about all the incidences of refusal to become involved in the implementation of the new computer system and its consequences for the applicant. He failed to appreciate that in the context of the facts, the conduct of the third respondent amounted to both insubordination and insolence, and that his conduct was deliberate and intractable and he disregarded or failed to place the appropriate weight on the cumulative effect of the infractions which occurred on 26 June 2009 in the server room.

Analysis of the facts and arguments raised

20. The applicant has been unnecessarily harsh towards the commissioner in its grounds of review. Some of the grounds of review are really grounds of an appeal. This Court has pointed out on a regular basis that commissioners must deal with disputes with the least of formalities. They are enjoined to give brief reasons for the awards that they issue. They are not required to deal with all the facts that have been led before them but simply with the issues.
21. It is common cause that the third respondent was charged with six acts of misconduct. He pleaded guilty to charge 1 and not guilty to the rest of the charges. He was given a

final written warning in respect of charge 1 and a written warning in respect of charge 5. He was found guilty of charges 2, 3 and 4 and was dismissed. The chairperson of the disciplinary hearing did not address charge 6 in his findings. The charges for which he was dismissed were as follows:

21.1 he had repeatedly refused to carry out a reasonable instruction to support project phoenix actively and to stop making negative comments which amounted to gross insubordination.

21.2 he had refused to stop making negative comments about project phoenix and in doing so actively stirred up hostility between fellow employees.

21.3 he had allowed unauthorised access of fellow employees in a prohibited area being the secure MIBCO server room,

22. The commissioner had found that the applicant did not present any evidence about charge 4 which related to that he had allowed fellow employees in a prohibited area being the secure server room. The commissioner said that the essence of charges 2, 3 and 6 were the alleged misconduct that the third respondent had refused to carry out reasonable instructions, alternatively insubordination and ‘stirring up of hostility’ amongst fellow employees.

23. The essential elements for insubordination according to Brassey et al, The New Labour Law, p 430 are as follows:

23.1 It should be evident that an order, which may even be in the form of a warning, was given;

23.2 The order must be lawful;

23.3 The reasonableness of the order should be beyond reproach;

23.4 The refusal or failure to obey must have been serious enough to warrant dismissal

24. The evidence led before the commissioner stands to be examined. Schroeder testified that the third respondent was asked to participate in the feasibility study as far back as November 2007 and at that point in time they picked up resistance and unhappiness from him about the way forward. External consultants were appointed to drive the process on their behalf and the third respondent as a key role player about his expertise and background was not willing to participate in that exercise. He addressed the IT team in February 2008 and the third respondent was present. He addressed them about what was required from them and the way forward. All the other IT personnel actively participated in the discussion in an open and frank manner, posing questions. He told them that he needed all the current expertise to assist them to ensure the successful implementation of the new system. The third respondent was the only employee in the IT department who did not participate in the discussion at all. He told him that if he had any concerns, he should feel free to ask him. His response was that he had already conveyed his concerns to the IT manager and that he would therefore not participate in the discussion. In June 2009 they reached a stage in the development of the program that they referred to it as the screened review phase. They invited the third respondent to again participate in the meeting. He did not participate and junior staff questioned his obvious resistance in that meeting. Simpson and Hughes brought it to his attention on 23 June 2009 that he did not participate. Schroeder called a meeting at 08h00 on 24 June 2009 where the third respondent was present with Hughes and Momsen. He confronted the third

respondent about his non participation and ongoing resistance which he did not deny. He made it clear to him that he would not tolerate his further resistance against the project and that as long as he was prepared to receive a salary from the applicant, he would have to deliver what was required by the applicant. He spoke to him very hard and direct and told him that it was not negotiable. He left his office with the understanding that he would stop his resistance. Schroeder had also emphasised the importance of the knowledge that he needed to part with the success of the project. Schroeder testified that on 26 June 2009 he went to the basement and accidentally bumped into the third respondent, Jan du Plooy an IT consultant and Thys Jackson a junior IT personnel and found them in possession of liquor at the exit glass doors of the basement. Schroeder then went back to his office on the 2nd floor. The third respondent's office is inside an environment controlled by a fingerprint access device. He does not have access to it. He stood outside the door and could clearly hear the conversation going on inside the office. He heard the third respondent saying that they were paying the consultants huge amounts of money that would be wasted. They were not familiar with the applicant's environment and did not understand the nature of its functions. The system would be a failure and he would not take part in any participation nor would he fix any mess left behind by them. He went back to his office and called the IT manager who was not in. He told her on 29 June 2009 about the incident. The third respondent was suspended pending an enquiry. He called them in on 8 July 2009 and he refused to discuss anything with him and said that he had nothing to say. He then decided to proceed with a formal hearing.

25. During cross examination Schroeder was asked what the resistance was that the third

respondent had shown. He said that from the word go, even when they embarked on a feasibility study, he indicated his unwillingness to participate in the project. At the same time he confirmed that the existing system could not sustain the applicant's needs into the future. It was put to him that he was a skilled person in the IT field and had a view that he did not think that it was a good idea and that he was not willing to support it and was asked why it was insubordination since he was expressing a view that he did not believe that it was a good idea. He said that he refused to indicate to them what the alternatives was and to guide them to what he believed in. He was asked if he had said that he was refusing to give alternatives. He said he should have told them why he thought that it was not going to work so that they could have addressed it pro-actively to ensure that there was no failure down the line. It was put to him that the third respondent was not given a specific instruction which he said he was not going to comply with. He said that he was requested to participate in various meetings and was given an opportunity to undergo training on the new system which even the consultant took up but he never did. He was asked what the reasonable, lawful instruction he repeatedly refused to carry out. He said that it was to assist them and to participate in the process required to ensure the successful implementation of the project. He admitted that he was not present at the meeting of 23 June and was informed that he had not participated in crucial elements that were put on the screen and they believed that he could have given a valued input. He agreed that he was not present and could not answer that he had participated with particular reference to the input provided on fund codes and said that it was nominal participation. He would have expected an employee of his standing and number of years service would speak his mind and indicate to the consultants and the applicant about what was wrong with what they were embarking. He should have told them what his concerns were. All

that he did was to indicate that he did not believe in the project. He was asked that why if he did not express his concerns it was misconduct. He said that he believed that an employee, as long as he receives a monthly salary from the employer and his employer put forward reasonable requests to ensure the future sustainability of a business, there was a legal obligation on him to actively participate. There was not an unreasonable request to him. They did not force him to agree that it would be a success. They expected him as a *quid pro quo* to participate and give them his input about whether they were on the right or wrong track. He said that he could not comment that he was invited only to two workshops. He did not receive the feedback but he had engaged the IT manager Momsen about some of the concerns that he had about the project. The only feedback that he had was that he was resistant and not interested in participating in the project. The instruction that he did not comply with was to provide input.

26. Hughes testified that at the time when the system was introduced, she was the financial manager and had no authority over the IT department. Schroeder had a meeting with the IT staff in February 2008 when he tried to allay their fears and to get them on board. She received feedback from Schroeder after the meeting that the third respondent told him that he had nothing to say on the subject and that he had already conveyed his feelings about it to the IT manager. The feedback that she got from the IT manager was that he was not interested to attending training and to enhance his skills to be able to work in the new environment. He was reluctant to participate. She had instructed him to give priority to the data extraction which he did. The screen review meeting took place on 23 June. Momsen could not attend the meeting and instructed the third respondent to go in her place. Hughes did not attend the full

duration of the meeting but noticed that the third respondent's body language was negative. He sat with folded arms barely looking at the screen. She could see that he did not want to be there. She afterwards received feedback from various personnel that the third respondent had brushed off a certain question and did not answer or assist in any way to resolve the issue at hand. She raised this with him and attended a meeting on 24 June 2009. Schroeder told the third respondent that he had been informed about his attitude and unwillingness to participate and that he was instructing him to participate and that he would not allow him any further resistance. That was the sum total of her involvement. She was also told by Simpson that the third respondent was not very supportive of the project. During cross examination she said that she could not say to how many workshops the third respondent was invited to and she could not dispute that it was two. She was not responsible for inviting him. She was not at the February 2008 meeting and had received feedback. She was aware that the whole IT department had shown some resistance to the project. She arrived at the conclusion that he was not interested in attending training sessions. There was not a limit on the number of people who could attend it and everybody was given an opportunity to attend and if a person declined to attend it was neither here nor there. It was that person's right. The third respondent complied with the instruction sent in the email. She did not recall if any specific instructions were given to the third respondent to comply with. She said that a query was directed to him at the meeting and if he did not respond to it, it would not classify as an instruction and it was just a question. She said that Jackson and du Plooy had access to the server room for work purposes and they could have accessed the server room at a time when they chose to do so.

27. Simpson, the client services manager testified. He was involved in the feasibility study plan. He said that the third respondent participated but at times reluctantly. When questions were directed, they would get response about it in the form of a yes or hesitantly. He attended about six to eight of the feasibility studies and his approach was similar. He attended the screen review meeting on 23 June 2009. He tried once or twice to get the third respondent involved in the discussion and getting a response or information from him at that particular meeting was like pulling teeth. It was embarrassing and his input was very minimal. He raised this with Schroeder after the review meeting.
28. During the arbitration hearing the applicant's representative told the commissioner that it appeared that charge 6 was rolled into the other insubordination charges because the chairperson did not deal specifically with it. He was dismissed for charges 2 to 4.
29. The evidence of the applicant's three witnesses failed to show that a lawful, reasonable instruction was given to the third respondent which he failed to obey. No evidence was led that before 24 June 2009 that the third respondent was given an instruction to support project phoenix. The applicant's own witnesses testified that his failure to participate meaningfully at the meeting was not misconduct. Schroeder testified that the insubordination was his failure to indicate to them what the alternatives were and to guide them. He should have told them that it was not going to work so that they could have addressed it and have been proactive to ensure that there would be no failure in the future. Charge 6 related to the warning that Schroeder had issued to the third respondent on 24 June 2009. The chairperson did

not address this in his findings. The applicant's representative said at the arbitration hearing that charge 6 was rolled into the other subordination charges because the chairperson did not deal specifically with it and the third respondent was dismissed for charge 2 to 4. This should put pay to the applicant's grounds of review about the commissioner's failure to deal with the instruction given on 24 June 2009. In any event there is no evidence that the applicant had failed to comply with that instruction. His interactions with du Ploy and Jackson was a private discussion where he had expressed his views about how he felt. There was no further meeting held about the project. No evidence was led in what way he had failed to comply with that instruction. When Schroeder testified, he did not refer to this in his testimony but more to the fact that he should have guided them. He was asked several times about the instruction he had failed to comply with and could not provide a proper answer. His failure to provide any input could hardly be construed as failure to obey a reasonable instruction or insubordination. If he was instructed to attend a meeting and had failed to do so he may be guilty of failure to obey an instruction. It is also clear from Schroeder's testimony that he had based his conclusions on reports given to him by others. It is clear from the evidence led before the commissioner that the third respondent was furnished with one written instruction to comply with a request to extract certain data. He complied with the instruction. Apart from this, despite numerous opportunities presented to Schroeder to explain the misconduct and what reasonable instruction the third respondent had failed to carry out, it is apparent that no such instruction was given. Hughes said that a query was directed to the third respondent at the screen server meeting and he did not respond to it and it could not classify as an instruction and it was just a question.

30. There was simply no evidence placed before the commissioner that the third respondent had stirred up hostility. One would have expected if this was the case for the applicant to have called the said witnesses. The evidence led showed that initially the employees in the IT department had certain concerns which were addressed by the applicant.
31. The applicant has failed to establish that the decision of the commissioner falls outside the bounds of reasonable contemplated in the Constitution. None of the grounds of review contained in section 145 of the LRA have been proven by the applicant. Quite to the contrary, given the evidence led and the arguments raised and his application of case law his award is clearly indeed one that a reasonable decision maker could have reached. *Ex facie* his well reasoned arbitration award it is clear that the commissioner did deal with the real issues that he was called upon to determine.
32. I am satisfied that the evidence submitted by the applicant failed to prove that the third respondent was guilty of charges 2, 3 and 4. The decision arrived at by the commissioner was a decision that any reasonable commissioner, having regard to the evidence presented would have arrived at.
33. The application stands to be dismissed.
34. There is no reason why costs should not follow the result.
35. In the circumstances I make the following order:

35.1 The application is dismissed with costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : W LA GRANGE INSTRUCTED
BY CLIFFE DEKKER HOFMEYER

FOR THIRD RESPONDENT : ATTORNEY CARLS

DATE OF HEARING : 15 SEPTEMBER 2010

DATE OF JUDGMENT :17 DECEMBER 2010