REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1147/10

In the matter between:

SA POST OFFICE LTD	**Applicant**
and	
CCMA	**First Respondent**
JW MCGAHEY N.O.	**Second Respondent**
COMMUNICATION WORKERS' UNION	**Third Respondent**
S NODLAYIYA	**Fourth Respondent**

Heard: **5 June 2012**

Delivered: **25 July 2012**

Summary: Review – LRA s 145 – appropriate remedy.

JUDGMENT

STEENKAMP J

Introduction

1] This is an application to have an arbitration award reviewed and set aside in terms of s 145 of the Labour Relations Act[1]. The arbitrator (second respondent) found the dismissal of the employee (fourth respondent) to have been substantively and procedurally unfair. The applicant (SAPO) had dismissed the employee on 15 September 2010. The arbitrator ordered SAPO to reinstate him with effect from 15 December 2010 in a non-supervisory position at the same level or one level below his previous job; and that he be paid a rate for the job in which he is placed. The effect of the award is that the employee would effectively be suspended for three months without pay; and that he could effectively be demoted.

Background facts

2] The employee worked at the post office for almost twenty years. At the time of his dismissal, he was a depot controller.

3] In May 2010 the employee found a parcel in a delivery cage at the depot. It appeared to have been opened slightly and he opened it further. He took it to his office and placed it in a drawer in a filing cabinet. He claims that he forgot about it until a search was launched four months later.

4] In an internal disciplinary hearing, the employee acknowledged that he had committed misconduct by delaying the delivery of mail and by tampering with mail without authorisation. Both are dismissible forms of misconduct according to SAPO's disciplinary code. However, the code also provides for a final written warning, depending on mitigating circumstances. After the chairperson of the hearing took mitigating and aggravating factors into account, he decided on dismissal as the appropriate sanction.

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1 Act 66 of 1995.

The arbitration award

5] The arbitrator acknowledged that "this was a very difficult case to decide" as both parties had presented plausible versions. He accepted that the following was common cause:

5.1 The employee broke company rules by opening the parcel and delaying its delivery by four months.

5.2 These are serious offences which affect the core business of SAPO. Both are dismissible for a first offence.

5.3 The employee knew the rules.

6] In deciding on the fairness of the sanction, the arbitrator relied heavily (his words) on the judgment in *Sidumo & ano v Rustenburg Platinum Mines Ltd. & ors.*[2] He noted that there are significant similarities between the two cases:

6.1 Both cases concern an employee with long service and a clean record (Sidumo had 15 years' service);

6.2 Both cases concern an employee who failed to carry out a core function;

6.3 In both cases no loss was incurred by the employer;

6.4 In both cases no dishonesty was proven;

6.5 The arbitrator suggested that in both cases the best description of the misconduct was one of gross negligence.

6.6 They differ in that Sidumo was not in a senior (supervisory) position.

7] The arbitrator was guided as follows, relying on *Sidumo:*

7.1 "I must not defer to the [employer's] decision.

7.2 The criteria [*sic*] to be used is one of my own sense of fairness.

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2 (2007) 28 *ILJ* 2405 (CC).

7.3 I must take all the factors into consideration and properly determine if corrective discipline properly applied was a more appropriate approach."

8] The arbitrator concluded that the employee had been grossly negligent. He also concluded that he was unsuitable as a manager. But, having regard to *Sidumo*, he took into account the employee's long clean service of twenty years and the absence of dishonesty. He accepted that the employee could no longer be trusted in a supervisory role, but expressed the view that "the issue for me is whether or not this would be the case in a more junior role."

9] With regard to procedural fairness, the arbitrator found that the chairperson was not biased (as the employee had alleged). However, he found it "problematic" that the chairperson had decided "to move straight from the admission of guilt to aggravating and mitigating factors without testimony." He found that the chairperson should have heard evidence as to the "good reason" the employee proffered for having committed the misconduct. He found the omission to do so to render the dismissal procedurally unfair.

10] The arbitrator took all of these factors into account in making his award in terms of s 193 of the LRA. He noted that gross negligence is not listed in Schedule 8 Item 4 as a dismissible offence for a first offender. He found no dishonesty and no direct loss to SAPO. He took into account the employee's long service and clean disciplinary record. He found that the employee had committed the misconduct in question but that the sanction of dismissal was unfair. He then ordered reinstatement on the basis set out above.

<u>Grounds of review</u>

11] The applicant raised the following grounds of review:

11.1 The arbitrator misconceived the nature of the enquiry and failed to apply the proper test for determining whether the employee's

dismissal was fair;

11.2 The arbitrator exceeded his powers;

11.3 The arbitrator failed to apply relevant legal principles;

11.4 The arbitrator failed to failed to evaluate the evidence properly;

11.5 The arbitrator failed to apply his mind to the dispute;

11.6 The arbitrator failed to weigh up evidence and make a credibility finding where required;

11.7 The finding that the dismissal was procedurally unfair exceeded his agreed terms of reference.

12] I will deal with these grounds of review under the three broad headings of the general approach to fairness of dismissal; procedural fairness; and the reinstatement into a non-supervisory position.

Evaluation / Analysis

The general approach to the fairness of the dismissal

13] In my view, the arbitrator's general approach to the question of sanction – having regard to the fact that the employee did not dispute the misconduct – was not unreasonable. He had regard to the factors outlined in *Sidumo* and carefully applied his mind to those factors. His approach to the fairness of dismissal, as outlined in paragraph [7] above, is a reasonable summation of the law.

14] Another arbitrator may have found the misconduct sufficiently serious to warrant dismissal; but the arbitrator's finding in this regard, taking into account the seriousness of the misconduct, the employee's long service of twenty years and the fact that it was his first offence, is not so unreasonable that no other arbitrator could have come to the same conclusion. In this regard, it is to be noted that the applicant's disciplinary code provides for either dismissal or a final written warning as the

prescribed sanction for the misconduct in question, depending on mitigating circumstances.

Procedural fairness

15] The arbitrator's finding on procedural fairness is more problematic. The employee did not rely on these grounds at the arbitration proceedings. He accepted that he had committed the misconduct; and that the only question to be decided was that of sanction, based on mitigating and aggravating factors.

16] In coming to a contrary conclusion, the arbitrator exceeded his powers. This ground of review must succeed.

Reinstatement in a non-supervisory position

17] The arbitrator's decision on the appropriate remedy appears, at first blush, to be reasonable. He accepts that the employee can no longer be trusted in a supervisory position, but that dismissal is too harsh a sanction. The *via media* of reinstating him in a non-supervisory position, possibly at a lower salary, and coupled with an effective unpaid suspension of three months would appear to address both the aim of corrective discipline and the question of trust; but was the arbitrator empowered to impose such a sanction in terms of s 193 of the LRA?

18] No evidence was led at arbitration as to whether a suitable alternative post existed.

19] Section 193(1) provides that:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
>
> (a) order the employer to re-instate the employee from any date not earlier than the date of dismissal;
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> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other

reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee."

20] The arbitration award may appear to be contemplated by s 193(1)(b) insofar as SAPO was ordered to reinstate the employee "... in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal"; but the difficulty is that the subsection uses that phrase in the context of re-employment and not reinstatement.

21] In the recent case of *Director-General: Office of the Premier of the Western Cape & ano v SAMSA obo Broens & ors*[3] the Labour Appeal Court had occasion to discuss a similar order.

22] In that case, the arbitrator had ordered the employer to reinstate the employee in a "non-clinical equivalent position" to the one he had held formerly, as he was not medically suited to be reinstated into his former post. The Labour Court declined to review the finding and award of the arbitrator.

23] On appeal, the LAC upheld the finding of the court *a quo* with regard to the arbitrator's principal finding; however, with regard to the question of reinstatement into an alternative position, the court held:

> "The difficulty with the award is that there was no evidence that there was a designated post into which Dr Broens could be placed; no such evidence had been placed before [the arbitrator]. Had [the arbitrator] called for such evidence, he could then have determined whether it was possible, under the circumstances of this case and the organisation of [the employer], to appoint Dr Broens into a non-clinical position...
>
> [T]he only alternative remedy which was reasonably available to [the arbitrator] was to award compensation for unfair dismissal. Hence, this dispute falls within the framework of s 193(2)(c) of the Act, namely it is a case where reinstatement or reemployment cannot be required because it is not reasonably practicable for the employer to reinstate or reemploy the

3 Unreported, case no CA 5/2011 (26 April 2012) [coram Davis JA, Molemela AJA and Murphy AJA concurring] paras [13] – [15].

> employee. Accordingly, the appropriate remedy in this case would have been to grant the maximum compensation, pursuant to s 194(1) of the Act, that is 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

24] In this case, a similar situation prevails. The arbitrator did not hear any evidence with regard to the availability of a non-supervisory position. In making the order that he did, he exceeded his powers.

Conclusion

25] The award is reviewable for the reasons set out under the second and third sub-headings above. It may be that another arbitrator could come to a similar conclusion with regard to the proper order to be made, once he or she had heard evidence on the suitability and availability of other positions; but in order to evaluate that aspect, the matter has to be remitted to the CCMA.

26] Given these findings, I do not believe a costs order to be warranted.

Order

27] The arbitration award made by the second respondent under the auspices of the first respondent under case number WECT 13597-10 dated 2 December 2010 is reviewed and set aside. The matter is remitted to the first respondent for an arbitration *de novo* before an arbitrator other than the second respondent.

28] There is no order as to costs.

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Steenkamp J

APPLICANT:	G Elliot
	Instructed by Maserumule Inc (G J Cassells).
FOURTH RESPONDENT:	EJ Simons of Simons Van Staden.