



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1158/10

In the matter between:

CITY OF CAPE TOWN

Applicant

and

SAMWU OBO S HARRIS

First Respondent

SALGBC

Second Respondent

A SINGH N.O.

Third Respondent

Heard: 25 July 2013

Delivered: 19 August 2013

Summary: Review – process related – misconduct – abuse of Council vehicle. Arbitrator disregarded relevant evidence. Reviewed and remitted.

JUDGMENT

STEENKAMP J

Introduction

- [1] The employee, Ms Sharon Harris, was charged with 105 counts of misconduct arising from her misuse of an official vehicle of the City of Cape Town.
- [2] The City dismissed her. Her trade union, SAMWU (the applicant) referred an unfair dismissal dispute to the South African Local Government Bargaining Council (the second respondent). The arbitrator (the third respondent) found in the employee's favour and ordered her reinstatement with full retrospective effect. The City seeks to have that award reviewed and set aside.
- [3] At the outset of this hearing, I granted condonation for the late filing of the review application. I provided *ex tempore* reasons for that ruling and will not repeat them here.

Background facts

- [4] Harris was promoted to the position of principal inspector of law enforcement in the City's anti-land invasion unit and provided with an official vehicle in January 2009.
- [5] It is common cause that Harris abused the official vehicle by using it when she was not officially entitled to do so. However, the arbitrator found that the city had not proven that the employee had any intention to defraud or that she was dishonest. He also found that "there was a breach of the rule, but the rule was breached in what I would term special circumstances."
- [6] Harris was charged with 105 counts of misconduct and dismissed for having committed 102 of those. These accounts can be conveniently grouped into six categories:
 - 6.1 the misuse of her vehicle for private purposes;
 - 6.2 the misuse of her vehicle while booked off sick;
 - 6.3 the misuse of her vehicle while off;
 - 6.4 the misuse of her vehicle while on standby;
 - 6.5 fraudulent conduct by making false entries on timesheets; and

6.6 dishonesty by making false entries on timesheets.

- [7] The nub of the case against Harris was that the vehicle tracking device fitted to her vehicle revealed discrepancies between her actual whereabouts and her submitted attendance registers, overtime claim forms and standby forms. The time sheets and duty reports are not in dispute. The City submitted detailed vehicle trip reports at arbitration derived from its Altech Netstar Fleet Management tracking system. The tracking reports revealed that there were numerous discrepancies between the employee's official recorded whereabouts and the location of the vehicle at various times. The city called a witness, Mr Cornelius van der Wateren, to interpret and confirm the accuracy of these records. He was employed by the city as a loss control officer and he had been trained by NetStar to interpret the tracking reports. He explained how the tracking system worked and he testified that it was accurate up to 5 metres. The database in the report was largely accurate although from time to time that could be "glitches". Under cross-examination, eight discrepancies (out of 102) were put to him.
- [8] Save for raising these eight discrepancies in the reports, neither Harris nor her trade union representative, Mr Archie Hearne, challenged Van der Wateren's evidence or led any evidence to gainsay his testimony. Harris admitted a number of discrepancies between her official recorded whereabouts and the location of the vehicle, although she offered some explanations.
- [9] The contents of the tracking reports were germane to the enquiry before the arbitrator. However, the arbitrator rejected the tracking reports on the ground that they were "unreliable". The arbitrator found that Van der Wateren "was in effect a lay person who happens to have some knowledge of how the system is designed to work" and that the City "did not produce any evidence to corroborate the allegations made on the basis of data which its own witness concedes that it does have its limitations."

Evaluation / Analysis

- [10] Mr *Leslie* submitted that the rejection of the vehicle tracking reports constituted a material misdirection and a gross irregularity in the proceedings. He based his argument on a process related review as discussed in *Herholdt v Nedbank*¹.
- [11] The arbitrator found that the city had not discharged the onus of proving that the dismissal was fair, *inter alia* because its case was based largely on the data generated from the vehicle tracking system and that it did not lead any expert evidence in this regard. In this regard, the arbitrator imposed a standard of proof on the city that is not appropriate for informal arbitration proceedings.
- [12] The facts of this matter and the test imposed by the arbitrator are similar to those in *Exactics-Pet (Pty) Ltd v Patelia N.O.*² in that case, commissioner rejected evidence of a breathalyser test as unreliable in circumstances where the employee had been dismissed for drinking on duty. The Court held that the arbitrator had adopted far too strict a test and that this constituted a reviewable error.
- [13] The arbitrator in this case committed a similar error. She rejected the evidence of Van der Wateren, despite the fact that he had extensive experience in operating the tracking system and was in a position to explain how it worked and how to read the relevant reports. Save for it discrepancies out of 102 counts of misconduct, is evidence stood uncontradicted. The arbitrator failed altogether to take these clear indications of misuse of the vehicle into account.
- [14] The various excuses and explanations offered by Harris should have been tested against the clear evidence generated by the tracking reports. This the arbitrator failed to do.

¹ *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC) para [36].

² [2006] 6 BLLR 551 (LC).

[15] The award must be set aside, but it should be remitted to the SALGBC to enable another arbitrator to engage in this exercise. In the circumstances, I do not consider a costs award to be appropriate.

Order

The arbitration award made by the third respondent on 8 November 2010 under case number WCMP 100919 is reviewed and set aside. The dispute is remitted to the second respondent (the Bargaining Council) for fresh determination by an arbitrator other than the third respondent.

Steenkamp J

APPEARANCES

APPLICANT:

G A Leslie

Instructed by Herold Gie.

FIRST RESPONDENT:

J Whyte of Cheadle Thompson & Haysom.