REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 832/08

Not reportable

In the matter between:

GRAHAM FREDERICK THORNE **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

CARLTON JOHNSON, *N.O.* **Second Respondent**

ITHEMBA LABS **Third Respondent**

Heard: 16 April 2013

Delivered: 03 November 2014

Summary: (Review – failure to obey a lawful and reasonable instruction – basis for allegedly unlawful nature of instruction not properly placed before the arbitrator – award not reviewable)

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter, Mr G Thorne, was dismissed after being found guilty of two charges arising out of an incident in mid- August 2007, namely:

1.1 Refusing to carry out a reasonable and lawful instruction (falling within the parameters of his job description) issued by management.

1.2 Failing to carry out a reasonable and lawful instruction which resulted in an actual work stoppage.

[2] In September 2001, the applicant was employed as a fitter and turner by the respondent, a division of the National Research Foundation performing medical research in the accelerator-based sciences field.

[3] In the arbitrator's award, he rightly found that the second charge concerned the consequences of the misconduct in the first charge and as such might amount to an aggravating factor but should not constitute a substantive charge in its own right.

[4] The applicant was dismissed after an extensive disciplinary process which included a hearing over three days chaired by an external chairperson and a full appeal hearing. The arbitration hearing itself took place over three days.

The arbitration award

[5] For the purposes of this judgement it is unnecessary to repeat all the arbitrator's findings or the factors he considered save to outline his conclusions and reasoning. In so far as further detail needs to be

addressed that will be done in the course of considering the grounds of review.

[6] Having decided that the fairness of the applicant's dismissal had to be assessed with regards to the first charge, the arbitrator's reasoning was as follows:

6.1 It was undisputed that the applicant had been instructed to weld certain aluminium frames and had refused to do so and consequently the fundamental and decisive issue was whether the instruction was valid, reasonable and lawful.

6.2 The applicant was not formally qualified to perform aluminium welding, but had done aluminium welding in the past and the employer had never complained of work performance in respect of such work.

6.3 Despite the applicant's contention that welding was not part of his responsibilities and duties it was contained in his job description.

6.4 Even though the applicant did not have code certification for aluminium welding, that was not a legal requirement to perform the welding in question but merely a matter of best practice. As such, the respondent was not bound to comply with the standard and the applicant was adequately qualified to do the welding in question.

6.5 The arbitrator accepted that the applicant suffered from an eye condition, but he was receiving treatment for it and it was not advanced as the reason he could not do the welding.

[7] In view of the considerations above, the arbitrator concluded that the applicant was indeed guilty of the misconduct with which he was charged. In deciding if dismissal was fair, the arbitrator made reference to the criteria mentioned in ***Sidumo & another v Rustenburg Platinum Mines Ltd & others***.[1] He decided that the dismissal was

[1] (2007) 28 ILJ 2405 (CC)

substantively fair because his misconduct was deserving of "the most severe sanction" in light of the following factors in particular:

7.1 The arbitrator acknowledged that the sanction described in the respondent's disciplinary code for the offence of refusing to carry out an instruction was a final written warning, but that, such a penalty had to be regarded as a guideline and the case had to be judged on its own merits.

7.2 In the circumstances of the case, the applicant had no valid reason for refusing the instruction and dismissed his attempts to diminish the significance of his refusal by trying to justify on the basis of his concern about the quality of their work and his eye condition.

7.3 It was only nearly a month after refusing the instruction that the applicant further sought to justify his refusal by claiming that he was not a welder but a fitter and turner, which showed that even at that stage he was not willing to comply with his obligation to perform welding work, and he had apparently adopted the stance that he was not obliged to do any welding work pending the outcome of the disciplinary hearing, which was clearly incorrect.

[8] However, the arbitrator did find that the applicant's dismissal was procedurally unfair because the chairperson of the disciplinary hearing had not consulted the full committee constituting the disciplinary tribunal in determining his findings and sanctions, which was contrary to the provisions of the third respondent's own disciplinary code. The arbitrator awarded one month's remuneration to be paid to the applicant as compensation for this procedural unfairness.

Background

[9] For the purposes of the review, it is useful to set out in summary some of the evidence bearing on the substantive issues in dispute.

[10] According to the applicant's detailed job description as a Fitter and Turner, his task descriptions included the following:

Key Performance Area	Inputs (Method Used)	OUTPUTS (Expected Results)
1. Machining	…..	…..
2. Welding/Sheet Metal Work	i. Apply welding techniques to fabricate components and structures (including bellows) ii. Manufacture and install cooling manifolds, vacuum components and piping systems.	a) Component manufactured to drawing and maintaining accuracy. b) Time, cost and quality constraints are met.

[11] Mr Paulsen, the foreman of the main workshop where the applicant worked and his immediate superior, testified that the quality of the applicant's aluminium welding was 'fine' and brought an example of it to the hearing to demonstrate that. He further confirmed that the particular type of welding the applicant was required to do was not limited but could be any type of welding. As far as he was concerned, the applicant had demonstrated in the past that he was more than capable of doing welding with aluminium.

[12] Paulsen also testified that the particular task he had been asked to perform on that occasion was to weld aluminium frames for computer monitors in the control room which was a 'run of the mill job' for the applicant considering his skills as a welder. He dismissed the applicant's contention that his refusal to do the job was because he was incompetent to do it and because he was concerned that it would create difficulties for the employer if something went wrong with what he had welded. Paulsen doubted that a medical reason was a real reason as it was not the reason he had refused to weld.

[13] Mr Wyngaard, the divisional head to whom Mr Paulsen reported, testified that in 2004 the applicant and a colleague had motivated for a reassessment of their packages in view of the commitment and knowledge of work they had displayed in the past few years and the contribution they had made "without even being skilled by the company". The motivation also requested that they be given "extensive training" to enhance their skills. He had supported the recommendation because of the applicant's welding work and he was the most experienced welder in the Department and the only one who could do plasma welding at that time.

[14] When Wyngaard was told by Paulsen told that the applicant would not weld the monitor frames, he called the applicant in and asked him why he would not do so. The applicant told him he was not a welder and therefore could not do the job. Wyngaard's response was that that it was a lawful and reasonable instruction and unless it affected his health he was expected to do it. At that, the applicant said it did affect his health but did not elaborate. As far as Wyngaard was concerned the 'bottom line' why the applicant was refusing to do the work was that his claim that he was not a welder, but a fitter and Turner.

[15] From that date onwards, Wyngaard said the applicant would not do any welding. Consequently, a few weeks later the applicant refused to weld bellows, which were critical for the functioning of the entire plant. His refusal to do that welding made it necessary to urgently send two other employees on a course to learn how to do stick welding so that they could effect the repair. On that occasion the material being used was stainless steel. According to him, applicant had done more training courses than any other fitter and turn on the workshop, including welding courses.

Another area of focus in the applicant's job description was performance to ISO 9001:2000 in terms of which the applicant was expected to work to those standards, to recommend improvements to system procedures to highlight problems that had to be prevented or

corrected and to submit a report if there was any nonconformity with the standard. The expected results listed for this key performance area were that there should be no deviations from the quality management system, that quality would not be compromised and quality would be improved by correcting and preventing problems. Wyngaard said that the respondent itself was not accredited for those standards, but was striving to achieve them.

[16] Regarding the applicant's contention, that he was not given a new job prescription for the work he was to perform in the main workshop after he returned from a brief secondment to the Medical Radiation division (Medrad), Wyngaard said that the applicant's previous job description in the main workshop remained current, and the job description he had been given at Medrad was simply for the different work that he performed there. The reason why another fitter and turner in the workshop did not have welding described in his job description was that he had not been trained as a welder at that time. The respondent had started training the fitters and turners in welding in 2002, beginning with the applicant, then subsequently training others over time.

[17] In explaining why the agreed 2006 training plan for the applicant, as set out in the applicant's performance evaluation in May 2006 indicated that the applicant should go on an aluminium welding course by the end of that year, Mr Wyngaard said there was always something that he might learn from an official welding course, but that did not mean the applicant was incompetent in welding. Further, Wyngaard stated that when the applicant had been approached to attend the course provided at Sampson's School of Welding he was not keen because he wanted to attend a course at the South African Institute of Welding which would have cost significantly more. Wyngaard only had a training budget of approximately R800 per person, whereas the course the applicant wants to attend would have cost about R 2 500. Although the applicant subsequently testified that he hadnever been approached to attend such a course at the Sampson School of Welding, Wyngaard's

evidence that such an offer being made was not challenged when Wyngaard was cross-examined.

[18] Wyngaard also testified that it was only a month later, after the incident on 17 August 2007 that the applicant specifically raised the question of suffering from an eye condition. A certificate for one day's absence from work from an ophthalmologist in March 2007 was introduced as evidence of the applicant's dry eye condition. Wyngaard testified that they only became aware of the applicant suffering from an eye condition in September 2007 when the applicant visited the respondent's doctors. Wyngaard did not dispute that the certificate had been handed in but the applicant had never alerted them to the fact that he had a problem with his eyes. This only came to light when the applicant sent an email to Mr M Jakoet, the Group Head, in which most of the letter was dedicated to explaining that he was a qualified fitter and turner but not qualified as a welder and that he was denied the opportunity to do other training. In the letter he also did raise his eye condition as a problem which had been diagnosed a few months before which prevented him from doing welding and welding could exacerbate his condition.

[19] On Friday 18 July 2008, an unsigned affidavit of Mr Nell, a welding expert, from the South African Institute of Welding was sent to the respondent, prior to the hearing which was due to resume on 21 July 2008. The applicant had previously announced his intention to call an expert witness, but no details of the witness's identity or the nature of his evidence was provided until that Friday. As a result of the short notice, the respondent applied for a postponement to consider the ramifications of Nell's statement and whether it needed to call its own expert witness. The postponement was granted and this necessitated an alternative arrangement be made for Nell to testify as he could not come to Cape Town on a second occasion. The arrangement made was that he would testify by means of a video conferencing facility at the respondent's attorney's offices.

[20] When the postponed hearing resumed, there was a debate about whether it was necessary for Nell to testify at all. The respondent had agreed it was not disputing the contents of an affidavit setting out the expert evidence Nell intended to lead, on the basis that the real thrust of the testimony was that worldwide best practice construction standards required a welder to be qualified to perform in accordance with an approved welding procedure, but that it was not a legal requirement in order to perform a particular kind of welding to have the a specific qualification for that. The affidavit also stated that apart from the best practice requirement of a welder having a Welder's Performance Qualification Record, this requirement was reinforced by Section 9 of the Occupational Health and Safety Act ('OHSA') and regulation 9 of that OHSA, which placed a duty on employers to ensure persons receive the necessary training.

[21] The arbitrator reasoned with the applicant's representative that there was little point in calling Nell if his evidence was going to be the same as what he had set out in his affidavit and given that the employer accepted it on the basis mentioned above. In the interchange which followed, the arbitrator confirmed with the parties that the employer's case was that the applicant was technically competent to do the welding work in question, which was a matter the Nell could not comment on, and that the applicant's case was that he could not do the welding because he was not certified to do so.

Despite the arbitrator's cautionary words and his categorisation of the nature of the parties' respective cases, which was not disputed, the applicant initially decided he would still call Nell to give oral testimony.

[22] When the time came to hear the expert testimony an arrangement had been made to hear Nell's evidence using a video conferencing facility at the respondent's attorneys' offices, but at the time this was due to take place there had been a power cut in Johannesburg. The applicant' s representative announced that they were going to abandon the use of the video conference or other avenue and the arbitrator then confirmed

that the witness would not be called. The arbitrator then confirmed that Nell's statement could be relied on subject to the understanding of the import of his affidavit mentioned above.

[23] The applicant testified that he was able to do stick welding or, more colloquially, 'arc welding'. His understanding was that you had to be 'coded' to do a specific type of welding, which meant you had to pass a test for that particular method or technique. Without passing the test a person could not do a particular weld 'properly'. However, he did agree that he had done stick, tig, aluminium and gas welding for the respondent.

[24] His explanation for not welding the aluminium frames was that he did not feel competent to do that particular job and that is what he told Mr Paulsen. The reason he did not feel competent was because of the thinness of the material. The applicant claimed that when he told Paulsen he did not feel competent and would damage the job, Paulsen said he would work around it, but the following day he was told to go and see Wyngaard.

[25] As far as the applicant remembered, the aluminium material was thinner than the 3 mm mentioned by Mr Paulsen. Regarding the second incident in which he was about not welding the bellows, the applicant said he had explained that he had not been given that job to do. He claimed it was then that he told Paulsen and Wyngaard that he was not a welder and that since his training assistant, Leon Adams, had received extensive training on aluminium and advanced tig welding techniques he could do the job. Although he denied having the skill to weld aluminium he did not dispute that the welding sample presented by Paulsen was not his. He said it could have been done better, but that Paulsen had said 'as long as it did not fall apart' it was fine.

[26] Although it had been agreed that he would do advanced training in December 2006 it did not happen. Altogether, he had only received two weeks training on welding. He also gave evidence of a document he had handed in containing criticism of his performance agreement

assessment for the period ending 31 March 2006 in which he had complained that he was told there was no funding to send him on training but subsequent to that others were sent on training.

[27] The applicant also elaborated that he had concerns about the job because there was a big difference welding something like the burglar bars and the welding something that would carry a great amount of weight. He regarded the welding of the frames as something that required a 'coded' welder.

[28] In April 2007, the applicant was seconded to the medical radiation group within the respondent's organisation for one year because of great unhappiness between himself and workshop management. The situation was to be reviewed thereafter. However the secondment was revoked by the middle of July and he returned to the main workshop prematurely. He said he had been given a new job description at Medrad but basically was doing fitting and turning work. When he was asked to do some welding he objected because he told them that he was not a welder and Mr Adams could do the work.

[29] Although the applicant did allude to his eye condition it was apparent from his evidence that the reason he refused to do the welding he had been asked to do was not because of that. He was also challenged that despite the fact he had started diarising issues at work because of prior incidents such as when he made a request for a ventilated facemask, he had not even mentioned a medical reason in his recording of why he would not weld the aluminium that day. The relevant entry in his diary on 15 August reads:

> *"PP ASK ME TO WELD ALUMINUIUM. ISAY I WOULD REFRAME FROM THAT BECAUSE L.A. IS WELDER"*[2]

(*sic*)

[2] "PP" seems to have been a reference to Paulsen and "L.A." was apparently a reference to the applicant's colleague, Leon Adams, who had received training in aluminium welding.

[30] Although he explained that the reason the diary entry does not mention other reasons for not doing the work was because it was just a note to remind him, the gist of the note does identify the core reason for his refusal which dovetailed with Paulsen's evidence.

[31] The applicant denied that he had refused to go to the Sampson School of Welding, where Adams had undergone training. He also confirmed his evidence to that effect which he had given in the disciplinary enquiry. Under cross-examination he said that he had simply suggested that he be trained at the South African Institute of Welding ('SAIW') but nobody came back to him and said he could not go there and nobody told him to go to the Sampson school. It is only at his disciplinary enquiry hearing that he heard for the first time that he had not been sent on training because the training he had suggested at SAIW was too expensive.

[32] The applicant believed he should have been sent on training because he was having difficulties with his welding which was cracking and Mr Paulsen could not help him with it. Under cross-examination, he agreed that he had the ability to do aluminium welding but not the knowledge of how to apply his ability properly, and he was concerned because of the type of work he was doing could affect people's lives if it was defective. His evidence about Paulsen been unable to assist him with his welding was not something put to Paulsen when he testified.

[33] When the applicant was asked whether, if he came back to work at the respondent, he would still not do welding until he had been sent on a course, he confirmed he would still refuse because the welding he would be asked to do would not be of a proper quality according to "legislation". He claimed that he only came to know about the legal requirement governing his work *after* the event, namely the Occupational Health & Safety Act and the national standards for welding. He understood that, in terms of those instruments it was a legal requirement that the employer had to make sure the person doing the job was competent.

Grounds of Review and evaluation

Grounds relating to the failure of the applicant's expert witness to testify in person

The arbitrator's postponement of the hearing after the applicant gave notice of who he intended to call as an expert and the evidence he would give

[34] In his founding affidavit, the applicant complained about the alleged prejudice he suffered in being unable to call his expert witness because of the problems encountered with the video conferencing. Without specifying the particular form of misconduct committed on the part of the arbitrator in this respect, the thrust of the complaint was that even though the matter was scheduled to continue on 21 and 22 July 2008 and the applicant had made arrangements for Nell to attend on 22 July 2008, the arbitrator granted the respondent the postponement causing grave prejudice to him because at the following hearing the video conferencing problem arose.

[35] The reason why the respondent' s representative had requested a postponement was that a signed version of the applicant's expert had not been received and that it had only been given one day' s notice of whom he intended to call, giving the respondent no time to consider if it needed to call its own expert. The applicant had adopted the view that it was not necessary to have the statement signed as the expert would be giving evidence in person.

[36] Nonetheless, in his replying affidavit the applicant rightly withdrew any reliance on the granting of the postponement as a basis for the review application.

Procedural irregularities limiting the material evidence before the arbitrator

[37] Despite abandoning the abovementioned ground of review based on the postponement ruling, in his supplementary affidavit the applicant

advanced another related ground of review arising from the chain of events following the postponement. More specifically, the applicant took the arbitrator to task for allowing the respondent's legal representative to argue for a postponement of the matter after the arbitrator had already made a ruling refusing the respondent legal representation. The arbitrator also supposedly acted irregularly in allowing the legal representative to tender an offer of arranging for a video conference to be held at the attorneys' premises to ensure that the applicant' s expert could be given an opportunity to testify. He argued that as a result of allowing the postponement, the applicant was deprived of an opportunity to lead his expert witness in person on the substantive issues which were in dispute.

[38] The applicant accused the arbitrator of deciding that no further opportunity would be afforded to him for Nell to present his evidence *viva voce*. The applicant regarded this as critical because the expert would have been able to explain the nature of what his job description entailed and the relevance of his refusal to do aluminium welding. This failure had a direct impact on the arbitrator's misunderstanding of Nell's evidence.

[39] I agree that the arbitrator as a matter of procedural regularity should have excluded the respondent's attorney, Mr Ellis, from the proceedings once he had ruled against legal representation. However, the attorney's input was essential in explaining why a postponement was being sought as he had been dealing with the applicant's attorney at the stage when the applicant advised of his intention to call Nell. Moreover, in his replying affidavit the applicant did not dispute that neither he nor his representative had objected to Ellis' continued involvement on that issue. In so far as it was irregular, the question is whether it prejudiced the applicant.

[40] If one has regard to the circumstances on which the application for postponement was based, it was not an obviously unfair decision to grant the postponement based on the applicant's late notification both

of Nell's identity as his expert witness and of the nature of his testimony. These were proper considerations which the arbitrator ought to have taken into account as a basis for postponing the hearing whether argued by Mr Ellis or not. I do not think the applicant can say he was *unfairly* prejudiced by these matters being tabled in the postponement application. So, even if there are instances in which procedural irregularities can cause substantive prejudice, this was not one of them. In ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others***[3], the LAC said:

> *The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act 4 (LRA) continue to be determined in terms of s 145 of the LRA but that the constitutional standard of reasonableness is 'suffused' in the application of s 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, 5 gross irregularity in the conduct of the arbitration proceedings, 6 and/or excess of powers 7 will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material. "*[4]

[3] (2014) 35 ILJ 943 (LAC)

[4] At 948, para [14].

Failure to consider that the applicant had a grievance pending

[41] The second ground of review raised in the founding affidavit is that the arbitrator failed to consider that the applicant had filed a grievance about the fact that he had failed to receive training in aluminium welding and that he ignored all the evidence that he never refused to attend any welding jobs he was instructed to do. It was never put to any of the respondent's witnesses that the applicant should not have been disciplined when he had a grievance pending over the employer's failure to send him on further training. The arbitrator can hardly be faulted for not giving any weight to this factor. It is true that after the applicant's pointed refusal to weld the monitor frames, that the respondent did not cite specific instances of his subsequent refusal to perform specific work, but it is clear enough from the evidence that on 13 September he was instructed to perform welding work and made it unequivocally clear that as things stood he would not do so, this time citing his medical condition as the primary reason, but still mentioning that he was a qualified fitter and turner, not a welder. Even though his subsequent refusal was not formulated as a charge, it was obvious he was not relenting on his stance.

Failure to appreciate that the respondent had not fulfilled its duties and responsibility to the applicant to provide him with training.

[42] Thirdly, the applicant criticised the arbitrator for failing to see that the third respondent had failed in its duties and responsibilities towards him as an employee and the difficulty could have been overcome simply h by granting him the proper training. The applicant did not specify which responsibilities or duties he was referring to in his affidavit and, in reply to the respondent's denial, he insisted that if the employer had paid due regard to his concerns and his grievance about not being sent on training, he would have been able to carry out the specific instruction. I take this to be a re-emphasis of his original reason for not doing the

welding work, namely that he was not qualified to do so because he had not done the necessary formal training. The criticism of the arbitrator I infer from this is that the arbitrator should have realised that it was simply the employer's obstinacy in not sending the applicant to the formal training that had created the crisis. This relates to the central issue in the case, namely whether he could be instructed to perform aluminium welding work in the absence of having done the necessary formal training if the employer was satisfied with the actual standard of his work.

Alleged misinterpretation of OHSA

[43] In the form this ground of review was expressed, no specific reference was made to OHSA, but the applicant also claimed that the arbitrator had committed a gross irregularity in misinterpreting OHSA. The respondent retorted that in the arbitration proceedings the applicant had not made out a case that the reason for his refusal to carry out the instruction was on account of the requirements of that Act. It must be mentioned that when the employer's witnesses were questioned, none of them was confronted with an argument that it was unlawful for the employer to insist on the applicant performing the welding work in question because it was contrary to OHSA or OHSA Regulations.

[44] Throughout his own testimony, when explaining why he had refused to perform the work in question, the applicant kept reiterating that he did not feel he was competent to do the job without having been certified for that work. At one stage during his cross-examination the applicant was asked whether he would refuse to do the welding until he had been sent on the courses he had been requesting. The following appears at this point in the transcript:

> *"Mr Thorne: I will have to be qualified first.*
>
> *Mr Msiza: no, but you are not answering my question. My question to you is would you do welding? Would you still refuse until you have been sent to the courses?*

Mr Thorne: I have to refuse because (intervention)

Mr Msiza: so you will refuse?

Mr Thorne: because the welding that they want me to do is not of a proper quality in my opinion because it is not being, according to legislation it is not proper."

[45] A little later, the applicant was referred to the email he had sent to Jakoet on 13 September 2007, in which he had tried to explain his reasons for not accepting the directive to perform welding work. The transcript reflects the following exchange:

"Mr Msiza: you also refer you know to your eye problem there, but there is nothing you mention about the instruction been unlawful. Can you tell me why is that?

Mr Thorne: Because I did not know it was not lawful. Mr Harry Gargan brought it to my attention (indistinct). All I knew about welding was that it is a trade on its own and that you get trained properly in doing the job. But the legal aspects I did not know at that time."

[46] Further on in his cross-examination, when he was asked why he said the instruction was unlawful when it had been agreed that Nell's affidavit merely reflected best practice, he referred to OHSA. The transcript of that portion of the evidence reads as follows:

"Mr Msiza: … Mr Thorne what I want to put to you is the fact that it has been accepted by both parties you know the fact that in terms of the affidavit that was put to us by your witness, expert witness, that this is purely a best practice which is why we have sought to have accepted it, but then now why-how do you then say this was not a legal instruction? (Indistinct) I mean as a welder you have to be expected to be coded welder legally, but your experts testimony in the expert witnesses saying that is just a best practice.

Mr Thorne: And that is covered with legislation. Best practice.

Mr Msiza: Which legislation is this?

Mr Thorne : The Act.

Mr Msiza: There are lots of (indistinct) (intervention)

Mr Thorne : Occupational Health and Safety Act, and The Labour Relations Act also covers that (indistinct). I think it is section 9 if I am not mistaken in Occupational Health & Safety Act."

[47] Still later, when asked again why he said the instruction was unlawful he said that the company was obliged to 'skill and get the person competent' in the job in terms of OHSA and the National Standards for Welding.

[48] Can the arbitrator be blamed for not having regard to the provisions of the Occupational Health & Safety act in determining whether or not the instruction to the applicant to perform the welding work in question was lawful? In terms of the evidence before him, it is apparent that the reason why the applicant had refused to do the welding work was not because he believed it would be in contravention of any statute or regulations. As mentioned, such a ground for contending that the instruction was unlawful was not put to the employer's witnesses.

[49] I accept that it was open to the applicant to raise a new ground of unlawfulness at the arbitration proceedings even if he did not know of that particular basis at the time of his dismissal because those proceedings are proceedings *de novo.* However, if that was the intention it was not clearly expressed in the conduct of the applicant's case at the arbitration and has only become apparent in the course of this review application.

[50] It is true that OHSA was mentioned in Nell's affidavit, but at the outset of the arbitration it was confirmed that the status of the evidence in the affidavit was confined to being a description of best practice, and the

relevance of the OHSA provisions to determine the lawfulness of the instruction was not made a central issue in the case. The applicant's representative had confirmed in an email before the arbitration commenced that certification of persons for each particular form of welding was best practice and not a legal requirement. The applicant's representative also did not give any indication to the respondent's witnesses or at the commencement of the arbitration that he would be arguing the unlawfulness of the instruction based on a contravention of OHSA or the regulations, notwithstanding the qualified nature of Nell's evidence.

[51] Had the applicant's expert witness not made the concession that was accepted by the respondent, and had the applicant gone on to make out a case in the arbitration that the instruction was unlawful because it was in contravention of OHSA or the regulations under that Act, the outcome might have been different.[5] However, it is not open to the applicant to use review proceedings to make out a case that was never properly put before the arbitrator and blame the arbitrator for not inferring the existence of a ground of unlawfulness that he now wishes to argue is a central pillar of his case but failed to raise in the those proceedings except in the most oblique and vague way at best and then only during his own cross-examination.

Failure to keep a record of proceedings

[52] The applicant also said that the arbitrator was guilty of gross irregularity in the conduct of proceedings in failing to keep a record thereof in terms of an implied duty on him to do so. The respondent claims that insofar as there was no digital recording of what occurred on 15 May 2008,that is of no moment because all that occurred was an adjournment in order to allow the applicant to file opposing papers to the respondent's

[5] A good example of a case where this properly placed before the arbitrator is ***National Union of Metalworkers of SA on behalf of Williams and Gold Sun Industries (Pty) Ltd*** (2013) 34 ILJ 469 (BCA) .

application for legal representation. Further, the respondent submits that the absence of any recording of events on 21 July 2008 is not material to the issue of whether or not the award should be set aside since no testimony was given by any witnesses on that date and the postponement of proceedings was considered. Even if I take account of the applicant's account of the alleged missing portion of the testimony which is attached to his supplementary affidavit, the only point which arises from that, is that, Paulsen indicated that he did not have a problem with the applicant's refusal to do the work when the applicant said he was not competent and Paulsen decided 'to work around' that, but Wyngaard did not find this acceptable this very portion of the applicant's reconstruction was disputed by the respondent and the parties have not agreed on it.

[53] I accept that there were portions of the record missing, but even if I take the applicant's unilateral reconstruction into account, I do not think the missing portions seriously affect the court's ability to determine the substantial points of review. It is not clear that in the efforts to reconstruct the missing portions of the record, the arbitrator was either unwilling to provide his notes, or that he had none which could have assisted in the reconstruction. Moreover this was not a case like ***UEE-Dantex Explosives (Pty) Ltd v Maseko & others***[6] or ***Doornpoort Kwik Spar CC v Odendaal & others*** [7] in which there was a complete failure to maintain or provide a record.

[54] In this regard, even allowing for the fact that the prevailing authority on review of procedural irregularity at the time the matter was argued was the LAC decision in ***Herholdt v Nedbank Ltd*** [8], to succeed a process related review still had to establish that the irregularity was such that a commissioner failed to apply their mind to material facts or issues which had the potential for prejudice to the extent that a different outcome

[6] (2001) 22 ILJ 1905 (LC)

[7] (2008) 29 ILJ 1019 (LC)

[8] (2012) 33 ILJ 1789 (LAC)

might have been possible.[9] I do not believe the process related points in this application even met that threshold.

Failure of video conferencing arrangement.

[55] A further point raised by the applicant was an insinuation that, in effect, the respondent's attorneys of record had misrepresented that video conferencing facilities had been arranged. In relation to this issue there is a dispute of fact in the founding supplementary and replying affidavits which cannot be resolved. In any event, this evidence was not before the arbitrator and, if it was material to the outcome of the arbitration, the applicant's recourse would have been to rescind the award. As such, it is not a proper ground of review.

Alleged misconstruction of Nell's affidavit

[56] The applicant maintains that the arbitrator incorrectly understood that the evidence of the expert witness was based purely on best practice and not on the legal requirements for performing welding work of a particular kind. The applicant contends that Nell's evidence would have been that no person could perform production welding unless qualified with an approved welding procedure and that a welder could only use those processes for which he holds a valid code certification in production. Nell's evidence would also been to the effect that section 9 of the Occupational Health & Safety Act and the associated Regulations placed a duty on employers to ensure that persons receive the necessary training. Consequently, the arbitrator's conclusion that the applicant was adequately qualified to carry out the specific welding instruction shows that he gravely misunderstood the evidence presented by the applicant.

[57] The basis on which the respondent was willing to admit Nell's affidavit as uncontested was subject to the order that it was a statement of best practice rather than a statement about legal pre-requisites for performing certain welding work. This point was made more than once

[9] At 1801-1802, paras [38]-[40]

during the arbitration and the applicant did not object to this qualified basis on which Nell's statement was to be admitted, even though on the face of the statement the reference to the Occupational Health and Safety Act in the affidavit gave an indication that there was some statutory regulation of qualifications for the performance of welding work.

[58] Moreover, even though the applicant might have felt frustrated by the failure of the planned video-conferencing arrangement, it was not the arbitrator who then ruled that the evidence of Nell would not be heard: it was the applicant's own representative who indicated that the efforts to hear Nell's oral testimony would be abandoned: the arbitrator simply confirmed this. In the circumstances, it is disingenuous of the applicant to try and shift responsibility to the arbitrator for the lack of Nell's oral testimony.

Ground of review advanced in applicant's heads of argument

[59] Perhaps realising the difficulty of over-reliance being placed on the arbitrator's purported refusal to hear the applicant's expert's oral testimony, the applicant sought to introduce a substantially new ground of review in supplementary heads of argument. This version argued that the arbitrator was not in a position to determine the dispute properly because he did not have enough evidence before him to understand certain issues and therefore was not able to reach a conclusion on whether there was a good or sufficient reason for the applicant to refuse the welding instruction. As the respondent bore the onus of proving the dismissal was fair, it had to prove the instruction was lawful and reasonable and the refusal to obey it was unjustified. Given the applicant's explanation for not complying, the commissioner was obliged either to obtain enough evidence to evaluate it, or find that the employer had failed to discharge the onus it carried.

[60] For the sake of completeness, I will assume that these grounds of review do fall to be considered, despite not being set out in the founding or supplementary affidavits.

[61] It was contended that the arbitrator could not determine if the applicant was able to weld aluminium without the necessary technical evidence about the differences between welding different materials. I am satisfied on the evidence that it was perfectly plausible for the arbitrator to conclude that the applicant was capable of welding aluminium to a standard which was satisfactory to the employer. To the extent that there was a real risk that the applicant would have been unable to weld the aluminium frames properly without causing damage or doing so without a material defect that was an issue for the parties to lead evidence on. I do not think an arbitrator is obligated to solicit evidence on such issues, even if that might yield a more scientifically sound result.

[62] It was also argued that the arbitrator needed to have regarded to so-called 'artisan protocol', namely whether a person in the applicant's position would normally consider himself entitled to decide what jobs he could and could not do. However the existence of such a discretion was never part of the applicant's case. For instance, no evidence was led to suggest that it was not unusual for such a person to refuse to perform certain tasks if, in their judgment, it would be unsafe to do so. By contrast in the case relied on by the applicant, there was extensive evidence on the work practices of a tug master.[10]

[63] Lastly, it was submitted that the arbitrator needed to consider the regulatory framework governing the acquisition and application of technical skills in South Africa and in this regard failed to have regard to OHSA and the regulations. I have already dealt with the fact that the applicant did not pertinently contend that the lawfulness of the instruction depended on compliance with these regulations, but in determining the seriousness of the applicant's infraction, they might well have played a part. In any event, this is an issue to be considered under one of the grounds of review still be dealt with below.

[10] ***MITUSA obo Clarke / National Ports Authority*** [2006] 9 BALR 861 (TOKISO)

[64] In relation to the alternative argument that the employer had not discharged the onus of showing that the instruction was lawful and reasonable, I think the criticism is wrong. Apart from evidence of the applicant's contract, there was the evidence of the applicant's job description which showed that welding was part of his functions and it was not confined to a particular type of welding. There was also sufficient evidence for the arbitrator to conclude that the applicant could perform aluminium welding as he had done so in the past. This evidence was enough in my view for the arbitrator to conclude the instruction had been both lawful and reasonable. If the applicant wished to raise a special defence that the instruction was in breach of a statute or regulations then it was for the applicant to place *prima facie* evidence of that contravention before the arbitrator. The employer would then have to satisfactorily rebut such evidence to discharge the onus.

Failure to consider the seriousness of the applicant's refusal

[65] The applicant lastly contends that the arbitrator failed to consider whether the insubordination was serious persistent and deliberate. The applicant's refusal to perform an instruction which he did not feel qualified to perform did not constitute insubordination according to the applicant and the arbitrator failed to consider this, thus rendering his decision unreasonable.

[66] In argument, it was submitted that the applicant's refusal to perform the aluminium welding was not insubordinate because he made reasonable and measured attempts to explain his situation to the employer and tried to negotiate a workable solution. Further, it was argued that his refusal to comply was made in the *bona fide* belief that his conduct was justified and not as a snub to managerial authority.

[67] The respondent contends there is no difference between refusing to obey an instruction and insubordination. In making this point the

respondent refers to J Grogan's, Dismissal.[11] However, the reference is misplaced because the learned author was not comparing a refusal to obey an instruction with insubordination, but was comparing insubordination and insolence. He makes the point that nothing turns on the distinction between the two latter terms. Nevertheless in identifying what constitutes insubordination, the learned author writes:

> *"It is generally accepted that, to constitute insubordination, an employee's refusal to obey an instruction must be deliberate, and the instruction must be reasonable and lawful."*[12]

In this instance, there is no real dispute that the applicant deliberately refused the instruction to weld the aluminium frames. The arbitrator not unreasonably concluded, on what was before him, that the instruction was a reasonable and lawful. The respondent's own code describes insubordination as "an unwillingness to submit to authority, i.e. direct challenging of the authority of a supervisor."

[68] In terms of the respondent's disciplinary code a wilful refusal to obey a reasonable and lawful instruction could normally be expected to result in a final written warning followed by dismissal and the same approach is recommended for insubordination, though probably in error the code refers to a written warning rather than a final written warning as precursor to dismissal. It should also be remembered that the applicant was not dismissed for insubordination as such but for refusing to carry out an instruction. In the circumstances, it seems it cannot be said that the arbitrator somehow arrived at an unreasonable decision based on some confusion between the two closely related and often overlapping forms of misconduct.

[11] Juta, 2010

[12] Op cit at 196-197

Failure to arrive at a reasonable conclusion on the appropriate sanction

[69] The arbitrator was clearly mindful of what he ought to have considered because he referred in some detail to the relevant case authorities. He decided dismissal was appropriate because:

69.1 The suggested written warning as a precursor to dismissal in the respondent's disciplinary code is a guideline, which can be deviated from if the gravity of the offence warranted it.

69.2 The applicant had no valid reason for refusing the instruction and instead of accepting responsibility for his decision tried to justify his action with reference to medical reasons and concerns about the quality of his work.

69.3 Despite having a month to reflect on his actions, the applicant still persisted in insisting that he was a fitter and turner not a welder a month after the initial refusal to do the aluminium welding and was not willing to comply with his obligations as an employee.

[70] The applicant contends that arbitrator failed to consider the applicant's long service history and other mitigating factors. The applicant concluded that in the light of all these factors the conclusion that the sanction of dismissal was appropriate was unreasonable and one that no reasonable Commissioner would have reached on the evidence.

[71] The applicant submits that it runs counter to the Code of Good Practice: Dismissal which states it is generally not appropriate for an employee to be dismissed for a first offence. This principle the LAC in ***Wasteman Group v SA Municipal Workers' Union & others*** accepted also is applicable also in the case of insubordination.[13] Further, the applicant argued that in finding that there was no reason to interfere with the employer's decision to dismiss him, the arbitrator had failed to consider that the employer's decision had been based on finding him guilty of

[13] (2012) 33 ILJ 2054 (LAC) at 2058I-J

three charges of misconduct, whereas in the arbitration he had been found guilty of one.

[72] The applicant argues that the arbitrator failed to justify his decision that the applicant's conduct 'was deserving of the most severe sanction' as he put it. In this regard, the applicant points out that there is nothing to indicate that the employer considered if some other corrective action might have provided a solution, nor that his clean disciplinary record was taken into account. Lastly, the applicant contends the arbitrator was unduly deferential to the employer's decision contrary to ***Sidumo & another v Rustenburg Platinum Mines Ltd & others*** [14]

[73] I agree with the respondent that merely because the arbitrator expresses the view that he finds 'no reason to interfere with the respondent's decision' to dismiss the applicant, that does not mean that he actually deferred to the employer's reasoning in arriving at his own decision. It can mean nothing more than he came to the same outcome, but based on his own assessment.

[74] Although the commissioner does not expressly deal with the argument that this was a first offence, it is clear that he was perturbed by the fact that a month after the frame welding incident the applicant appeared obdurate in his insistence that he was not obliged to weld. In my view, there is nothing impermissible in considering the applicant's subsequent conduct where it is appropriate to consider if the conduct complained of was a once-off event or was of a continuing nature.

[75] The applicant says the arbitrator unreasonably failed to consider other alternatives to dismissal. Whilst seeking to fault the arbitrator on this issue, it must be said that in challenging the fairness of his dismissal, it was never part of the applicant's case that if he had correctly been found guilty, a lesser sanction would have been appropriate. His attack was focussed entirely on the finding of guilt and procedural deficiencies. The respondent's witnesses were not tackled on why a less serious

[14] 2008 (2) SA 24 (CC);(2007) 28 ILJ 2405 (CC) at 2461-2 at paras [178] – [182].

sanction would have been appropriate even if he was found guilty. Moreover, this was not a case of an illiterate unrepresented employee, who might not have been alive to the need to deal with this issue in evidence. In the circumstances, I do not think that it was unreasonable of the arbitrator not to find that some alternative sanction would have been appropriate, when this was not even suggested by the applicant.

[76] Lastly, I accept that it is conceivable that another arbitrator may, in spite of the features of the applicant's conduct which troubled second respondent, have found that the applicant should not have been dismissed, it cannot be said that the second respondent's assessment of the sanction was an untenable one on the evidence.

Conclusion

[77] In light of the reasoning above, I am not satisfied the applicant has made out a case to review and set aside the arbitrator's award. The fact that a proper case might have been made out in the arbitration that the instruction to perform the welding in question was unlawful because it was contrary to statute cannot assist the applicant in these review proceedings.

[78] Although there is no ongoing relationship between the parties the review application was not frivolous and the nature of the applicant's misconduct was not of an inherently dubious character such as misconduct involving dishonesty but was motivated by a genuine belief that it was justified even if he was unable to establish sufficient reasons to refuse the instruction.

Order

[79] Accordingly, the review application is dismissed and no order is made as to costs.

Lagrange, J

Judge of the Labour Court of South Africa

APPEARANCES

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