REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C324/2014

In the matter between:

GERALD DELPORT	Applicant
And	
SA RED CROSS AMS (AIR MERCY SERVICES)	First Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Second Respondent
COMMISSIONER P VAN STADEN N.O.	Third Respondent

Date heard: 11 November 2014

Delivered: 12 March 2015

JUDGMENT

RABKIN-NAICKER J

[1] This is an unopposed application to review an award by third respondent (the Commissioner) under case number WECT 10511-13, dated 17 March 2014. The Commissioner found that the applicant's dismissal was both substantively and procedurally fair.

[2] The applicant started his employment with the respondent on 1 October 2011 and at the time of his dismissal, he served as a National Operations Centre coordinator. He was charged at a disciplinary enquiry with the following offences recorded in the Award as follows:

"Sexual Harrassment

5. It was alleged that in December 2012 he made inappropriate phone calls to Ms Park – Ross both while she was on duty. He also dispatched her on a fabricated mission and later indicated that it was a "joke".

6. It was also alleged that in January 2013 he made comments of a sexual nature, towards Ms Rose Mizon in the terms of "the younger the better", "no one will hear you scream, "sweetie", and "sweetheart". It was contended that these utterances were sexist and disrespectful.

Gross Misconduct and Insubordination

7. It was alleged that the applicant had, on 2 January 2013, arranged a charter mission for a patient being transferred between intensive care units and such was in contravention of the AMS policies, SOPS and guidelines in terms of quotations and authorization procedures and it also amounted to the unauthorized use of the W/Cape Department of Health's ambulances and air ambulances."

[3] The applicant was on duty on 2 January 2013 in the national operations centre of the first respondent. The centre receives calls and requests for medical air services. During his time on duty there was a patient who was transferred to Johannesburg and was from the ICU of a hospital on the West Coast. The patient had to be conveyed to an ICU unit in Suikerbosrand in Gauteng. The patient had initially made arrangements to fly to the destination on a commercial carrier and the latter agreed with the proviso that she be accompanied by a nurse. The patient suffered from acute renal failure and had a history of cancer since 2007. The commercial carrier then refused to convey the patient as the latter could not sit upright and the patient's family approached the respondent. It was first respondent's evidence that its investigation revealed that the patient's condition justified a full air ambulance configuration. The patient morphine allergy was not properly assessed and

medical equipment was removed from the aircraft by the applicant. The applicant accompanied the patient to Gauteng although he did not qualify to do so unless accompanied by a doctor or an advanced life support paramedic.

[4] The applicant testified at the arbitration that he had issued the quote for the transfer, which was signed off by his base manager and the finance department. He stated that he was not aware of the instruction of 27 December 2013, which recorded that the permission of the CEO had to be obtained even though the email was sent to his official and private email addresses. He confirmed in his testimony that he did not take the medical equipment that was in the aircraft on the journey. He stated that pilots had to perform the weighting and balancing of the aircraft. He had no knowledge where the patient came from and he assisted merely in an endeavor to accommodate the patient. He wanted to know why you should have any remorse in such an event

[5] The Commissioner found that the charge of gross misconduct and insubordination alone was sufficient to uphold the sanction of dismissal. In his analysis of the evidence he stated as follows:

"The only question that needs to be answered is whether the applicant was authorized to arrange for the chartered flight as he did. On the overwhelming evidence against him, it is quite apparent that he was not permitted to do so. He had to source permission from the CEO which he agreed he did not do. His explanation was that he was not aware of the instruction. I have difficulty in accepting this as such instruction was sent to his work and private emails on 27 December 2013.

The conduct of the applicant had put the respondent at serious risk. The patient was in such a condition that the commercial carrier was not prepared to convey her, even with a nurse. This suggested that this was not simply a charter passenger but someone who needed qualified medical attention on the flight. Why the applicant then, after he had authorized the flight for which he did not have the authority to do, would remove the equipment which might well become necessary on the flight escapes me.

The applicant relied strongly on the fact that he had permission of his base manager, Mr Olifant. He did not call Mr Olifant to testify on any of these issues and I am of the view that I ought to make an adverse inference from his omission. It is not that the applicant acted in ignorance. He had a lawyer who assisted him and who was present at all times during the arbitration proceedings. In my view, the probabilities are simply that Mr Olifant's evidence would not support the applicant's version and I must accordingly side with what the respondent has put forward in its case. I am therefore satisfied that the allegation that the applicant, the chartered flight without permission has been proved."

[6] The applicant's grounds for review are set out the founding and supplementary affidavit and amount to the failure of the Commissioner to consider certain facts and give sufficient weight to them. The heads of argument drafted on behalf of the applicant also reveal that no reliance is placed on relevant jurisprudence regarding the review of arbitration awards. Furthermore, no case is made out to allege or establish that the outcome of the award is one that a reasonable decision-maker could not make.

[7] In my judgment, on a reading of the arbitrator's award and the record of the proceedings, the arbitrator's decision is simply not susceptible to review. In this respect, I refer to the matter of **Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others**[1] in which the LAC held:

> "The questions to ask in a review are: (1) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process employed by the commissioner give the parties a full opportunity to have their say? (2) Did the commissioner identify the dispute he or she was required to arbitrate? (3) Did the commissioner understand the nature of the dispute he or she was required to arbitrate? (4) Did the commissioner deal with the substantial merits of the dispute? (5) Is the commissioner's decision one that another

[1] (2014) 35 ILJ 943 (LAC)

decision maker could reasonably have arrived at based on the evidence? “

[8] In respect of all the above questions, the answers are in the affirmative. It is not necessary to consider the Commissioner’s finding on the sexual harassment charges as his decision that the gross misconduct charge alone was sufficient to uphold a sanction of dismissal cannot be challenged. As the Commissioner stated: “one merely needs a little common sense to realize what would have happened had the patient died on the flight. The craft did not have the recommended equipment on board nor was the patient in the company of someone who was adequately qualified to accompany the patient. The conduct of the applicant potentially exposed the respondent to criminal and civil liability……”

[9] In all the circumstances, I therefore make the following order:

1. The review application is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Mr Coereius of Parker Attorneys