



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number C410/2014

In the matter between:

VUKILE GOMBA

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

COMMISSIONER K KLEINOT NO

NAMPAK TISSUE (PTY) LTD

First Respondent

Second Respondent

Third Respondent

Date heard: 15 April 2015

Delivered: 20 August 2015

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review an arbitration award under case number WECT5100-14 in which the second respondent (the Commissioner) found the dismissal of the applicant to be substantively and procedurally fair.
- [2] The applicant was employed as an electrician from the 1 November 2003 until the 6 February 2014. At the time of his dismissal he was earning R16,153 84, a provident fund contribution of 1,211 54 and insurance of R726 92. He was charged with misconduct in that he was absent from work without authorisation from 17 December to 3 January 2014. It was common cause that he was not at work on the days cited. He had no valid written warnings for a similar offence. His application for annual leave was submitted on 2 September 2013 and again on 6 December 2013. It was also common cause that applicant was due 39.3 days leave.
- [3] The transcript of the arbitration reflects the events leading up to the charges against applicant. The applicant's manager Mr Essa (Essa), testified that the applicant applied for leave in September for the dates 23 December 2013 to the 15th of January 2014. This was declined due to operational requirements because the company could not operate with one electrician. There was a grievance hearing and management put forward alternative dates being the 17 of December until the 2nd of January 2014. According to Essa the applicant was not happy with the dates but accepted them. After the grievance hearing applicant came back to Essa later that afternoon and wanted to extend the dates. Essa told him that unfortunately the company could not because applicant was on stand-by at the weekend and the company only had one electrician at that time. He then took applicants leave application form, and put in the dates the company offered and signed it. He gave it to Kim Charles who does the time-keeping and asked her to process it.
- [4] Two days later Essa found another leave application form next to his computer with the dates applied for now the 17th of December to the 3rd of January 2014. Essau took this to his manager who denied the leave. The evidence in chief of Essau is recorded as follows:

“Ms Rosanna: Did you inform Mr Gomba of this?

Mr Essau: Yes what I did was I took both leave forms to him, I made copies of it and I gave it to him.

Ms Rosanna: And what did you say?

Mr Essa: And I informed him that according to the leave application forms none of it, one has been cancelled and the other one has not been authorised either, so he cannot actually go on leave.....

I have told him, I again told him that according to this forms he has no authorised leave and he cannot go on leave and he responded on that and he said will just go.”

[5] The evidence given by the administrator Ms Charles was that the applicant came to see her “because, what he told me was the dates are incorrect, Essa wrote the wrong dates on the form....I told him but the form looks really ugly I will advise you why we don’t we write out, make out another form....He said okay fine and then he wrote out another form he did not put dates on he just wrote his name and employee number and then he walked out the door and before he left the office he told me ‘don’t forget to cancel the form’. She further testified that “the second form was brought to me with a note at the bottom,’ leave denied’. Mr Essa asked me to make copies of both leave forms so that we can give it to Mr Gomba so that he is aware that the one form was cancelled and the other forms says denied.”

[6] The evidence of Mr Prince Ngobe (Ngobe), Operations Manager at the arbitration and chairperson of the disciplinary enquiry is worth recording. He stated that: “I found Mr Gomba to be – what is the word – not have respect for authority or management because after all the discussions and proceedings that had taken place, he still went ahead and changed his leave form according to his liking which invalidates the agreement that was made to him with him to take leave from the 17th to the 2nd. Already he is going back to the originally cancelled, sorry not cancelled, but not approved leave application by putting the date of the 3rd, thereby technically he does not have authorised leave”.

- [7] The Commissioner, in analysing the evidence before him stated the following in the award:

“24. The basis for the challenge of the dismissal is the fairness of the sanction and the fact that Mr Gomba believes that the leave that he took had been authorised. The challenge to the fairness of the sanction is dependent on the merits of the case. The view that Mr Gomba’s leave was authorised is patently incorrect. Mr Gomba’s own evidence was that he rejected the period Mr Essa had authorised and regarded it as fraudulent. Further that Ms Charles was then instructed to remove the authorised leave from the system. To argue that this leave was authorised is nonsensical. The second application reflected an extra day, the 3 January 2014, this was inserted by Mr Gomba who was aware that this was not was offered or suggested. “

- [8] The Commissioner also records that it was Gomba’s evidence that he had traditional ceremonies to perform in the Eastern Cape. This was the reason he wished to have the leave extended for one day, the Friday 3rd January. In Gomba’s view the only unauthorised leave he took was the 3rd of January.
- [9] It is submitted by applicant in his founding papers that the Commissioner’s failure to consider the issue that the employer had cancelled all of applicant’s previously authorised leave, amounted to a gross irregularity. Further that the Commissioners failure to take due account of the evidence that the period from 17 December to 2nd January had been authorised, had led to an unreasonable result.
- [10] In my view, the Commissioner does not reflect that he gave any consideration to an essential enquiry i.e. whether the company issued a reasonable instruction, in telling the applicant that he could take no leave at all. The omission was compounded by the Commissioner’s apparent acceptance of the company’s proposition that the applicant cancelled the authorised leave himself, when he made a new application which included the previously authorised period, plus the 3rd January. This was despite the evidence given by Ms Charles that she herself had written ‘cancelled’ on the first leave form and that this did not mean that the

leave was cancelled as she had no authority to do this. It meant only that the form was cancelled. The entire leave became cancelled on decision of management.

[11] In **Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA)** the court held that:

“[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

[12] The decision to cancel all applicant's leave by the company and to order him not to take leave at all, was material evidence before the Commissioner. The failure of the Commissioner to accord this evidence any weight and to accept that the applicant cancelled his leave himself, led to an unreasonable result i.e. that applicant's dismissal was fair on the basis that he had absconded for the whole period in question. I therefore find the award susceptible to review. There is no purpose in remitting the award. The substitution of the award should take into account that the applicant was insubordinate in taking the additional day's leave off without authorisation. I therefore make the following order:

Order:

1. The award under case number WECT 5100-14 is reviewed and set aside and substituted as follows:

“1.1 The dismissal of the applicant was substantively unfair;

1.2 The third respondent is ordered to reinstate the applicant into the position he held prior to his dismissal as from the date of his dismissal;

1.3 Such reinstatement is subject to a final written warning in respect of the taking of unauthorised leave valid for a period of six months from date of this order;

1.4 The respondent is to pay the costs of this application.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

For the Applicant: Bagraims Attorneys

For the Third Respondent: MJ Van As instructed by Cliffe Dekker Hofmeyer Inc