THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not reportable

Case no: C985/2014

In the matter between:

MAX MODELS CC **Applicant**

And

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

JOHN M BROWN N.O. **Second Respondent**

STEPHANIE PETERS **Third Respondent**

Heard: **21 May 2015**

Delivered: **2 February 2016**

Summary: Review application. The applicant contends the award in which an employee's dismissal for poor work performance was found to be both procedurally and substantively unfair is reviewable. Applicant contends the commissioner incorrectly applied the principles relating to the employer's "right to right a wrong" and that no compensation ought to have been awarded.

JUDGMENT

RALEHOKO AJ

Introduction

[1] The third respondent ("the employee") referred an unfair dismissal dispute to the CCMA after she was called to a meeting where she was informed that her performance was below the expected standard and therefore she should leave the premises immediately. The matter could not be resolved during conciliation. Two days after the conciliation meeting, the applicant, through its legal representatives addressed a letter to the employee instructing her to report for duty as she was still under the notice period and that she had been re-instated. She rejected the offer of re-instatement.

[2] In subsequent arbitration proceedings, the second respondent (the commissioner) found the employee's dismissal to have been both procedurally and substantively unfair, *inter alia*, because the offer of re-instatement was not genuine. She was awarded 3 months compensation.

[3] In these review proceedings the applicant takes issue with the award on the grounds, *inter alia*, that the commissioner misapplied the law as regards the principle of "the right to right a wrong". The applicant also takes issue with the award of 3 months compensation. The employee opposes the review application.

Background facts

[4] In the arbitration proceedings, the applicant did not call any witnesses in support of its case. The employee testified on her own behalf.

[5] Applicant specialises in the development and management of models and the employee was employed as a model booker. The employee's main responsibility was to secure bookings for models with both foreign and international clients.

[6] The employee commenced employment with the applicant in January 2013. When she joined the applicant, the employee had no experience in

booking models. She received on the job training. It was in dispute whether the training received was adequate.

[7] The employee's probation period was extended for 3 months but this was not unusual at the applicant.

[8] The applicant shutdown for the festive season from 21 December 2013 to 5 January 2014. Before the shutdown, the employee received an R8000 bonus as well as a Christmas card from the managing member of the applicant, Lynn Maxwell (Lynn), stating "*Thank you for the wonderful year, you have really become part of the team*. *Well done. Lots of Love Lynn".*

[9] The employee returned to work after the shutdown and worked without incident. She went on annual leave from 24 June 2014 and returned to work on 14 July 2014.

[10] A week after her return from leave and on 23 July 2014, Lynn confronted the employee and accused her of *inter alia* poor work performance, spending a lot of time in the kitchen and on the computer attending to non-work related stuff. Of the 3 employees who were responsible for booking models, the employee had generated R604 091.73 of the applicant's 2013/2014 turnover of R7 569 630.05, which was the least amount. Lynn informed the employee that it was not working and that she should rather leave immediately and to communicate her decision the following morning on whether she would resign or go the CCMA route. The employee left the premises soon after that encounter with Lynn.

[11] Later that day, the employee received an e-mail from Lynn confirming the discussion held earlier that day that her employment was being terminated due to incapacity because "*I do not believe that your performance will change and I believe 18 months has been more than enough time to fulfil your employment obligations*". She was informed that she would be paid *in lieu* of notice.

[12] The employee referred an unfair dismissal dispute to the CCMA on 28 July 2014 and the matter was unsuccessfully conciliated on 15 August 2014.

[13] On 18 August 2014 the applicant's attorneys of record addressed a letter to the employee instructing her to report for duty as she was still on notice. She was also informed that she had been re-instated.

[14] The employee's legal representative responded on the same day rejecting the offer of re-instatement.

[15] During the arbitration proceedings and in response to the allegations of poor work performance, the employee stated that she was aware of corporate but not individual targets. She testified about how she invoiced for more and smaller jobs than her two colleagues. She also testified that she filed e-mails in clients' folders which might have led Lynn to believe that she sent fewer e-mails. She denied spending a lot of time in the kitchen making toast or that she spent a lot of time on the computer attending to non work related stuff.

[16] She also explained her decision to reject the offer of re-instatement which she did not regard as genuine.

[17] A month after her dismissal, the employee found employment as an Operations Manager in Durbanville, far from her home, at a substantially reduced salary than what she earned at the applicant.

[18] She was not paid her notice pay, which was due at the end of August 2014.

<u>The award</u>

[19] Procedural fairness was not in issue, the only issue being substantive fairness.

[20] The commissioner started the analysis of the evidence by pointing out that the applicant bore the onus to prove that the dismissal was substantively fair but that inexplicably it led no sworn evidence.

[21] The commissioner found the employee to have been *reliable, highly credible, open* and *frank*. He accepted the employee's evidence that she had no personal targets to meet but rather corporate targets and that Lynn had on about 5 occasions encouraged all bookers to increase the financial

value of their model bookings but had not singled out the employee in that discussion.

[22] The commissioner further found that the employee had at no point been confronted about her performance, that in fact she was unaware of what she was costing the applicant and that she had not been given a chance to explain her perceived shortcomings. The commissioner attached significance to the christmas card that the employee received in December 2013 and noted that this was despite that in the period immediately preceding that December, she had costed the applicant.

[23] The commissioner further found that the applicant's gross flouting of the guidelines in the Code of Good Practice dealing with dismissals for incapacity impacted on the substantive fairness of the dismissal.[1]

[24] On relief, the commissioner considered the submissions made on behalf of the applicant, that the employee's refusal to accept the offer of re-instatement disqualified her from receiving compensation. The commissioner stated that the issue for determination was whether the offer of re-instatement was genuine and reasonable and found that it was not, for the following reasons:

24.1 the applicant did not offer re-instatement when the matter was conciliated as had happened in the case authority that the applicant was relying on.

24.2 there was no indication that the applicant accepted that it acted unfairly or had wronged the employee.

24.3 there was no indication that in making the offer to re-instate, the applicant was not looking for an opportunity to simply follow procedures and ultimately dismiss the employee; and

24.4 the offer of re-instatement smacked of bad faith.

[1] The Code requires an employer to consider whether the employee failed to meet a performance standard and if so, whether the employee was aware or could reasonably be expected to have been aware of the standard, whether the employee was given a fair opportunity to meet the required standard and lastly whether dismissal was an appropriate sanction for not meeting the required standard.

[25] As has already been stated above, the commissioner found the dismissal to have been both substantively and procedurally unfair and awarded 3 months compensation.

Grounds for review

[26] The applicant submits that in general the commissioner committed material errors of law and owing to those errors, he misconstrued the nature of the dispute and asked the wrong question, which deprived the parties of a fair trial.

[27] More specifically the applicant argues that in arriving at the conclusions that the commissioner arrived at, he acted inconsistently and contrary to his duties and obligations by, amongst others:

27.1 disregarding the nature and extent of the inquiry and therefore exceeding his powers.

27.2 ignoring evidence, *inter alia,* that the employee had been offered intensive training, that she had been spoken to about her failure to perform at acceptable levels, the loss suffered by the applicant as a consequence of the employee's performance and that the employee was offered and rejected re-instatement.

27.3 accepting and relying on irrelevant evidence and reaching conclusions that are not rationally connected to the evidence. It is alleged that the commissioner focused his inquiry almost exclusively on third respondent's version that the employment relationship was strained when there was no evidence to support this.

27.4 erroneous interpretations of the issues and material errors of law about the legal principles applicable to unconditional offers of re-instatement which are rejected and the effect on relief to be granted.

27.5 the failure to have regard to what would have been fair to both parties.

[28] The award is also attacked on the general ground that it is not reasonable. I deal with this ground first.

Reasonableness of the award

[29] The test applicable in reviews is by now well settled and both parties referred to the relevant authorities in their heads of argument as well as in oral argument. The question is whether the decision arrived at by a commissioner is one that no reasonable decision maker could have come to.[2] An award falls to be set aside if the conclusion falls outside a range of what is considered reasonable.

[30] As has already been stated, the applicant conceded procedural unfairness but sought to defend its decision to dismiss on substantive grounds.

[31] The only evidence placed before the commissioner by the employee has already been summarised above. The commissioner found the employee to be a reliable and credible witness who was frank during her testimony.

[32] The applicant elected not to lead evidence to explain its reasons for dismissing the employee or its conduct. The commissioner lamented the applicant's approach given that it bore the onus to prove that the dismissal was for a fair reason. In argument Mr Benade correctly conceded that the applicant's failure to tender evidence during the arbitration proceedings creates difficulties.

[33] Given the uncontroverted evidence of the employee as summarised above, the commissioner's finding that there was no fair reason to dismiss is without a doubt, one that falls within a band of what is considered reasonable. The employee was unaware of individual targets and was oblivious to the fact that Maxwell had concerns about her performance. At no point prior to 23 July 2014 was she confronted about her performance as an individual. In fact in December 2013 she had been given a bonus and her contribution to the business was acknowledged in a christmas

[2] *Sidumo & Ano v Rustenberg Platinum Mines Limited & Others* 2008 (2) SA 24 (CC) at para 110.

card. In the 6 months preceding the meeting of 23 July, the employee's performance had in fact improved. There was no evidence that the employee had done anything wrong.

[34] There is therefore no merit to the applicant's contention that the award is unreasonable. I will nevertheless consider the other grounds of review raised.

The "right to right a wrong"

[35] After finding that the dismissal was substantively unfair and it being common cause that the dismissal was procedurally unfair, the commissioner went on to determine whether the employee was entitled to compensation for the unfair dismissal.

[36] Applicant submits that the employee was not entitled to compensation as she had refused an unconditional offer of re-instatement. In that regard the applicant relies on the decisions of the Labour Appeal Court in ***Kemp t/a Centralmed v Rawlins***[3] and that of the Supreme Court of Appeal reported as ***Rawlins v Kemp***[4]. These are the same case authorities that the applicant relied upon during the arbitration proceedings and were considered by the commissioner, as is evident from the award.

[37] In these proceedings the applicant persists with its submission that it should be open to an employer to remedy a procedurally unfair dismissal through a bona fide offer of re-instatement. The applicant criticises the commissioner for (a) focusing his entire investigation on whether the offer to re-instate was genuine and reasonable, (b) ignoring the concession made by the employee during cross examination that the offer was unconditional and (c) taking into account the employee's subjective views that the employment relationship had become intolerable.

[38] I will now deal with each of these arguments in turn.

[3] (2009) 30 ILJ 2677 (LAC).

[4] (2010) 31 ILJ 2325 (SCA).

(a) Whether the offer of re-instatement was genuine and reasonable

[39] It was not in dispute that on 18 August 2014 the applicant's attorneys sent the employee a letter instructing her to report for duty because she was on notice as she had been retrospectively re-instated. The employee rejected the offer of re-instatement.

[40] An employer has a right to remedy an unprocedurally unfair dismissal by offering to re-instate. In ***Rawlins v Kemp t/a Centralmed*** the Supreme Court referred to this principle as the employer's "right to seek to right the wrong".

[41] The case authorities that the applicant relied upon during the arbitration proceedings and in these proceedings[5] emphasise the fact that the offer to re-instate must have been *bona fide* and not a sham. The offer must be genuine and reasonable. It is therefore incorrect, as submitted by Mr Benade in oral argument, that the offer of re-instatement itself is sufficient. It must be a *bona fide* offer of re-instatement.

[42] The commissioner found that the offer to re-instate was not genuine and reasonable. The applicant criticises the commissioner for confining the inquiry to the genuineness of the offer and also submits that the offer was in fact *bona fide*.

[43] Since the genuineness of the offer to re-instate is an important part of the investigation whether or not an employee acted unreasonably in rejecting an offer of re-instatement, the criticism that the commissioner focused his entire investigation on the genuineness of the offer must be rejected. Once it has been established that the offer to re-instate was not genuine, that should be the end of the inquiry.

[44] The applicant's submission that the offer to re-instate was *bona fide* was considered and rejected by the commissioner, with reasons. That finding is unassailable and there is no basis for interfering with it.

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[5] *Van Niekerk v Cheque Guarantee Services* (2001) 22 ILJ 728 (LC), *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (199) 20 ILJ 89 (LAC), *Basson v Cecil Nurse (Pty) Ltd* (2001) 22 ILJ 673 (LC).

[45] That the employee conceded that the offer was unconditional is not decisive because she also testified that she was concerned that the offer to re-instate was made to afford the employer an opportunity to dismiss her after following procedure. The applicant could have rebutted that version if it had a different motive in offering to re-instate the employee. It chose not to do so. In any event Lynn made it clear to the employee on 23 July 2014 that if she chose to come back, the applicant would go through the process of issuing warnings. That statement was never retracted.

[46] Making an offer of re-instatement solely for purposes of subjecting an employee to an inquiry to remedy procedural flaws arose in ***Setcom (Pty) Ltd v Dos Santos and Others***[6]***.*** There the court found that the offer to re-instate was not made to restore the status *quo* before the dismissal but was contrived to portray the employers' actions as an upliftment of a suspension in order to allow it to pursue a disciplinary hearing. The court found that the offer to re-instate was not genuine. I align myself with the views of the court that where an employer makes an offer to re-instate for other reasons other than to restore the status *quo* before dismissal, the employer's motives become a relevant factor in deciding whether the employee was justified in rejecting the offer of re-instatement

[47] Although there appears to be merit in the submission by Mr Kantor that the letter from the applicant's attorneys did not constitute an offer but rather an authoritarian instruction, I have approached the matter from the same basis that the commissioner approached it, which is that the offer was made but it was found not to be genuine. In any event the commissioner's finding that an offer was made is not the subject of a counter review by the employee.

(b) <u>Breakdown of the employment relationship</u>

[6] (2011) 32 ILJ 1434 (LC) at para 36.

[48] The applicant submitted that there was no evidence of a breakdown of the employment relationship and that the employee merely expressed her subjective views.

[49] The applicant also relies on a statement by the employee that the relationship with the employer was fine. If one has regard to the employee's entire evidence, it becomes clear that she was referring to the period prior to 23 July 2014. Everything changed on 23 July 2014.

[50] As regards the breakdown in the trust relationship, the employee testified that;

50.1 "*This issue of trust I think it is quite clear that I am not – she does not want me there that it is not an option that I come back to work out my notice period*" and;

50.2 "*I did not believe that this was a sincere re-instatement of my employment. The e-mail from Lynn made it quite clear that there was no room for me there*" and;

50.3 "*I have been terminated it is very clear in this e-mail on page 11 that it is- that there is no return*" and also;

50.4 "*First of all I would have to go back into an office with colleagues that know that I have been fired. Secondly, I would not trust that I am back there to work there for good. I could not because I would feel I am just back in there so that she can follow procedure properly. That means just prolonging agony…"*

[51] The applicant could have rebutted that evidence but chose not do so. In oral argument it was submitted that the applicant chose not to rebut that evidence because it regarded the employee's evidence on this issue as insufficient. That is the risk that the applicant took and it cannot now criticise the commissioner for the findings he made based on the uncontroverted evidence of the employee.

[52] Since the employee was of the view that she was no longer wanted at work and in circumstances where Lynn did not disavow her previous stance that it was not working, the trust relationship had already broken down.

[53] The applicant's further submission that the relationship could have been mended after a short period of time was not placed before the commissioner and I need not entertain it in these proceedings.

(c) Whether the commissioner should have granted compensation

[54] Mr Benade for the applicant submitted that the commissioner misconstrued the meaning and import of the discretion afforded to him in terms of section 193(1) (c) of the Labour Relations Act No 66 of 1995[7] and that on a proper evaluation of the facts and circumstances, his decision was judicially incorrect.

[55] As I understood the applicant's argument, it was that the commissioner ought to have exercised his discretion against granting the employee compensation because she rejected an unconditional offer of re-instatement.

[56] The submission ignores the fact that the commissioner found that the offer to re-instate was not genuine and not reasonable. An employee is justified in rejecting such an offer and when that happens, that employee should not be denied compensation.

[57] The commissioner correctly distinguished the facts in ***Rawlins v Kemp*** where the court refused to award compensation. The offer to re-instate Dr Rawlins was made in good faith (which was not in dispute), the offer was made repeatedly and there was no evidence of a breach of the trust relationship. In contrast, in the matter before the commissioner, the offer to re-instate was not genuine and the commissioner found that it in fact smacked of bad faith, that the applicant did not apologise for its actions and that it also did not disavow its stance to issue warnings and ultimately dismiss the employee.

[7] The section provides as follows:

(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-

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

[58] The authorities relied upon by the applicant to argue that the employee should have been denied compensation all confirm that an employee may be denied compensation where they unjustifiably rejected a genuine and reasonable offer of re-instatement. Where the offer of re-instatement is not *bona fide*, as the commissioner found was the case in this matter, there is no reason why an employee who rejects such an offer should be denied compensation.

[59] The ***Johnson & Johnson (Pty) Ltd v CWIU***[8] decision which the applicant seeks to rely on does not assist it. In that matter, only procedural fairness was in issue. In the present matter, the dismissal was found to have been both procedurally and substantively unfair.

[60] I must also point out that the ***Johnson & Johnson*** decision predates the 2002 amendments to the LRA. The current section 194(1) provides that the compensation to be granted to an employee whose dismissal is found to be unfair, either substantively or procedurally, must be 'just and equitable in all the circumstances' to both the employer and the employee, subject only to the maximum limits set out in the section.

[61] In my view 3 months compensation for a substantively and procedurally unfair dismissal was just and equitable. Other relevant considerations were that although the employee had found another job a month after leaving the applicant, she now earned considerably less than she earned whilst working for the applicant and the fact that the applicant did not pay the employee her notice pay in August 2014 salary as promised.

[62] The commissioner's award of compensation must stand.

[63] I find that the commissioner correctly applied the legal principles as regards the "right to right a wrong" and whether or not to grant compensation. I also find that the award is not one that no reasonable decision maker could reach. The review must fail.

Costs

[8] [1998] 12 BLLR 1209 (LAC)

[64] Both parties submitted that costs must follow the result. Taking into account the requirements of law and fairness, this is an appropriate approach to take in the matter.

Order

[65] In the premises I make the following order.

65.1 The review application is dismissed.

65.2 The applicant is ordered to pay the third respondent's costs, including the costs of counsel.

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TC Ralehoko

Acting Judge of the Labour Court

Appearances

For the Applicant:	Advocate E Benade
Instructed by:	Carelse Khan Attorneys
For the Third Respondent:	Advocate Peter Kantor
Instructed by	Dorrington Jessop Attorneys