Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C89/2017

In the matter between:

UNITRANS SUPPLY CHAIN SOLUTIONS (PTY) LTD	**Applicant**
and	
THE NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY (NBCRFLI)	**First Respondent**
COMMISSIONER C M BENNETT (*NO*)	**Second Respondent**
IVAN JURIES	**Third Respondent**

Heard: 8 August 2018

Delivered: 15 August 2018

Summary: (Review – misdirections leading to irrationality.)

JUDGMENT

LAGRANGE J

Background

[1] This is an opposed review application of an award in which the arbitrator found that the third respondent, Mr I Juries ('Juries'), was dismissed by the applicant ('Unitrans') unfairly because he did not deliberately falsify payroll information which caused a shop steward to receive remuneration he was not entitled to. The arbitrator found at worst that Juries did not carry out his duties as he should have and that Unitrans should have treated the matter as a case of poor performance rather than misconduct involving dishonesty. He also found that reinstatement was an appropriate remedy.

[2] I do not intend to summarise the evidence before the arbitrator or his award. They form part of the record.

[3] Unitrans essentially raised five grounds of review, some of which bear more serious consideration than others. In summary, the grounds of review are:

3.1 The arbitrator committed a material misdirection deciding that negligently providing information which resulted in an overpayment on more than one occasion to a shop steward, Mr G Coetzee ('Coetzee'), did not warrant dismissal because the company had considered and offered Juries demotion from his position as a contract supervisor, as an alternative to dismissal. The applicant claims that the arbitrator failed to appreciate that the proposed demotion was only acceptable as an alternative because Juries would not have been engaged in a position which entailed the same degree of trust or responsibility as a contract supervisor.

3.2 In a related ground of review, the Unitrans contends that the arbitrator misdirected himself in deciding that it should have subjected Juries to further training in circumstances where he had

never raised a lack of proper training for personal incapacity as a reason for providing the incorrect information which resulted in the overpayments. Moreover, Juries had been performing the duties of a contract supervisor for three and a half years. Further, Juries had not acknowledged or admitted making errors but had initially claimed that the shop steward was entitled to the payments. In addition, the evidence showed that Juries was fully familiar with the biometric clocking system and that it was supposed to be used, but he placed little reliance on it. This was not evidence of lack of training or expertise on Juries' part, but an unwillingness to use the system. There was no evidentiary basis to conclude that, what he lacked was sufficient training.

3.3 The arbitrator had concluded that because the overpayments were only discovered after investigating whether the recipient of the payments was engaged in conducting a private business, it could not be inferred that the overpayments were a result of intentional misrepresentation on the part of the employee, because if the investigation had been wider it might have revealed that other misrepresentations about hours worked by other employees had been made, which would indicate that it was not intentional.

3.4 Unitrans contends that in the light of the evidence that Juries knew that the shop steward was leaving work early in order to collect his son from school, it is inconceivable that he believed he was entitled to be paid for those hours. Further, there was no documentary evidence to support the employee's claim that the shop steward was indeed engaged in legitimate union activity for which he was entitled to be paid, and Juries had conceded that such supporting documentation was required. Moreover, the applicant claims that the Juries' justification for authorising payment of the shop steward was inconsistent and changed during the course of the hearing. Further, Juries had contended that he had only relied on trip/time sheets to calculate the hours owed to the shop steward without considering biometric clocking records as he was required to, yet there were instances where the shop steward received payment even when

those limited records showed he was not at work, such as one occasion when the timesheet showed Coetzee was at work for an hour, but Juries credited him with 9 hours at work. In the circumstances, had the arbitrator taken this into account, he could not have reasonably concluded that Juries' conduct was not intentional.

3.5 Coetzee appears not have been charged with misconduct relating to the improper payment he received and the arbitrator concluded that this meant either that no overpayment occurred or that Unitrans did not regard it as sufficiently serious to warrant action being taken against him. Unitrans contends that it was improper of the arbitrator to have regard to this when it was not something that Juries made an issue of in the arbitration and the arbitrator did not even ask it to address him on this issue.

Evaluation

[4] In relation to the first ground of review, I agree with the applicant that, taken to its logical conclusion, it would mean that no employer who offered an employee demotion as an alternative to dismissal would be allowed to defend the subsequent dismissal if the employee refused that alternative. That is an untenable proposition. Because an employer cannot contemplate retaining a person in a certain position because of the risks that would pose by them continuing to perform that function, it does not mean that it might not reasonably willing to retain them in a post where those risks do not exist, or are minimal. Likewise, if they cannot place them in that alternative post, it does not mean retaining them in their existing one becomes any more feasible. The arbitrator's logic is fundamentally flawed in seeing the offer of demotion as necessarily meaning that Juries' dismissal from his post as contract supervisor was not justified. See also ***Public Servants Association of South Africa obo Ntsime v Education Labour Relations Council and Others***.[1]

[1] (JR2452/10) [2014] ZALCJHB 119 (3 April 2014) at para [33] in which the alternative of demotion was construed as a benefit offered to the employee.

[5] As to whether the arbitrator misdirected himself in deciding that Juries conduct should have been handled as a performance matter, there are two fundamental problems with that approach. The first is that, an arbitrator deciding the fairness of a dismissal must assess the fairness thereof in relation to the reason given by the employer. If the employer cannot justify the dismissal on that basis, it will fail. What an arbitrator should be very wary of is to consider whether the employer ought to have dealt with the employee's conduct on a completely different basis and then evaluate the fairness of the dismissal with reference to the test applicable to that type of dismissal, when that was not the reason advanced by the employer for the dismissal. If the arbitrator is satisfied incompetence rather than misconduct was the explanation for the employee' behaviour, then the employer will not succeed in justifying the fairness of the dismissal based on misconduct. Secondly, in a case of misconduct when the employee does not raise incapacity of some kind as a defence, it is improper of an arbitrator to make findings on this basis when the employee themselves had not raised it. That is tantamount to making out a case for a party and gives rise to an inference of possible bias on the part of the arbitrator, apart from meaning that the arbitrator embarked on an enquiry they were not supposed to. Accordingly, the award must be sustainable once all the arbitrator's inferences and findings based on this misdirection have been removed from consideration. In this instance, the main effect seems to have been that, it led the arbitrator to take his 'eye off the ball' so to speak, and to focus on a defence for Juries' of his own making, instead of dispassionately assessing the probabilities whether Juries' conduct most probably reflected negligence rather than wilful misrepresentation of Coetzee's hours worked.

[6] I agree that the arbitrator's reasoning in concluding that there might have been other 'errors' made in respect of hours credited to other staff by Juries, which simply weren't discovered because they were not investigated is highly speculative and irrelevant. It should have played no part in his reasoning. However, I am not sure ultimately, it is a decisive factor in the arbitrator's chain of reasoning. However, it also raises a concern that if Juries intended to raise a defence of incompetence or lack

of training, then it was for him to raise examples of other 'errors' he claimed to have made. It was not for the arbitrator to speculate about the outcome of a potential defence that was never even advanced at the arbitration.

[7] The fourth ground is perhaps the most telling. There simply was insufficient evidence for the arbitrator to reach the conclusion that the overpayments were merely a result of negligence on Juries' part, when there was significant evidence that cried out for a coherent explanation from Juries as to how it could simply have been an error rather than deliberate. Thus, while the arbitrator was willing to speculate about errors that might have been made, the arbitrator did not consider evidence of 'errors' made in Coetzee's favour, for which no explanation was provided, for example when he was credited for being on union training when he was rostered to be on night shift and there was no supporting documentation as evidence of any union training program. It is here that the arbitrator's reasoning reveals itself as most wanting because it goes to the heart of his decision that intent on Juries' part was absent. By construing the issue as being one of incapacity, the arbitrator was able to skirt the obvious deficiencies in Juries' defence that his conduct was not intentional.

[8] In relation to the fifth ground, it is true yet again that an issue not raised by Juries was given some weight by the arbitrator, though it is difficult to see how significant this was in arriving at his conclusions and whether it had a decisive distorting effect on his reasoning.

[9] In conclusion, I am satisfied that the review should succeed on the basis of the first, second and fourth grounds of review. I am also persuaded that the grounds identified showed that the arbitrator adopted lines of reasoning which, at the very least, distracted him from the issues he had to determine and at worst led him to reach conclusions which could not be justified on the evidence. In particular, these led him to find Juries not guilty of intentionally misrepresenting the hours worked by Coetzee resulting in him being overpaid and in failing to appreciate the seriousness of retaining Juries in the position of trust he occupied. In relation to the

latter issue, it should be mentioned that at the arbitration, Juries did not advance the argument that the alternative position he was offered entailed as much responsibility as his previous one and therefore did not indicate a lack of trust on the part of the employer about his honesty.

[10] Had the arbitrator not misdirected himself, I am persuaded he would have been compelled to conclude that Juries dismissal for misconduct was substantively fair.

Order

[1] The arbitration award issued on 11 January 2017 by the Second Respondent under case number WCRFBC 40744 is reviewed and set aside.

[2] The Second Respondent's effective finding that the Third Respondent was not guilty of misconduct in the form of deliberately supplying false information in that, during the period 1 August 2015 to 31 January 2016 he submitted hours for Gert Coetzee to receive payment, for which the latter was not entitled, is replaced with a finding that he was guilty of that misconduct and dismissal was an appropriate sanction in the circumstances.

[3] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	N Preston of Cliffe Dekker Hofmeyr Inc.
THIRD RESPONDENT:	In person