IN THE LABOUR COURT OF SOUTH AFRICA

(CAPE TOWN)

CASE NUMBER : C667/2016

DATE : 5 DECEMBER 2018

In the matter between:

RAINBOW FARMS (PTY) LTD Applicant

And

NUFWBSAW obo E JORDAAN First respondent

CCMA Second respondent

Commissioner I DE VLIEGER-SEYNHAVE Third respondent

JUDGMENT

STEENKAMP, J:

This is an application to have an arbitration award by Commissioner De Vlieger-Seynaeve of the CCMA reviewed and set aside. It arises from the dismissal of Mr E Jordaan who was a maintenance fitter at Rainbow Farms (Pty) Limited. He was dismissed because he had incorrectly filled out his attendance register on two occasions, on the 19th and the 29th September 2012. Because of that he was charged with dishonesty. The charges read as follows:

1. "You are hereby charged for alleged dishonesty in that it is alleged that you recorded your clocking time in excess of the actual reported clocking as per payroll

for the period of 19 September 2012; and

2. You are charged for alleged dishonesty in that it is alleged that you recorded your clocking times in excess of the actual reported clocking as per payroll for the period of 29 September 2012."

Before dealing with the two specific incidents it is important to note the ways in which working hours were or are recorded in Worcester at Rainbow Farms. It is common cause that there is an electronic system called *Blick* as well as the manual attendance register. Mr *Geldenhuys* submitted that in her reward the arbitrator did not sufficiently distinguish between these two ways of clocking and more specifically the use of the physical attendance register in the maintenance department where Mr Jordaan worked. He referred in that regard to the evidence as reconstructed and specifically the following extract where Mr Jordaan says:

"Die *daily attendance* Steve [Le Roux] gebruik dit. Hy werk net volgens daai papier. Rainbow prosedure sê hulle werk met Blick."

It is then put to him:

"Dit word gebruik as kontrole dokument. Presies."

And he responds:

"As backup."

In that regard the arbitrator notes that it is common cause that the times were wrongly recorded on the 19th and 29th September 2012. She then says:

"However, a distinction must be made as to whether this document, referring to the attendance register, is the original document which is used to base the payment of the salary on or if this document is used as a control document. Through all the evidence that was submitted it was confirmed that the Blick system which records the time when an employee is at a door is used to record the attendance and to

calculate the salary. The attendance register on the other hand is still used by certain supervisors to double-check the attendance and is also used when the Blick system is not working. If someone therefore wishes to claim extra hours for which he had not worked it will be extremely difficult to do so via the attendance register."

That conclusion is entirely reasonable in the light of the evidence before the arbitrator of which the portion that I have just quoted forms one part. The Court has also had regard to the full transcript of the evidence at arbitration. It must also be noted that it is common cause that the Blick system was working on the 19th and the 29th September and that no extra overtime was paid to Mr Jordaan. This conclusion of the arbitrator as I have said is reasonable and is not open to review.

I then turn more specifically to the two incidents. As far as the 19th September is concerned the employee recorded on the 19th "skool toe 08:00 tot 10:15". However, what is in specific contention is that it appears from the face of the document that the hours worked were changed from 9 ½ to 11 ½. The allegation was that it was Mr Jordaan who changed it. The onus, as the arbitrator quite correctly points out, is on the employer to prove that. Given that there were two conflicting versions and no direct evidence, it is correct, as Mr *Le Roux* pointed out, that an inference had to be drawn. He referred in this regard to FAWU v Amalgamate Beverages Industries Limited 1994 (15) *ILJ* 1057 (LAC) where the Labour Appeal Court held:

"It is a cardinal rule of logic when reasoning by inference that the inference sought to be drawn must be consistent with all the proved facts."

It is in the light of that and the jurisprudence of this Court that the arbitrator had to consider whether the only probable inference was that it was indeed Jordaan that changed the hours. She firstly considered his evidence that he switched the times on 18 and 19 September, which she accepted, does make sense. With regard to the specific change from 9 ½ to 11 ½ hours she correctly points out that it remained a mystery even after having heard the evidence before her. She noted that even though it was changed there were no changes made to the overtime claimed. She had regard to the fact that Mr Jordaan claimed that he had not made the change, otherwise he would have changed his overtime as well. That appears to me to be a

reasonable way of dealing with the evidence before her and the probabilities.

She also noted again that the salary is calculated based on the Blick system and that changing times in the attendance register would most likely not reflect into an overpayment. She also took into account that it was common cause that the Blick system did work on that day so there was no chance that Mr Jordaan would be overpaid. Having taken all those factors into account she found that the employer had not discharged the onus of proving that the employee was dishonest with his time recordal on 19 September 2012. Whether this Court would have made the same finding based on the inferences and the probabilities is neither here nor there; this is a review, not an appeal.

The test as set out in Sidumo v Rustenburg Platinum Mines Limited 2007 (28) *ILJ* 2405 (CC); 2008 (2) SA 24 (CC) is well-known. The question is whether the conclusion reached by the arbitrator is so unreasonable that no other arbitrator could have come to the same conclusion. That is not the case here. Another arbitrator could have come to the same conclusion, even if this Court may not have come to the same conclusion. The conclusion in that regard is not reviewable.

That brings me to the 29th September. In that case, where the time worked on the Saturday was recorded as 8 hours, the arbitrator accepted Mr Jordaan's evidence that he had made a mistake. The fact that Jordaan actually corrected the 8 hours on the following Monday to reflect it as 5 hours is consistent with that evidence, i.e. that he had made a mistake but that he corrected it subsequently. The arbitrator also quite reasonably took into account that in distinction to the common practice that weekends are shaded out that was not the case with Saturday the 29th September.

The evidence of Mr Jordaan that he was extremely tired at the time is accepted or unchallenged, and it is also consistent with the actual times worked -- sometimes during that week to 02:30; 02:45 and even four o'clock in the morning. The arbitrator accepted in the light of all this evidence that it was possible that the employee did make a mistake and she accepted his evidence in that regard. Again, given that this is a review and not an appeal, that is a conclusion that another arbitrator could have reached; and whether or not this Court may have reached the same conclusion is

neither here nor there. It is not a reviewable finding.

Lastly, the arbitrator took into account the inconsistency between the treatment of Mr Kearns and Mr Jordaan. It is common cause that it was found that Mr Jordaan had been dishonest in incorrectly reflecting his times but that there was no allegation that Kearns had been dishonest, even though he had also incorrectly reflected times where he claimed to have taken two tea times and that he did not tick the box that clearly appears on the attendance register where he could simply tick the box "no lunch". The arbitrator's finding that there was inconsistent treatment between Messrs Kearns and Jordaan is within a band of reasonable findings that another arbitrator could reach.

Lastly, Mr *Geldenhuys* submitted that, despite all of this, the arbitrator should not have ordered reinstatement. As he correctly pointed out, the question of relief is dealt with in section 193 of the LRA. It is trite that the default position is reinstatement, as reiterated by the Constitutional Court in Equity Aviation[1]. In this case the exclusions that the section provides for, for example that the dismissal was only procedurally unfair, or that it is not reasonably practicable to reinstate, do not apply. There was no evidence that it would not be reasonably practicable to reinstate Mr Jordaan in a big company such as Rainbow Farms. The fact that there is no love lost between Mr Jordaan and Mr Le Roux is not something that makes it not reasonably practicable to reinstate him. In all of these circumstances the award is not open to review.

That leaves the issues of costs. Both parties asked for costs to follow the result. I see no reason in law or fairness to disagree. The purpose of the Act is expedited dispute resolution. Arbitration awards are meant to be final and binding. This is a matter that should have ended at arbitration. There is no reason why Mr Jordaan or his trade union should be saddled with the costs of this application.

THE APPLICATION FOR REVIEW IS DISMISSED WITH COSTS.

[1] *Equity Aviation Services (Pty) Ltd v CCMA* [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); (2008) 29 *ILJ* 2507 (CC); 2009 (2) BCLR 111 (CC).

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STEENKAMP, J

APPEARANCES

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APPLICANT: Elco Geldenhuys of MacGregor Erasmus.

FIRST RESPONDENT: Dawie le Roux of Murray Fourie & Le Roux Inc.