



**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)**

Not Reportable

Case Number: **C289/2019**

In the matter between:

ITESENG JOSEPH NKGWANG

Applicant

and

CCMA

First Respondent

MARINA TERBLANCHE

Second Respondent

ESKOM HOLDINGS LTD

Third Respondent

Date heard: 23 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on the 1 December 2021

Summary: Review - Employee dismissed for making derogatory comments against senior managers on more than one occasion. Held – no basis for review.

JUDGMENT

CONRADIE, AJ

Introduction

1. This is an unopposed review application in terms of section 145 of the Labour Relations Act (LRA) in terms of which the Applicant (the employee) seeks to review the award handed down by the Second Respondent (the commissioner) on 15 March 2019.
2. There is also an application for condonation in respect of the late filing of the review application and subsequent processes. I will dispose of the condonation application at this stage by granting condonation for any non-compliance with the required time periods.

Background

3. The employee was employed by the Third Respondent (Eskom) as a Senior Technician. He commenced employment on 10 October 2005 and was dismissed on 30 April 2018.
4. The employee was part of a provincial team headed up by Nozipho Mtanza (Mtanza), Senior Manager - Maintenance and Operations, although he did not report directly to her.
5. The employee posted the following messages about Mtanza on Facebook-
“when you are disabled you have to treat people like rubbish”
[translated version]
6. He also posted the following messages in respect of the General Manager in the Province, Linda Ntombeni (Ntombeni):

“you think I am scared of Linda Ntombeni, black mother full of shit”.
[translated version]

7. Neither Mtanza nor Ntombeni had met the employee before he made the posts.

8. The employee was charged with breaching clause 2.35 of Eskom's Disciplinary Code which deals with conduct that is reasonably regarded as unacceptable in terms of Eskom's values and ethics.
9. Dirk Opperman (Opperman), who is a Pricing Manager at Eskom, was appointed to chair the disciplinary hearing, which took place on 27 December 2017.
10. Opperman found the employee guilty of both allegations and Eskom asked him to dismiss the employee. Opperman, however, decided not to dismiss the employee but rather, on 12 January 2018, imposed the following sanction:

"The employee is suspended for 14 (fourteen) working days without pay from Eskom's service starting on 15 January 2018. The employee must report for duty on 2 February 2018.

Further should the employee, within a period of 12 months from the date of this letter make himself guilty of a transgression related to this case or any other serious transgression, disciplinary action will be taken against him which may lead to a more severe sanction."

11. Opperman later learned that on 28 December 2017, the day after the disciplinary hearing, the employee posted the following on Facebook:

"We will speak about dirk opperman one day, the idiot came to a Disciplinary hearing with a pre-determined outcome. If he feels like it he must take me to court to like GrizzlyBear said she will take me to court, I am waiting" (sic).

12. The above words were accompanied by emojis of faeces.
13. In response, Opperman lodged a grievance against the employee. The chairperson of the grievance hearing referred the matter for formal disciplinary action as provided for in Eskom's Grievance Policy and Procedure.

14. A disciplinary hearing took place, and the employee was dismissed. He referred a dispute to the CCMA. His case at the CCMA can be summarised as follows:
- 14.1. He was not on duty when he posted the messages on Facebook.
 - 14.2. An employer cannot charge an employee for something done outside of the workplace.
 - 14.3. His grievance hearing did not comply with the Grievance Policy and was defective.
 - 14.4. He was dismissed whilst on sick leave and in possession of a medical certificate.
 - 14.5. Opperman was biased against him during his first disciplinary hearing as he had pre-determined the outcome.
 - 14.6. There was nothing insulting towards Opperman in the Facebook post and he was being vilified for telling the truth. No one would have known which Dirk Opperman he referred to on Facebook, except perhaps employees who were on Facebook as well. Opperman misunderstood what he meant by idiot.
 - 14.7. He only received the documents for the hearing on 26 March 2018 and the hearing took place on 28 March 2018.
 - 14.8. Eskom was inconsistent in that other employees also posted issues about it on Facebook.
 - 14.9. The social media rules were only sent to employees after his dismissal.
 - 14.10. He did not appeal against the 14 day suspension imposed by Opperman because he decided to accept the punishment.
15. After considering the evidence before her, the commissioner concluded that the employee's dismissal was substantively and procedurally fair.

Grounds of Review.

16. Dissatisfied with the commissioner's award, the employee seeks to review it on a host of grounds.

Ground 1: The commissioner was unduly influenced by the previous Commissioner

17. The employee submits that Commissioner Fanapi, who was previously allocated the matter, unduly influenced the commissioner in that he;
 - 17.1. Left his notes in the file which the commissioner had access to; and
 - 17.2. Colluded with Eskom.

Ground 2: The dismissal was based on the incorrect clause and the commissioner failed to apply her mind to the wording of the clause

18. The employee submits that clause 2.3.5, which he is accused of transgressing, refers to conduct of employees when they are at work and does not extend to conduct of employees outside of work.
19. In addition, the commissioner failed to apply her mind to the wording of clause 2.3.5 by only considering the testimony of Eskom's witnesses and failing to look at the actual clause.

Ground 3: Irregularities and inconsistencies in the award

20. The employee claims that paragraphs 11.5 and 11.6 of the award are incorrect as he filed a request for arbitration on 11 September and not 30 September 2018 as the award suggests.
21. He also claims that the issues were not "narrowed" as suggested by the commissioner and the process explained by the commissioner differed from the previous process on 10 September 2018 and the Applicant was confused by this process.
22. The employee submits that it is not correct as stated by the commissioner under common cause, that "*the bundle of documents submitted by the Applicant....was not in dispute.*"
23. The employee argues that the commissioner failed to apply her mind to the facts of the case, because it is not correct that he was under the 14 day suspension when he posted the comments about Opperman. The disciplinary hearing was held on 27 December 2017 and he made the post on the 28 December 2017.
24. At the time that he made the post, Opperman was acting in his capacity as a chairperson and not as a manager. In these circumstances, the grievance

process could not be used as it regulates conduct between employees. The commissioner failed to appreciate this.

Ground 4: The commissioner incorrectly referred to the previous case that did not lead to the dismissal

25. The employee argues that the commissioner did not only concern herself with the case that lead to the dismissal but incorrectly referred to previous/closed cases and referred to points that did not appear on the charge sheet to be lead in the proceedings. The employee does not however clarify which cases he is referring to.

Ground 5: There were irregularities in the proceedings

26. The employee alleges that when Eskom's witnesses testified, they were questioned on matters which did not appear in the charge sheet. However, when he attempted to cross-examine the witnesses, he was denied the opportunity to do so.
27. The employee claims he was not allowed to take an Eskom witness through his bundle. However, Eskom was allowed to refer its witnesses to the employee's bundle.
28. The employee argues that the commissioner unduly assisted an Eskom witness and because of this the witness changed his testimony.
29. The commissioner found that the employee failed to testify that Mthombeni called his colleague, Macshane Mosala, a fraudster on internal emails and that she was not disciplined for her conduct. The commissioner interfered with the way the employee wished to lead evidence in the matter.

Ground 6: The recordings that Eskom supplied were tampered with

30. Recordings that Eskom supplied were tampered with. The commissioner listened to the recordings and captured what she heard in red pen. The commissioner confirmed that there were signs that Opperman was biased against the employee, but failed to state this in the award.

Ground 7: The commissioner failed to apply her mind to the issue of consistency

31. The employee submits that the commissioner failed to apply her mind as to whether Eskom consistently applied her mind to the issue of consistency in the disciplinary process as other employees were not disciplined for Facebook posts.

Ground 8: The Commissioner failed to determine the procedural fairness of a hearing that happened prior to the disciplinary hearing

32. Instead of hearing the grievance, the chairperson of the grievance hearing referred the matter for a disciplinary hearing. The commissioner failed to determine the fairness of the employer's decision to refer a grievance for disciplinary action.

Ground 9: The commissioner failed to "disclose" whether the employee could be dismissed while on sick leave

33. The employee asked the commissioner whether it is fair for an employer to dismiss an employee while he is on sick leave.
34. The dismissal was captured in the employee's absence. The employee provided evidence in the form of a recording that the commissioner refused to listen to because she was of the opinion that the employee could have been dismissed while he was on sick leave because it was a summary dismissal.

Evaluation

35. While the employee has raised a plethora of review grounds, none of them lay the basis for me to interfere with the commissioner's award.
36. Ground 1 has no merit. The notes were in the file because the matter had previously been heard by Commissioner Fanapi. There is nothing sinister about this. Commissioner Fanapi did not hear the merits of the dispute and his notes could not have influenced the commissioner's decision.
37. Ground 2 also lacks merit and is more akin to an appeal ground than a review ground. In any event, the commissioner cannot be faulted for concluding that the employee's conduct "outside the workplace" had an impact on his employment and that he could be dismissed for it.
38. In respect of ground 3, the employee's complaints relating to the date on which he filed his request for arbitration, the issues not being "narrowed" and the commissioner's comment that the bundle of documents was not in dispute are not material to the matter. With regard to the remainder of ground 3, to the extent that the commissioner incorrectly concluded that the employee was under his 14 day suspension when he posted the comments on Facebook about Opperman, I do not believe that this taints her award. The fact of the matter is that on 27 December 2017 the employee attended a disciplinary hearing to answer serious allegations relating to the derogatory comments he made on Facebook about senior managers. He had barely walked out of the hearing, so to speak, when he insulted Opperman who is also a senior manager. In my view that conduct at that stage would be enough to justify the commissioner's decision that the dismissal was fair, notwithstanding the fact that the employee had not yet received his sanction of 14 days suspension.
39. In respect of ground 4, even if the employee is correct in respect of this complaint, this too cannot not have a bearing on the commissioner's finding.

40. In respect of grounds 5 and 6, the employee has not pointed to any portions of the record in support of the contentions which he makes in respect of these grounds of review.
41. There is also no merit in respect of ground 7. The commissioner fully addressed the issue of consistency in paragraphs 86 to 92, spanning nearly 3 pages. She properly distinguished the so-called similar cases complained of by the employee with the employee's case.
42. In respect of ground 8 the commissioner cannot be faulted as the "previous hearing" was not part of the issue which she needed to decide.
43. Clause 9 was also irrelevant to the issue which the commissioner had to decide and as such lacks merit.
44. In addition to the reasons given above for dismissing the review, I am also of the view that the commissioner was alive to the essence of the dispute before her and properly assessed the evidence before her and evaluated it accordingly. Ultimately, she did not reach a decision that any other commissioner could not reach.
45. I make the following order
1. The application is dismissed.



BN. Conradie

Acting Judge of the Labour Court

Appearances:

For the Applicant: In person