

**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

**Not Reportable**

C37/2020

In the matter between:

**LINDA MCMASTER**

**Applicant**

and

**THE COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSONER GAIL MCEWAN N.O.**

**Second Respondent**

**ASTRAL OPERATIONS LIMITED T/A  
COUNTY FAIR FOODS**

**Third Respondent**

**Date heard: 18 August 2021 by means of virtual hearing**

**Delivered: 18 January 2022**

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**JUDGMENT**

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**RABKIN-NAICKER J**

- [1] This is an opposed application to review an arbitration award under case number WECT4268-19. In terms of the Award, the second respondent (the Commissioner) found the dismissal of the applicant to have been substantively fair.
- [2] The applicant started her employment for the third respondent (the Company) on the 22 June 1992. She earned R42 257.50 a month at the time of her dismissal more than 27 years later, on the 18 February 2019. The Award records the Charges against her as follows:

“McMaster had failed to (i) manage outstanding items of age analysis (unpaid invoices). (ii) Manage subordinates and report performance measures (iii) Complete credit review timeously (iv) Maintain credit limits (v) Manage deadlines in respect of (a) DEPM (it was unknown what the acronym meant other than that it was part of the LN computer system) report (b) Credit reviews (vi) Attend to instructions relating to (a) Reporting as per National Credit Manager. (b) Performance measurement as per Financial Manager (c) Daily controls or invoicing and filing as per Financial Manager.”

- [3] The Award in question is not a readily comprehensible one in that after the above summary of the background of the dispute, it contains some 48 pages of recordal of the evidence before the Commissioner. Certain numbered paragraphs run over 4 pages. It is not a summary of the evidence, i.e. a recordal of the main points of evidence. The analysis of the evidence suffers from a similar lack of cogency. The arbitration ran over many days and there is a long transcribed record.
- [4] The evidence of Mr Geldenhuys is recorded from page 4 to 16 of the Award. He was the applicant's superior and held the position of financial manager, joining the Company in 2017 and implemented a restructuring of the financial system of the Department in the wake of County Fair being taken over by Astral Foods PTY (Ltd), which impacted on the applicant's function. When the Commissioner analyses his evidence she describes it as 'not credible, reliable or correct on a balance of probabilities'.
- [5] She states further as follows:
- “.....Geldenhuys had very little knowledge of what happened in the debtor's department as it relates to how the functions interfaced with the LN system – despite his being on the team that was managing the implementation of the new system. Geldenhuys had proposed a flatter structure in the debtors department to assist McMaster and to ensure that there was backup for her in situations where she was not at work. McMaster, Solomons and Moses were allowed to think over the restructure overnight. On their return to Geldenhuys the next day (and this was not disputed) all three had declined the offer as they all had heavy workloads. Only then Geldenhuys said that the restructure was

not an option and he went ahead and implemented this. Geldenhuys never disputed that McMaster had seen her job description for the first time at her disciplinary hearing. Geldenhuys however rigidly held McMaster to the contents of a job description she had never seen and referred to her KPI's a term which was not found in her job description Furthermore the job description was never signed off by McMaster or by Africa as the direct manager of McMaster."

- [6] The Commissioner also dealt with the issue of performance counselling in this analysis of Geldenhuy's evidence as follows:

" Geldenhuys held the performance counselling session with McMaster on 7 May 2018. I have noted from the "minutes" of this session that Geldenhuys only referred to the Kekkel & Kraai account as this had been raised by Berry at a management meeting held earlier. According to Geldenhuys McMaster had to prevent the Kekkel & Kraal management from contacting Astral Foods complaining about the management of their account. No guidance was given to McMaster as to how to do this yet she was urged to understand the new structure as well as to enforce it. No clarification was given and whilst McMaster had disputed the minutes, these were not disputed by Geldenhuys. Additionally a follow-up to the Performance Counselling was arranged to be held on 7 June 2018 at 15.30 No explanation was held as to why this follow-up never took place."

- [7] The evidence on which the Commissioner found that it was correct to charge the applicant with misconduct was that given by the financial systems manager of Astral Operations Limited and the Poultry Credit Manager for Astral operations. She repeats much of the evidence given by these two witnesses in regard to the applicant's failures to manage the new IT system and her new management role in the restructured system. She finds that:

"42. Turning to whether what happened related to misconduct or poor performance. It is correct that McMaster had the skills, knowledge and experience to have enabled her to prioritize her work and attend to most of the items that were persistently being pointed out to by Burger. This was certainly not an incapacity issue nor a performance issue as McMaster was expected to have done the correct things rather than spending time on items that could have

been delegated or had an overall lower priority. That only leaves misconduct for which McMaster had been correctly charged. It is easy to lay fault at the door of any new system. It was expected of McMaster to delegate work, communicate shortcomings with her direct reports and to deal with issues that were not being affected by the new system. McMaster never produced any evidence that she had delegated work to anyone, had followed up to ensure that the work got done and to prioritize her own workload as heavy as it undoubtedly had been. Burger kept pointing McMaster, Solomons and Moses in the right direction but it seems that McMaster lost focus presumably due the very heavy workload. It is in times like this that McMaster should have focused on what was important and delegated more to others to enable to get done what she had previously produced in respect of her job as the senior credit controller. It was as if McMaster believed that she never had the tools to do her trade but she did not use the tools that were available to her at the time. The other resources made available were the IT help desk, Softworx, Burger, Laidlaw, Spies, Berry and almost anyone working in the employer. McMaster never raised the proverbial flag saying that she was drowning in work, if that had been the case. McMaster never lodged a dispute or formal grievance about her workload. No evidence was put before me that others in the debtors department were also putting in extra hours to get things done correctly McMaster failed to instill a sense of urgency into those working in the department to make them realise that additional hours were needed to complete the job. I find on a balance of probabilities that McMaster is guilty of misconduct in the specific charges that I have already deal with and with which she had been charged.”

[8] The grounds for review of the Award include the following:

- 8.1 That the Commissioner misconceived the nature of the enquiry she was required to engage in. She ought to have determined the fairness of the dismissal through the lens of poor performance incapacity as opposed to misconduct;
- 8.2 That she failed to consider and weigh the applicant’s evidence properly and was thus guilty of misconduct; and

8.3 The Commissioner failed to properly determine whether dismissal was an appropriate sanction leaving material factors out of her assessment.

- [9] In her finding relating to the sanction of dismissal the Commissioner stated that:
- “....The Company could not trust McMaster to do her job effectively and therefore I am persuaded that the relationship of trust had broken down beyond repair. In these circumstances I find that dismissal was the appropriate sanction to have imposed.”
- [10] On the question of the Commissioner considering the evidence through the incorrect lens of misconduct, it was submitted by Mr Bosch for the applicant that the applicant's version was that she was incapable of fulfilling her tasks properly because of the changes in her work environment. She was not deliberately or negligently failing to perform her work. For the company, it was pointed out that the applicant testified that she was not incompetent or lacking in skills. However, the transcribed record, reflects that the applicant denied it was a misconduct issue but rather a performance issue in that she did not have the tools to do the job. In this regard, the summary of her evidence by the Commissioner reflects that the problems the applicant encountered related to the restructuring and the new IT system. It was common cause she had logged some 400 calls to the IT help desk.
- [11] It was common cause evidence that the applicant worked long hours after hours and over weekends to try and get everything done. It was submitted on her behalf that while this did not have the desired effect, any shortcomings on her part were not intentional or willful. She did not have the managerial skills or the tools in the form of a smooth running system to do her job properly. For the Company, Mr Frahm-Arp submitted that this amounted to dereliction of duty.
- [12] In the view of the Court, given the evidence of Geldenhuys for the Company, that the applicant saw her job description for the first time at her disciplinary enquiry, the labelling of her conduct as amounting to dereliction of duty, is difficult to sustain. The Commissioner's own evaluation of Geldenhuys's evidence was not taken into account by her when she came to consider and analyze the nature of the dispute before her. This includes his failure to explain

why the course of incapacity/performance counselling was not pursued with the applicant.

[13] I am of the view that this is indeed a case in which the Commissioner misconceived the nature of the enquiry before her as one of misconduct rather than incapacity/failure of performance<sup>1</sup>. It is now trite that in such circumstances the arbitration award stands to be reviewed. I do not find it necessary to traverse all the further grounds for review in this application. However, I am in agreement that in assessing the sanction of dismissal, the Commissioner failed to take all material circumstances into account. This is evident on the face of the Award, even were one to accept that the dispute was a misconduct enquiry.

[14] There is no need for this matter to be remitted to arbitration given the extensive record before me. The Award stands to be reviewed and substituted. In oral submission before me on behalf of the applicant, reinstatement was prayed for. However, it appears to the Court that such remedy would not be reasonably practicable, given that applicant's case in this application was that she should have been afforded an incapacity process rather than face misconduct charges. A just and equitable *solatium* for the applicant's unfair dismissal by the Company on charges of misconduct, after 27 years of employment (with a clean disciplinary record) is apposite. I therefore make the following order:

#### Order

1. The Award under case number WECT 4269-18 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 to pay compensation to the applicant in an amount equivalent to six months of her salary at the time of her dismissal  $6 \times 42\,257.50 = R253,545.00$  (two hundred and fifty-three thousand and five hundred and forty-five rand only).

1.3 The said compensation must be paid by no later than the 18 February 2022.

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<sup>1</sup> Consol Glass v National Bargaining Council for the Chemical Industries and Others (2017) LAC at para 54

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Craig Bosch instructed by Guy and Associates

Third Respondent: Fasken (incorporated in South Africa as Bell Dewar Inc)