Not reportable

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case no:C613/2019

In the matter between:

BIDAIR SERVICES (PTY) LTD	**Applicant**
And	
WINNIE EVERETT *N.O.*	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
NUMSA obo SIZANI & MAQANDA	**Third Respondent**

Date of Hearing: 29 June 2022
Date of Judgment:
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 26 July 2022

Summary: Application to review CCMA award – Commissioner ignoring unchallenged evidence and applying unduly onerous burden of proof – Award set aside for unreasonableness.

JUDGMENT

LESLIE AJ

Introduction

[1] This is an application in the terms of section 145 of the Labour Relations Act 66 of 1995 ("the LRA") to review and set aside an arbitration award issued by the first respondent ("the commissioner") under the auspices of the second respondent ("the CCMA"). The commissioner held that the dismissals, on grounds of alleged misconduct, of the third respondent's members ("Sizani" and "Maqanda" or collectively "the employees") had been substantively unfair. The applicant was ordered to reinstate the employees with retrospective effect.

[2] The relevant background facts may be summarised as follows:

2.1 The employees were employed by the applicant as check-in agents, assigned to the Mango Airline ("Mango") check-in counters at the Cape Town International Airport.

2.2 In November 2018, Mango's management received an anonymous tip-off that the employees were involved in receiving bribes from passengers whose baggage exceeded the permitted weight allowances.

2.3 The applicant carried out an investigation, which involved verifying the weights of items of luggage that had been checked-in by the employees. A hand-held scale was used for this purpose. The investigation was conducted by Mr Brian Chalmers, the applicant's Head of Department: Passenger Handling. He was accompanied by Mr Sergei Fisher, the applicant's Security Manager.

2.4 In respect of Sizani, on 28 November 2018, Chalmers and Fisher weighed approximately 20 items of luggage. The weight of 18 of these items corresponded with the weights that had been recorded by Ms Sizani at the check-in counter. However, there was a substantial discrepancy in the

weight of two items of luggage that had been checked in by one Van Huysteen. Whereas Sizani had entered a combined weight of 39 kilograms for these two items, the handheld scale recorded 44 kilograms. This was 4 kilograms over the permitted luggage weight for that passenger.[1]

2.5 In respect of Maqanda, on 29 November 2018, Chalmers and Fisher checked the weight of approximately 5 items of luggage that had been checked-in by her. Three of these items matched the weight that had been recorded by Maqanda. However, there was a substantial discrepancy in the weight of two bags that had been checked in by one Mokubane. Maqanda had entered a weight of 29 kilograms for these two items, and the passenger had paid for an extra 9 kilograms of weight.[2] The handheld scale recorded 34 kilograms.

2.6 A disciplinary hearing was convened which resulted in the employees' dismissals on grounds of misconduct. The employees' defence raised at both the disciplinary hearing and the arbitration was limited to challenging the accuracy of the scales, in particular, the handheld scale used by Chalmers.

2.7 Aggrieved at the outcome, the third respondent referred an unfair dismissal dispute to the CCMA, which culminated in the award under review.

Analysis

[3] At the commencement of the hearing of this application, Mr Shiba, who appeared on behalf of the third respondent, indicated from the bar that steps had been taken to certify the award under section 143(3) of the LRA. There was no indication on the court file that the award had been certified by the Director of the CCMA. I asked the parties to make submissions on this issue and the implications, if any, for the determination of the review application. This point was subsequently

[1] Each passenger is permitted 20 kilograms of luggage. Van Huysteen had paid for an additional 20 kilograms, totalling 40 kilograms.

[2] In addition to his or her allocation of 20 kilograms.

abandoned by the third respondent, and nothing further need be said about it for the purposes of this judgment.

[4] Turning to the merits of the review application, the crux of the enquiry before the commissioner was whether the employees had deliberately entered lower baggage weights into the applicant's system. If, on a balance of probabilities, it was found that they had acted deliberately, there was no question that the sanction of dismissal was warranted and fair. As the commissioner held:[3]

> *"The applicants conceded that it is dishonest to enter incorrect baggage weights into the system and I accept that they were aware of the rule. They also accepted that the rule was reasonable as incorrect baggage weight could have an effect on the balance of the weight of the plane, and hence on the safety of passengers and crew."*

[5] In concluding that the applicant had not established that the employees had deliberately inputted false weights, the commissioner reasoned as follows:[4]

> *"I find the employer's evidence insufficient for the following reasons: The handheld scale, when compared with the counter scale, had a discrepancy of 140 grams on a 3 kg weight. It is not inconceivable that the discrepancy of a heavier weight could be significantly more. Weights recorded on scales often vary, even on the same scale. While the employer's investigation was certainly sufficient to raise suspicion, requiring more investigation, it was not sufficient to prove the misconduct in itself. Besides the possibility of different weights on the scales, there is a possibility that the check-in agents made an error or miscalculation. There mere fact of differing weights on certain bags is insufficient to prove dishonesty."*

[6] The latter point made by the commissioner can be immediately disposed of. There was no intimation by the employees that they had erred or miscalculated. This formed no part of their defence at either the internal disciplinary hearing or the

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[3] Award para 26.

[4] Award para 28.

arbitration. Their defence was that the scales were inaccurate. If the employees had asserted that they had inadvertently made errors, this aspect could have been fully explored in the evidence. However, it formed no part of their case.

[7] It is clear that the main reason for the commissioner's conclusion, that the dismissals were substantively unfair, was her finding that the handheld scale was not reliable (specifically, that it was *"not inconceivable"* that the handheld scale could be substantially out). This finding cannot be reconciled with the evidence. In this regard:

> 7.1 Chalmers testified that the handheld scale had a discrepancy of about 140 grams. However, he was clear that there could not be a discrepancy of 5 kilograms. In response to a question from the commissioner, albeit in relation to the check-in scale which had a similar discrepancy of 100 grams, he testified that the discrepancy was *"not determined by kilograms it's determined, so irrespective if I put 30 kilograms or three kilograms it's just going to be off by 100 grams."* Crucially, this evidence was not pursued further by the commissioner, nor was it challenged in cross-examination by the third respondent. The third respondent led no evidence to rebut it.
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> 7.2 What is more, the fact that the weights obtained by the handheld scale correlated with those of the recorded check-in weights in respect of the 20 other items of luggage checked by Chalmers and Fisher on 28 and 29 November 2018, is a strong indication that the handheld scale was functioning properly.

[8] In short, there was no reasonable basis on which to reject the applicant's evidence that the employees had substantially under-recorded the luggage weights as alleged. As set out above, the employees at no stage alleged that they had made errors or miscalculated the weights in question. The probabilities that they both would have made such substantial errors is remote. When this is considered against the background of the tip-offs received in respect of these two employees, the only reasonable conclusion to draw from the conspectus of evidence was that the employees had acted deliberately in entering false weights into the system. That should have been the end of the matter.

[9] Having (unreasonably) rejected the evidence of the hand-held scale weights, the commissioner went on to find that:

> 9.1 The applicant ought to have contacted the two passengers whose luggage weights were under scrutiny; and
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> 9.2 The applicant ought to have presented camera footage of the check-in counters to corroborate its case.

[10] One gets the impression that, in seeking to impose these obligations on the applicant, the commissioner imposed a higher standard of proof than the applicable civil test. The applicant was not required to establish the alleged misconduct beyond any reasonable doubt. The question before the commissioner was whether, having regard to the parties' respective positions, the incidence of onus and the conspectus of the evidence, the applicant's version was more probable than the employees' version. No reasonable arbitrator could have concluded, on the evidence presented, that the employees' version was more probable.

[11] It was wholly unreasonable (and unrealistic) for the commissioner to expect the employer, *in addition* to presenting clear evidence of false weights being recorded by the employees, to adduce evidence from the passengers who had been the beneficiaries of the under-recording. This was not required of the applicant.

[12] Similarly, there was no requirement on the part of the applicant to present footage from the Mango check-in cameras. In any event, Ms Nzele, a fellow check-in agent called as a witness by the third respondent, confirmed in her evidence that these cameras were not positioned in a manner that enabled them to capture the weights on the check-in scales. This evidence was simply ignored by the commissioner.[5]

[13] In conclusion, the award is vitiated by irrationality and unreasonableness. On the evidence presented, I am satisfied that no reasonable arbitrator could have concluded that the employees' dismissals were substantively unfair. The award

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[5] Indeed, there is no mention of Ms Nzele testifying at the arbitration at all in the award.

accordingly falls to be reviewed and set aside. Since the result is a foregone conclusion and this court is well-placed to substitute an outcome, it would serve little purpose to remit the dispute to the CCMA for arbitration *de novo*.

[14] Neither party persisted for an order of costs.

Order

[1] The arbitration award issued by the First Respondent under the Second Respondent's case number WECT499-19, dated 16 August 2019 ("the award"), is reviewed and set aside.

[2] The award is substituted with the following award:

"The Applicants' dismissals were procedurally and substantively fair."

[3] There is no order as to costs.

Leslie AJ

Acting Judge of the Labour Court of South Africa

Representatives -

For the Applicant: I Kapalu, Moodie & Robertson Attorneys

For the Third Respondent: G Shiba, NUMSA official