Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C 410/2020

In the matter between:

SAKHUMZI KEKANAN **First Applicant**

and

JUSTICE NEDZAMBA (*N.O.*) **First Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **Second Respondent**

THE DEPARTMENT OF CORRECTIONAL SERVICES **Third Respondent**

Date of Set Down: 6 October 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 15h00 on 10 October 2022.

Summary: (Review – *In limine* point not pursued – Procedural fairness – disciplinary enquiry proceeded *in absentia* on first date of hearing – chairperson aware that employee claiming to be booked off ill –no medical certificate provided until date of hearing – arbitrator equivocal on validity of certificates – applying discredited 'no difference' principle – arbitrator's basis of distinguishing case without justification – procedural unfairness – balancing considerations - nominal compensation)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a review application of an arbitration award in which the arbitrator determined that the applicant's dismissal was procedurally unfair.

Condonation

[2] The application was filed one week late. The delays were attributed to interactions between attorney and counsel and the applicant's need to find additional funds. The third respondent ('the department') does not oppose the condonation application. The delay is short, there is no evidence of prejudice to the third respondent and the explanation is satisfactory in relation to the period of the delay. Accordingly, the late filing of the review should be condoned.

Some background detail

[3] On 30 September 2019, the applicant ('Kekana'), a provisioning administration officer, and a more senior colleague were dismissed, in effect for the theft of 51 boxes of soap from the department.

[4] Neither of them attended their disciplinary enquiry on the basis that both claim to have fallen ill with different ailments. They produced medical certificates in support thereof, but these were only provided to the

department after the hearing had proceeded in their absence. There was some controversy about how much, if anything was known about their medical reason for not attending the enquiry and, if so, at what stage it was known to the chairperson.

[5] From the record it is apparent that the applicant appealed against the outcome of the enquiry on the basis that the chairperson should not have proceeded in his absence.

[6] Both employees referred their unfair dismissal dispute to arbitration. In the applicant's request for arbitration, he claimed his dismissal was substantively and procedurally unfair, but in the pre-arbitration minutes the issue in dispute was described as "unfair dismissal on procedural (*sic*) unfair."

[7] The arbitrator proceeded to determine the procedural unfairness of the dismissal. In summary, he made the following findings:

7.1 In so far as the applicants challenged the authority of the departmental investigation unit to investigate the incident, which led to them being charged, the arbitrator found he had no jurisdiction to determine the legal validity of the investigation but noted that S95(A) of the Correctional Services Act 111 of 1998 allowed for the establishment of such a unit and the applicants did not dispute the testimony of the respondent that the director of that unit was delegated to investigate such matters. In any event, the arbitrator correctly found that this was irrelevant to the actual procedural fairness of the disciplinary process.

7.2 In relation to the claim that the failure to postpone the enquiry constituted procedural unfairness, the arbitrator accepted that the undisputed medical certificate showed that the applicants were 'booked off sick'. Nonetheless, he regarded the sick notes and their representative's supposed claim that he was not aware of their whereabouts on the day of the hearing with scepticism. Despite this, he noted that the certificates were not challenged and he had no reason not to accept that they were ill. He concluded that "ordinarily" the failure to postpone the hearing in those circumstances would result

in a finding of procedural unfairness. However, he decided the circumstances were not 'ordinary'.

7.3 In trying to distinguish the case before him and explain his finding of that the dismissal was procedurally fair, he referred to case authority that the mere production of a medical certificates was not necessarily sufficient to justify an employee being incapable of attending and that the chairperson was entitled to expect the employee to appear so that his capacity to participate could be considered.

7.4 He concluded that the certificates were only forwarded a day after the hearing so the chairperson was not in a position to determine their capacity to attend and their own evidence showed they were not so ill they could not attend and explain their indisposition, or at least inform their representative to address the chairperson. He also considered their previous attempt earlier in the month to resign as a ruse to avoid the disciplinary process. Their subsequent alleged illness he interpreted as another stratagem to avoid the enquiry. He noted that the purpose of enquiry is to give an employee a chance to put their side of the story and that if they had an alternative version on the substantive merits of the charges they would have provided this in the arbitration proceedings. In essence, he decided that they were the authors of their own misfortune if they were denied a hearing and declined to find that their dismissals were procedurally unfair.

7.5 Even if it was procedurally unfair to have not postponed the enquiry, he was of the view it would be unjust and against public morals to order compensation as they requested, thereby requiring the department to 'reward the very same applicants who had stolen taxpayers' resources under its [the department's] stewardship'.

7.6 He confirmed the substantive and procedural fairness of their dismissal, though strictly speaking his pronouncement on the former was not a finding he was required or entitled to make as he recorded earlier in his award that the applicants 'only disputed procedural fairness'.

In limine issue - jurisdiction

[8] In the department's answering affidavit, it had raised a jurisdictional point. It argued that the arbitrator had no jurisdiction to determine the fairness of the applicant's dismissal because he had already resigned on 9 September 2019, before being dismissed on 30 September 2019. His co-accused colleague had also handed in his resignation.

[9] The applicant was willing to accede to this argument, which meant the award and his dismissal should have fallen away and his service would have terminated on account of his own resignation. When the department's counsel prepared to argue the matter, it was realised it had raised a self-defeating objection and declined to pursue it further. Unsurprisingly, the applicant insisted that it should be determined. *Ms Nyman* (applicant's counsel) argued, albeit somewhat tentatively, that since the applicant agreed with the objection, the court must accept the parties' agreement on the issue as it appeared from the affidavits. In the alternative, he now relies on it himself.

[10] It is clear that the department reconsidered its objection and did not wish to pursue it, having come to a different view on its correctness. Because jurisdiction cannot be imposed on courts or statutory bodies by mere consent, whatever stance the respective parties had adopted, it remains a matter of contention it must be determined.

[11] In *Standard Bank of SA Ltd v Chiloane* (2021) 42 *ILJ* 863 (LAC) Labour Appeal Court finally clarified when the employment relationship terminates when someone resigns. Describing earlier judgments to the contrary as 'misconceived', the LAC stated:

> '[22] In the circumstances, where a contract prescribes a period of notice the party withdrawing from the contract or resigning is obliged to give notice for the period prescribed in the contract. The contract and the reciprocal obligations contained in it only terminate or take effect when the specified period runs out. Alternatively, absent a contractual term the parties are bound to the notice period provided in the BCEA.
>
> [23] In this matter, the employee's narration that her resignation was with 'immediate effect' was of no consequence because it did not comply with the contract which governed her relationship with her

> employer and the employer was thus correct to read into the resignation a four-week notice period within which period it was free to proceed with the disciplinary hearing.'

[12] Similarly, in this case, a four week notice period applied, so the applicant was dismissed before the notice period had expired during which he was still employed. Consequently, the *in limine* point falls away.

The review

[13] The applicant argues that the disciplinary chairperson's summary of the enquiry summary revealed that he was aware that the applicant had reported sick "hours before the hearing and did not inform their representatives or try to submit the certificate before the hearing commenced". He also notes in the initiator's submission of aggravating circumstances, the initiator recorded that the HR officer had testified that he was contacted that morning by both the applicants. On this basis he argues that the chairperson knew of his illness and that he had reported it beforehand, though he concedes the certificate was only handed in the day after the enquiry. It is apparent from the submissions made on appeal that the applicant did not speak to his representative but did speak to the HR manager and his erstwhile representative excused himself because he did not have instructions to continue.

[14] The applicant claims he had instructed his representative to challenge both the substantive and procedural fairness of his dismissal and was surprised when he was only asked questions about procedural fairness. He assumed that his representative was going to implement the instructions he gave him.

The grounds of review

[15] The applicant complains that the arbitrator ignored his evidence that he felt too ill to fax his certificates that afternoon because he would have to stand in a long view and accordingly the arbitrator's finding that an adverse inference must be drawn from the fact that he filed the certificate after the enquiry is

reviewable. He argues that the arbitrator was in no position to decide that he was not too ill to attend the enquiry because he was booked for nine days.

[16] Since he did have a valid reason for not attending the enquiry, the arbitrator should not have found that the chairperson acted fairly when he failed to postpone it. Moreover, the evidence showed that he had informed his representative who addressed the chairperson and requested a postponement.

[17] The commissioner committed a reviewable error in finding that because he did not dispute the substantive fairness of the dismissal in the arbitration hearing, the decision to postpone the enquiry would have made no difference.

[18] The Commissioner could not have found that he only challenged the procedural fairness of his dismissal as the referral form referred to substantive and procedural fairness.

[19] The Commissioner's finding that he suffered no prejudice because he had no intention to defend himself against the charges and the postponement would have resulted in an unwarranted delay is reviewable, because the Commissioner failed to appreciate that he was denied the opportunity to answer the case. When the chairperson decided to proceed with the enquiry in absentia, he had no reason to believe he would not defend himself on the charges. Moreover, he could have also wished to present mitigatory factors.

[20] He also argued that arbitrator's finding that it would be against public morality to award him compensation when he was guilty of stealing public resources is unjustifiable.

Evaluation

[21] The claim that the arbitrator should have decided the substantive fairness of the dismissal was not really pursued at the review hearing. For the sake of completeness, it is true that the arbitration referral form spoke of substantive and procedural fairness, but there was a pre-arbitration minute, referred to earlier, in which it was made clear that only procedural fairness was being disputed. It is wholly implausible the applicant was 'surprised' that substantive

fairness was not pursued given that he was present during the lengthy discussion between the parties' representatives and the arbitrator, before any evidence was heard. Anyone hearing that discussion would have concluded that the only issue before the arbitrator to determine was procedural fairness.

[22] The disciplinary code provided that if an employee did not attend a hearing without giving reasonable grounds for failing to attend the enquiry could proceed in their absence. Evidence was led that that the employer should establish the reasons for the absence, though this does not appear in the code. Likewise, it was not disputed that an employee is also required to contact the initiator beforehand if they are not going to be present and the responsibility lies with the employee to inform the employer if they are not going to attend the enquiry. The chairperson adjourned the enquiry for more than an houor to give the applicants' representative an opportunity to establish where they were. After the adjournment the representative still did not know the employees' whereabouts and then left as he had no mandate. It was only after that the initiator conveyed to the chairperson that he had received a message that the employees had reported they were sick.

[23] What the arbitrator was required to determine was if the chairperson had acted fairly in not postponing the enquiry, once he received the message that both employees had reported they were not present on account of illness, albeit that this news was only conveyed to him after he had decided to proceed with the enquiry and after their representative had already left apparently in ignorance of their alleged condition. The arbitrator was not required to assess if the chairperson acted fairly in light of any additional information provided by the medical certificates or after assessing their authenticity.

[24] Neither the initiator, who also represented the department in the arbitration, nor the applicants' former representative at the enquiry testified. The employees were represented at the arbitration by a different union than the one representing them at the enquiry. The only account of the initiator conveying the message to the chairperson was the oral testimony of the chairperson himself and his written summary of the disciplinary hearing. When he testified in chief he denied the employees had reported their absence prior

to the enquiry commencing. He later conceded he was made aware by the initiator that the latter had received a message from the human resources department that the employees had advised they could not attend on account of illness. He claimed he was only advised of this by the initiator after the union representative had already left the enquiry. However, his own summary of the disciplinary proceedings indicates that both the initiator and the representative received information from the Employment Relations office that the two employees had reported sick and, in the case of the initiator, he was informed they had notified that office a few hours earlier.

[25] Having accepted the medical certificates at face value, and despite having heard the applicant's evidence that, on the day of the hearing, when he went to the doctor, he was not able to stand in a queue to fax the certificate, because of how he was feeling, the arbitrator nonetheless effectively decided that they were both well enough to attend and that the certificates could be disregarded as part of a stratagem. The applicant's doctor recorded stress, backache and enteritis as the diagnosis. The arbitrator considered the coincidental illness of both employees to be simply their latest stratagem to avoid an enquiry, but he was in no position to dispute that the applicant was suffering from enteritis amongst other things, which might have made it untenable of him to wait in a queue at a media outlet to fax the certificate on that day.

[26] One of his other reasons for distinguishing this case from others was the arbitrator's resurrection of the long discredited 'no difference principle'1, namely that as the employees were not contesting the substantive fairness of their dismissals, any procedural unfairness would not have altered the result. This was a plain error of law on his part which he relied on to bolster his conclusion. It no doubt affected his view that it would be unconscionable in any event to award any compensation for procedural unfairness to employees who are guilty of the serious dishonest conduct amounting to theft. This is a question which concerns what compensation if any should be awarded, if

[1] See *Banking Insurance Finance & Allied Workers Union & another v Mutual & Federal Insurance Co Ltd* (2006) 27 *ILJ* 600 (LAC) at para [33] and the cases referred to there.

there was a degree of procedural unfairness. It does not support the arbitrator's argument that procedural unfairness was not present in the case because of distinguishing features of the case.

[27] All things considered, there was no basis for the arbitrator to justifiably distinguish this case from the 'ordinary' case he described in which he would conclude the failure to postpone the enquiry was procedurally unfair. For this reason, his finding that there was no procedural unfairness must be set aside.

[28] The question which arises is what compensation if any should be payable for failing to postpone the enquiry at least on the first occasion? Them misconduct for which the applicant was dismissed was serious. It is true that ultimately he did not seek to contest the substantive fairness of his dismissal in the arbitration. It is perhaps not likely, given that he never subsequently challenged the substantive fairness of his dismissal at the arbitration, that he would not have attended any further disciplinary enquiry that was convened. However, it also cannot be said confidently that he would never have attended any subsequent hearing to dispute the substantive charges or to argue mitigating factors.

[29] A balance must be struck between not incentivising an employer to rush procedures by taking a confident gamble that no negative consequences will flow from overhastily concluding proceedings in absentia in cases where the substantive charges are not contested, and not overcompensating an employee who ought to have been given at least one more opportunity to defend himself , in circumstances where they never subsequently did make use of de novo arbitration proceedings to challenge the substantive fairness of their dismissal2. In this case a nominal solatium of one months' remuneration would be appropriate in my view.

[30] There is no special reason to depart from the general principle applicable to cost awards in these type of disputes.

[2] In this regard, see the useful survey of jurisprudence on the balance to be struck in *Solidarity on behalf of Van Emmenis v Sirius Risk Management (Pty) Ltd* (2015) 36 *ILJ* 3175 (LC) at paras [33] to [49].

Order

1. The late filing of the review application is condoned.
2. The First Respondent's finding in respect of the Applicant in paragraph [47] of the award issued on 5 September 2020 under case number GPBC 2113/2019 and GPBC 2114/2019 is reviewed and set aside and substituted with the following:

   '[47] The Applicant's dismissal was procedurally unfair and the Third Respondent must pay the Applicant compensation of one month's remuneration, calculated on basis of his salary at the date of his dismissal.'
3. All references to the Applicant and Third Respondent in the substituted paragraph [47] of the award are references to the parties in this application.
4. No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	Ms R Nyman instructed by Mr N Dlakavu from Dlakavu Attorneys
For the Third Respondent	Mr S O'Brien instructed by Ms C Bailey from State Attorney