IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D641/17

In the matter between

WNS GLOBAL SERVICES (Pty) Ltd Applicant

and

CCMA First Respondent

MLABA N N.O. Second Respondent

GOVENDER K AND 21 OTHERS Third Respondent

Heard: **25 May 2018**

Delivered: **25 May 2018**

Edited: **21 August 2018**

Summary: **Review application - Commissioner disregarded material evidence – the award is not one that a reasonable commissioner could have made – no sanction considered by the Commissioner - case remitted to the CCMA to determine an appropriate sanction**

***EX TEMPORE* JUDGMENT**

Coetzee AJ

Introduction

[1] This is an *ex-tempore* judgment with reasons in the matter between WNS Global Services SA Pty Ltd v the CCMA, the first respondent, Nontutuzela Mlaba NO the second respondent and Krishnaveni Govender and 21 others.

[2] The tenth respondent had her own representation in Court.

[3] Firstly, I thank the representatives for their very useful submissions that contributed to the fact that I was ready to give an *ex tempore* judgment.

[4] This is an application to review and set aside the CCMA arbitration award issued by the second respondent on 12 April 2017. The dispute pertained to the fairness of the third and further respondents' dismissals. I refer to them as the individual respondents. The commissioner held that the dismissals were substantively and procedurally unfair and ordered the applicant to reinstate them with retrospective effect.

[5] The applicant approached the review on a narrow basis; it says that the commissioner disregarded material evidence on whether the applicant complied with the policy to notify the respondents 30 days in advance of a date to relocate the individual respondents from the Old Mutual Building where they were located to the new premises.

The background

[6] The applicant dismissed the individual respondents on charges of unauthorised absence from work and for having failed to obey a lawful and reasonable instruction to attend work.

[7] The notification of misconduct to the employees reads as follows:

> "Charge 1 – serious misconduct in that the employees took unauthorised absence from their place of work for more than five days. Please refer to 1.4 and note 1 of the Code."

[8] Charge 1 follows the wording of paragraph 1.4 of the Code to which they were referred and note 1 thereto reads as follows:

> "The no work no pay principle will apply to unauthorised absenteeism regardless of a disciplinary sanction."

[9] Charge 2 reads as follows:

> "Charge 2 – serious misconduct in that the employees failed to obey a reasonable and lawful instruction. Please refer to 2.17 and note 4 of the Code."

[10] Paragraph 2.17 of the Code reads as follows:

> "In subordination by the refusal of an employee to obey a reasonable and/or lawful instruction."

[11] The recommended sanction in the disciplinary code is a final written warning for the first offence and dismissal for the second. Note 4 that accompanies the notification provides as follows:

> "If the offences have a serious nature then dismissal for a first offence may be an appropriate sanction."

[12] The individual respondents were found guilty on both charges and were dismissed by the employer.

[13] The applicant relies upon a policy that it inherited from Telkom when the contracts of employment of the individual respondents transferred to applicant in terms of Section 197 from Telkom.

[14] This policy in paragraph 3.1(a) provides as follows:

> "Employees may be transferred to any Telkom work location if such an arrangement is in the interests of the company."

[15] In paragraph 4.1(a) the policy provides as to notice of transfer the following:

> "An employee must be given at least one months' notice of transfer. Any period of notice of less than one month is regarded as short notice and the employee needs to be consulted and agreed to accept the transfer of such short notice."

[16] The applicant's case is that it gave 30 days' notice (a month). Leanne Coetzer from the applicant's Human Resources department testified that prior to 21 April 2016 she was in

communication with CWU, the union representing the individual respondents and the union was aware that a relocation was on the cards for the 1 June 2016.

[17] Thivean Chinnathambi on behalf of the applicant on 21 April 2016 sent an email to, amongst others, CWU that represented the individual respondents in this matter, requesting a meeting on 28 April 2016. Attached to the email was the following notification dated 21 April 2016:

> (To) "CWU and CACU regional offices. Notice to Section 197 Staff Office Move.
>
> In accordance with our consolidation strategy we would like to issue you with this notice and thus invite you to consult with us regarding a proposed office move from the Old Mutual Durban building to WNS Durban site.
>
> (2) During meaningful joint consensus seeking processes the company will attempt to reach consensus on the proposed office move. Until there is clarity from the joint consensus seeking process above all employees in the Old Mutual Durban building are herewith informed that they are affected employees. The company aims to have a meeting with all employees affected on 28 April 2016 at 11:00 in the Old Mutual Durban.
>
> (3) The reasons and proposal. (a) Old Mutual building will be closed down by June. However, Telkom wishes to shutdown it as soon as possible. (b) Having to manage three sites in a single city is unproductive. (c) Better employer engagement across the WNS sites when employees are on one site.

> (4) Kindly consider the above proposal carefully together with all discussions during the consultations and we look forward to hearing from you regarding representations and proposals which you wish to make in this regard.
>
> Yours faithfully
>
> Leanne Coetzer
>
> Head of Human Resources WNS."

[18] The meeting occurred on 28 April 2016. What occurred at the meeting is recorded in two parts, the one part is recorded in the typed transcript of the meeting of 28 April 2016 and the rest is contained in oral evidence given in the arbitration in respect of the unrecorded last part of the meeting. It is common cause that only a part of the meeting was recorded.

[19] I first refer to the meeting transcript. During the meeting it was clear from the invitation to the meeting that the purpose was to consult meaningfully on the relocation of the employees in the Old Mutual building to a new building. Also, that Telkom required the applicant to vacate the premises by the end of June 2016 or on an earlier date if possible. The applicant in the meeting firstly raised the motivation for the relocation as "growing the family" and working more closely together, but that the first hard rule was that the applicant had to vacate the building[1].

> "The primary driver here is that we have been told to vacate."

[1] Transcript page 570

[20] The union responded thereto as follows[2]:

> "We need not to you now come in a meeting and then begin to say yes, the sooner the better because we need to deal with that process. *If you are saying end of June let us stick to that*, if you go beyond the end June or July or whatever, probably date that as well to us will not be a problem." (Own emphasis)

[21] The union repeated its position:[3]

> "Ja, let's say end of June because that's how it was reported to us."

[22] When the end of May is mentioned for the staff to move Mr Roland Mazery on behalf of the applicant conveys the following:

> "Sorry, as it stands our understanding of end of May is the thing, is the date that Telkom have indicated, but it's not on the notice and it is a question that I need to clarify for you."

[23] He continues[4]:

> "I would like to work towards the end of May. I mean we, as Thabo said, we had already opened up the opportunity for people to move voluntarily if they feel that they can do that. It might be beneficial for some staff to move now because they are closer, the new work will be closer. However, we will come back to you with the actual date. I can see that there might be confusion."

[2] Transcript page 575
[3] Transcript page 576
[4] Transcript page 578

[24] The discussion continued to and fro with the union stating[5]:

> "And we will work on the process towards end of June let it be."

[25] Mr Mazery later asked that could we work on the end of May? This again is queried by the union. The union refers to the notice calling the meeting stating that it received a mandate to negotiate on the end of June as mentioned in the notice. The union said it could not now go back to its members to say that the period has been shortened to the end of May. The union also points out that some of Telkom's operations would continue in the Old Mutual building after June 2016 and therefore it is incorrect to say that the Old Mutual building would be closed down.

[26] During the discussion it appeared that the notice had been sent only to the union and not to the individuals. This became common cause. The discussion led to a caucus called by the union.

[27] After the caucus the union referred to the various Telkom documents relevant to health and safety issues, the facilities and some other aspects. The applicant gave an assurance that the new building was a state of the art building absolutely compliant with all the requirements. The union however said[6]:

> "So therefore, we would have liked for each and every member of CWU needs to visit there themselves because we are talking about what do you call, is it called, I am not having this thing."

[5] Transcript page 579
[6] Transcript page 587

[28] A discussion then followed as to a visit to the building, travelling costs and some other aspects.

[29] The applicant repeated its position that at the end of May the employees must relocate. The parties seemed to come to some sort of an agreement or at least an understanding when the union says the following[7]:

> "*After end of May that's what you said*. That's what you said, *and I said we agree.* Now you are coming again to open that and you want us to open a discussion on that again. I think we are moving back and forth *let's agree that end of May people, after end of May that's when people will start moving and then that's what we are going to be communicating to the rest of our members*."(Own emphasis)

[30] Thereafter follows a caucus called by the employer and the rest of the meeting is not recorded.

[31] The oral evidence covers the rest of the meeting.

[32] Mr Thabo Madiehe for the employer testified that during the caucus the following happened[8]:

> "We even in fact asked for an adjournment to ensure that we confirm this thing both with the regional head of operation to ask to find out if there is a possibility of having maybe the employees moving maybe a week after the first week in the middle of June and all that. And it was confirmed that 1 June was the date because failure to do so we will – we won't have

[7] Transcript page 601
[8] Transcript page 24 and 25

> access to that building and will still have to provide services to Telkom. And that figure was given to the representative of the union that 1 June indeed it was the date of the move. And we then all agreed that 1 June was the date of the move."

[33] Mr Thabo Madiehe testified further[9]:

> "And there was a proposal from the union to check if it's going to be viable to have the move shifted by a week or two until around 15 June. We said we had a proposal, we adjourned, we were going to just get that understanding and the feedback was that unfortunately 1 June is the date because the building is going to be decommissioned. So, we needed to understand from all stakeholders if the proposal from the union to shift to the left was possible. So, we were all clear in terms of when is the move supposed to happen."

[34] And also:[10]

> "In that meeting the company was very clear in terms of what we needed to do and what was going to happen. We were very clear; hence we had to adjourn and get direction from our principals and it was made very clear in that meeting what was going to happen and then for how long was this thing. So, the decision and the direction it was very clear. The union representative pushed Mr Thabo Madiehe into conceding that if there was no agreement between the company and the union then in that case further notices had to be issued."

[35] On the same topic Thivean Cinnathambi on behalf of the applicant testified as follows[11]:

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[9] Transcript page 116
[10] Transcript page 120 and 121

> "During the course of that meeting we had a break during the duration of that three-hour meeting. We received clarity that the move has to take place on 1 June. During that meeting the unions did indicate you know can it be at the end of June or whatever the case may be. However, based on the clarity we received when we went back on a break we reiterated that the move needed to take place on 1 June."

[36] She continued[12]:

> "That was the whole purpose of the meeting to discuss the move and to obviously inform them. During that meeting like I mentioned, I did indicate that we went and found out and received clarity on the actual move on 1 June 2016."

[37] Mr Roland Mazery further testified on behalf of the employer[13]:

> "Well, there was a lot of discussion around the actual date which prompted us to actually caucus and step away from the meeting to go back to our principals to clarify the date. And on the back of that our message to our colleagues was that the 31 May was the last day that they had to be in that building and that the 1 June they needed to report to the new site. Yes, so the date we didn't expect that the date would be such a contentious issue, but we knew we had to give a months' notice and we felt that we were within that notice period. They requested for more time, but unfortunately, we weren't able to get more time we had been given strict instructions to vacate on the 31st. And then, Ja, so that was around the date."

[38] Mr Roland Mazery also said:[14]

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[11] Transcript page 261
[12] Transcript page 262
[13] Transcript page 432

> "And the position of the union consistently was no we don't accept that, no we actually want the end of June. But eventually they said well but look if we can agree that not before the end of May then we start moving thereafter. But that's what the position was that the union adopted."

[39] And further on the same page it is recorded in the transcript:

> "Ja, so and again the record doesn't carry through to the critical part unfortunately. Where we actually break away to go to our principals because we were listening, and we wanted to be absolutely certain that our date was a hard date and we broke away and I personally called in through to my principal to check that the date was the date of the move. And when we joined the meeting again that was when we said guys we cannot budge on this date that is the date."

[40] And further:[15]

> "So, around the date, in my mind there was no doubt around the date as to whether they thought this was an ongoing consultation I can't say.

[41] He also said:[16]

> "And we caucused so that we could go and absolutely verify that that date, we listened so we thought we would, so my call to my boss was is this date hard, can we move it, what will be the implications and the message I got back was that date has been given to us by Telkom. They need us out of that building.

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[14] Transcript page 454
[15] Transcript page 559
[16] Transcript page 474

> They have a plan for the equipment and we can't move that date. So that was the purpose of the caucus because then I came back into the meeting to say that's the information. We can't flex on the date."

[42] For the respondents Ms K Govender testified and in cross examination replied in response to a question[17]:

> "Advocate Posemann: In the meetings Thabo told you clearly 1 June, he consulted with Leanne and told you 1 June was the date?"
>
> K Govender: He didn't say 1 June, Thabo consulted with Leanne. It was Roland, Thabo and Thivean and they came back into the meeting and said end of May. Nowhere in that conversation did they say 1 June."

[43] A further question was put to her:[18]

> "So even if nobody else knew about the move you certainly knew about the move about the end of May and there would be a discussion in between.?"
>
> Govender: Yes"

[44] The meeting is followed by an email of 13 May 2016 from Thivean Cinnathambi on behalf of the applicant to the union providing information requested by the union on the implementation of the relocation stating:

[17] Transcript page 673
[18] Transcript page 677:

"Kindly note we will submit the schedule for the site visit on Monday 16 May 2016."

[45] This is followed by some further emails regarding the visit to the site. There was a note prepared on the outcome of the inspection that was submitted to the applicant. And then on 26 May 2016 Mr Thabo Madiehe circulated an email, including also the individual employees for the first time, with the following content:

"Dear colleagues,

re Office Move from Old Mutual Building to WNS premises.

We refer to numerous discussions and various interactions over the past few weeks with our employees based at the Telkom Old Mutual premises as well as organised labour CWU and SACU. A formal communication confirming the move was shared with all parties concerned on 21 April 2016. The communication was followed by subsequent meetings with CWU on 28 April 2016 and 25 May 2016. During the meeting on 28 April 2016, as recorded, it was confirmed that all employees would be moving from the current place of work Old Mutual building to the WNS sites effectively 1 June 2016. We had some feedback from CWU with regards to the new site/s. With this we recognise your feedback, but would however like to assure you that our sites are 100 percent compliant from a health and safety point of view and we take pride in the newly built sites for our employees. Where possible and on an ongoing basis we work with our employees through various forums to make our workplace a safe and exciting environment. We would like to reiterate and confirm that this move will take

> place on 1 June and we look forward to welcoming you to our new home on the 1 June 2016.
>
> Warm regards,
>
> Thabo."

[46] Ms Phiwe Mdletshe of CWU on 30 May 2016 replied thereto complaining that the applicant was addressing its members directly and the relevant parts are quoted below. It started off by saying:

> "Below is a letter you have written to our members regarding the movement to the new site and would like to state the following:
>
> We do not appreciate the direct communication to our members while we're still in consultation because that is tantamount to undermining the constitutional of your employees to be members of the union of their choice."

[47] And then it deals with the meetings and the last paragraph reads:

> "We are of the strong belief that there is an intention on your part to undermine and confuse our members, so they could fall in your trap of victimising, undermining and manipulation. It is also clear that you will not be able to change your ways or attitude in dealing with us which leaves us with no option but to consult an external party in dealing with the situation.

Regards,

Phiwe Mdletshe."

[48] He attached the email that he referred to in his communication. This is followed by an email, on the 31 May 2016, from Roland Mazery:

> "Hi All, the big move is tomorrow. Please note that the Telkom IT team will begin decommissioning equipment early on 1 June 2016 at the Telkom OM. This will include removing telephones and PC's and revoking physical access to the premises and access to systems. It is important that you report for work at your new designated site on 1 June 2016 as per your usual shifts. Please reach out to the HR team should you have any questions."

[49] CWU then referred a dispute relating to the move to the CCMA. CWU on 31 May 2016 replied referring to disturbing reports that the workers are being instructed to remove all their belongings as they must be out of the Old Mutual building and making mention of further meetings. Also stating that CWU is putting it on record that no members of the union shall move until all proper consultations have been done, that there is a current dispute before the CCMA and the employer must retract the instruction given until the matter that was before the CCMA has been completed. The employees are then informed:

> "Please note as per previous communication from tomorrow 1 June 2016 the Old Mutual building as a place of work will no longer be available. All WNS employees are required to report

> to the WNS sites tomorrow. The employees' access to the Old Mutual building Telkom premises will no longer be available."

[50] CWU then unsuccessfully approached Telkom to ask for assistance in terms of the section 197 transfer agreement.

[51] The individual respondents did not report for duty at the new premises and as a result the applicant issued an SMS to the affected employees:

> "Dear Employee, we are concerned about your absence from work today. As per our instruction earlier please report to the WNS site as soon as possible. Should you fail to report to the WNS this could be seen as AWOL. We are looking forward to welcoming you at WNS sites."

[52] The next day a second SMS was sent:

> "Dear Employee, your continued absence from work is of concern to us. Again, we urge you to please report for duty tomorrow at WNS sites."

[53] On the 3 June 2016 a third SMS was sent saying the following:

> "Dear Employee, you have not reported for duty since 1 June 2016 despite your employer's numerous instructions. Your continued absence without permission and failing to follow the reasonable instructions to report to WNS premises is viewed in a very serious light. Whilst we take note of your concerns raised with regards to the move you are still required to report as instructed. Please report for duty by no later than 08:00 Monday 6 June 2016. Failing which we have no alternative but

> to commence with disciplinary proceedings. We look forward to having you on board on Monday."

[54] The individual respondents did not report for duty and an SMS followed advising them of the disciplinary enquiry set for 10 June 2016.

[55] The employees during the period 3 June to 7 June responded with various SMS's to Thivean Chinnathambi saying:

> "Dear HR Manager, Thivean Chinnathambi, please be advised that our union CWU and the senior group manager Thabo Madiehe are still in consultation on the current situation regarding the move to the new workplace or site. Please direct all queries with regards to my daily reporting status to them directly for further info."

[56] It is also on record that Mr Thabo Madiehe on 3 June 2016 communicated to CWU as to health and safety issues. WNS still required the employees to report for duty at the WNS site to perform their duties notwithstanding. It is also pointed out that for 70 percent of the employees they would actually benefit because it was closer to their homes.

<u>The award:</u>

[57] The applicant seeks to review the arbitration award on the basis that the commissioner failed to have regard to the evidence of any oral communication informing the employees through its union of the date of the move. The commissioner thus misconceived the nature of the enquiry, so says the applicant, or

didn't have due regard to material evidence and consequently did not arrive at an award that a reasonable commissioner could have. It is the applicant's case that the evidence showed clearly that the date of the relocation was orally conveyed to the respondents on 28 April 2016 while the union was acting on behalf of its members. This evidence the commissioner ignored.

[58] The relevant part of the award under attack is to be found in paragraph 65 to 68:

> "(65) The fact herein is that the employees were only informed of the move that was to take effect on 1 June 2016, on the 26 May 2016 by an email that was sent to all affected employees, by Mr Madiehe.
>
> (66) It was admitted by Madiehe as well as Thivean at this hearing that that was the first correspondence regarding the move that was sent to the affected employees.
>
> (67) It was also a fact that is unchallenged that the first email pertaining to (b) (sic) the move was sent by Madiehe to the union's regional head on 21 April 2016. This email however as quoted in para [it's blank] above was clearly an invitation extended to the union for a consultation regarding the move.
>
> (68) The email of the 21 April was not a notice to employees as contemplated in the relocation policy."

[59] There is no mention in the award on whether oral evidence was given in respect of the meeting of 28 April 2016. The finding deals with only the applicant's proposition that there was an

agreement on the relocation date and not that oral notice was given. In this regard the commissioner held as follows:

> "(70) It was the respondents' evidence that the union had agreed at a meeting held on 28 April that the applicants would move to new premises on 1 June.
>
> (71) The applicants dispute the above and the record of the meeting was submitted.
>
> (72) I have perused the record which was submitted by the respondent and clearly there is nowhere in the transcript that suggests that there was such an agreement.
>
> (73) The respondents witness Thivean was questioned and asked to point out in the transcript any passage that stated that an agreement was reached. She failed to do so."

Analysis

[60] The applicant's case is that the commissioner failed to consider whether oral evidence was given on the meeting of 28 April 2016. The oral notification is material to the issue that the commissioner had to decide. The commissioner limited herself to whether there was an agreement and whether that agreement was apparent from the transcript of the first part of the meeting which was recorded and transcribed. She ignored the evidence on the second part of the meeting and the oral evidence that notification was given.

[61] On the other hand, the 10th respondent contends that nowhere in the available recording of the meeting of 28 April 2016 is it demonstrated that the applicant gave CWU clear and unequivocal notice that the individual respondents were required to relocate on 1 June 2016.

[62] The commissioner seems to concur with the submission based on the fact that the witness Thivean could not point out in the transcript of the meeting that such an agreement was reached, neither could he find it in the transcript.

[63] The commissioner did not consider at all the oral evidence as to what occurred during the unrecorded last part of the meeting after the employer returned from the caucus. The last part of the meeting was not recorded and there was no transcript for the commissioner to consider or for Thivean to point out anything on it.

[64] The evidence before the commissioner in respect of the proceedings after the caucus in my view strongly shows that the employer representatives contacted their principal in charge who made it abundantly clear that the relocation could not be later than 1 June 2016. That information was unequivocally conveyed to the union official and the shop stewards present at the meeting which also three of the individual employees attended.

[65] The position of the union at that stage had already been that if the relocation was not before the end of May 2016, then it was fine. The employer's evidence in this regard is confirmed by Ms K Govender, a shop steward. She testified on behalf of all the respondents (as quoted above) that when the meeting resumed

the three employer representatives said that the date was the end of May. She disputed that 1 June was mentioned but confirmed that the end of May was the final date. She also conceded that if nobody else knew she knew that the employees had to relocate at the end of May. She confirmed the applicant's version of events.

[66] The finding of the commissioner that no notice was given is against clear evidence that the employees' representatives were informed that the date was a "hard factor" and that there was no chance of moving the date beyond the end of May. The union clearly indicated its position that they agreed that the applicant could relocate the employees if it was after the end of May. The commissioner disregarded this material evidence.

[67] The 10th respondent further submits that the notification was not clear and did not comply with the requirements of a valid notice. The submission is in my view without substance as there was a discussion in respect of different dates and the parties were clear on the date. The employer did not have to consult anybody on the date, but nevertheless did so and then unequivocally informed the union of the date when the relocation would take place. There is nothing unclear about this.

[68] There were no requirements as to the form of the notification. The notification was oral. That was sufficient.

[69] The finding of the commissioner that there was no compliance with the requirement to notify employees 30 days (a month) in advance of the date of relocation is one that a reasonable

commissioner could not have arrived at. Such conclusion disregarded clear evidence to the contrary.

The alleged agreement

[70] The 10th respondent also submitted that no agreement was reached between the applicant and CWU that relocation would take place on 1 June 2016. The submission is that there was no mandate by its members to the union to agree to any date prior to June and therefore the union would not conclude such an agreement.

[71] The long and the short is that the applicant needed not rely upon an agreement in the form of a collective or other form of agreement as such an agreement was not necessary for purposes of complying with the Telkom relocation policy. In argument the applicant only relied upon the oral notification to the union.

[72] The policy required that information be conveyed to or the union being notified a month prior to the date. That was done. The purpose of the policy is advance warning, as Mr Todd puts it, before the "landing date", whether the union liked it or not and in any event the union stated its position clearly that as long as it was not before the end of May then it was acceptable.

[73] A further point raised by the respondents is that the individual respondents did not personally have knowledge or constructive knowledge of the date of relocation. The argument goes that the policy says that the "employees" must be informed and thus notice given to the union is not notice given to the employees.

Reference is made to the *Transport and Allied Workers Union-case*[19] where the High Court held that notice to the union of a proposed retrenchment was not sufficient notice to its members. Counsel for the 10th respondent, rightly also referred to several other cases where the Court regarded notice given to the union as sufficient. Those cases where notice was given of a disciplinary enquiry etcetera. Counsel attempted to distinguish those authorities on the basis that in those cases there have been disputes between the employer and the employees or the trade unions were found to have expressly or impliedly asserted their respective rights to act on behalf of the members in the course of dealing with such disputes or there had been service of documentation in connection with such disputes. The Court was urged to accept that unless it is clearly demonstrated that the union in this matter had a specific mandate from its members to accept the information conveyed as to the date of the relocation then in the absence thereof the employees did not have constructive notification through the conduit of their union.

[74] There is sufficient authority to show that in the employment relations and the labour relations sphere where a union specifically says I am acting on behalf of my members then notice to the union is notice to the employees who are members of that union. In this particular case, three individual employees were also present at the meeting. They at least first hand knew what was going to happen. And the union as I pointed out earlier chastised the employer for contacting its members directly. The union was clearly acting on behalf of its members. Also, during the meeting, the union indicated that it was going to communicate with its members regarding the date of their relocation. There is no reason to believe that the union was not

[19] (1992) 13 ILJ 1154 (D)

the representative who could receive the information on behalf of its members. In this case, on the facts alone, the union indicated clearly that it was going to communicate with its members on the issue of the date of relocation. The submission that the members did not have knowledge, therefore stands to fail. The respondents were duly informed of the date of relocation.

The procedural unfairness

[75] The respondents allege that there were procedural irregularities, amongst others, about the text messages sent to the respondents, the formulation of the charges and a lack of clarity. In my view there is no merit in this submission as it is clear from the text messages and the notification of the disciplinary enquiry that the employees could understand what was required of them. The only finding of an irregularity by the commissioner is that a notice calling the employees to the disciplinary hearing did not inform them of their rights. This is a finding that is so formalistic that it should be rejected. The union was involved from inception. There was no need to advise the individuals. This finding of the commissioner also is not one that a reasonable commissioner could have arrived at. There were no procedural irregularities.

[76] The second alleged procedural unfairness relates to the position of the third respondent who is a shop steward. The finding is that the employer did not follow the procedure regarding the dismissal of a shop steward. The procedure obviously refers to the procedure in the Code. Ms K Govender was a shop steward and she maintained that in terms of the collective agreement and the code the union had to be consulted or informed prior to her being called into a disciplinary enquiry.

[77] The applicant engaged the union before the enquiry on the entire collective process that it wished to follow and consulted on the disciplinary enquiry and this included the third respondent as one of the affected persons.

[78] It must have been absolutely clear that discipline would be taken against all and sundry and that would include the shop steward. To inform or consult the union separately on her position would not contribute in any way to the fairness of this matter because the union already knew and participated in the proceedings. The lack of formal consultation under those circumstances does not render this process unfair. Therefore, the finding that the dismissal was procedurally unfair is also not one that a reasonable commissioner could have arrived at.

The sanction

[79] The respondents in the arbitration put in issue, according to the arbitration minute, whether dismissal was the appropriate sanction. The commissioner made no finding as to the sanction of dismissal imposed by the employer after the disciplinary enquiry. The commissioner limited his finding to whether there was a rule, that is, whether the employer gave 30 days' notice of the date of relocation. He found the dismissal unfair and did not have to consider the sanction.

[80] I have been directed to various submissions and factors to consider and I was urged to consider imposing a fair sanction. The purpose of the Court imposing a sanction was to then take a global view of whether the dismissal was fair and whether the commissioner under those circumstances having regard to a

sanction imposed by this court acted like a reasonable commissioner.

[81] This means that the Court has been requested to sit as an arbitrator to determine a fair sanction. This Court may when it reviews and sets aside an award substitute its own award if appropriate. When it comes to sanction this Court is reluctant and has been reluctant to intervene with sanctions imposed by arbitrators and commissioners. I am even more reluctant in the first instance to determine a sanction where no one was imposed, and no consideration has been given as to a sanction.

[82] The Court may review and then substitute awards, but in only very exceptional circumstances determine the sanction in the first instance. This would also mean that the Court may be sitting as an arbitrator subject to review or appeal on the sanction issue.

[83] This Court is not prepared to consider and impose a sanction.

[84] The matter was dealt with as a collective matter, but that does not prevent the individual respondents who so wish to make individual representations as to a fair sanction *albeit* through their union if so elected. It is appropriate that the matter is referred to the CCMA. The CCMA must appoint a commissioner other than the second respondent to determine an appropriate sanction.

[85] As to costs the 10th respondent did not ask for a cost order and the applicant left it in the hands of the Court. Having regard to

the outcome and the other factors to consider I am of the view that it is not appropriate to make a cost order.

[86] I make the following order:

[86.1] The arbitration award of 12 April 2017 is reviewed and set aside.

[86.2] The individual respondents were guilty of the misconduct with which they were charged, and the employer followed a fair procedure.

[86.3] The question of the fairness of the sanction is remitted to the CCMA to be determined *de novo* by a commissioner other than the second respondent.

[86.4] There is no order as to costs.

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F Coetzee

Acting Judge of the Labour Court

APPEARANCES:

For the applicant:	Chris Todd
Of:	Bowmans
For respondents 3 – 9 and 11-21:	B Mashego
Of:	CWU
For the tenth Respondent:	K Allen
Instructed by:	Henwood Britter & Caney