



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D 282/2015

In the matter between:

HULAMIN LIMITED

Applicant

and

KIRATH HARRIMOHUN

First Respondent

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

Second Respondent

MOKGERE MASIPA N.O

Third Respondent

Delivered: 18 December 2018

JUDGMENT

TLHOTLHALEMAJE, J:

[1] With this application, the applicant seeks to review and set aside an arbitration award issued under the auspices of the second respondent (MEIBC) by the third respondent (Commissioner). The application is opposed by the first respondent (Harrimohun) .

[2] Harrimohun was previously employed by the applicant in the position of machine operator. He was dismissed on 18 March 2014 following a disciplinary enquiry into allegations of;

- 1) Removing/stealing company property from the maintenance lockers without permission from management.

- 2) Entering a substation which is a prohibited area without the permission of management.
- [3] The alleged infractions are alleged to have taken place between 3 and 4 November 2012 at the applicant's substation 5, which was regarded as being off limits to Harrimohun and other unauthorised personnel.
- [4] The allegations came about subsequent to the applicant's Instrumentation Assistant (Mr Mncube), having reported that he was missing the keys to the maintenance locker substation 5, which were kept in that area in a concealed place. The lockers in question as situated in substation 5 are in a restricted area, with access only being granted to instrumentation employees, electricians and engineers.
- [5] Substation 5 essentially consists of cupboards that store equipment and tools. At the entrance of the area is a clear sign indicating that unauthorised personnel are not allowed entry. Harrimohun as an operator worked at shredder machines, which ordinarily are maintained and repaired by instrumentation team. According to the applicant, it was thus not required of him to repair shredder machines where the need arose.
- [6] CCTV footage of the area was viewed with the objective of establishing who might have gained access to the area and retrieved the missing keys. On the video footage, Harrimohun was observed to have entered the restricted area at about 23h20 on 3 November 2012, shortly before he knocked off at 00h00. On the following day at 23h20, Harrimohun was again observed in the area, opening and closing the lockers, and proceeding to take some equipment which included multimedia tester, drills, a calibrator and other items from the maintenance lockers. He was further observed removing the missing bunch of keys from the top of a locker and placing them in his pocket as he left the substation.
- [7] Further investigations revealed that the items that went missing from the substation were valued at an estimate R78 100.00. Despite a search of the area upon viewing the footage, the items could not be found. A further viewing of a security video footage at the exit and entrance point of the applicant

revealed that Harrimolun was indeed searched as he exited the premises. Upon Harrimohun being interviewed and making a statement, his contention was that he had not removed any property from the premises and/or from substation 5.

- [8] After Harrimohun was suspended and notified of a disciplinary enquiry to answer to the charges, some of the missing items were subsequently found in the plant at substation 5, either concealed in a book or electrical panels. These included a multi meter tester, a 475 Field Communicator Emerson, Black and Decker drill kit box, Bosch portable drill and other minor accessories. Missing items such as Tong Tester and two others could still not be found. The discoveries came about despite the fact that immediately upon it being realised that the keys were missing, and after video footage was viewed, none of the missing items could be found despite a search. The discovery of some of the missing items was made after an anonymous tip-off. Further discovery of other items was made midstream the arbitration proceedings before the Commissioner, some two years after they had disappeared.
- [9] Following a finding of guilt on the charges and a dismissal, Harrimohun referred an alleged unfair dismissal dispute to the MEIBC. When conciliation failed, the matter came before the Commissioner for arbitration.

The arbitration proceedings and the award:

- [10] The evidence led on behalf of the applicant by its Control Engineer Mr Faizel Rawot, was essentially that upon the video footage having been viewed, Harrimohun was also observed looking up the roof of the area to see if there were any surveillance cameras in the area and proceeded to look through the cupboards. Rawot's contention was that if there was no intention to commit theft, Harrimohun could simply have requested permission to enter the area. He had further testified that Harrimohun did not in the course of his duties, require the tools from the substation; that only the engineering manager could authorise employees to enter the area, and further that a permit was also required if an employee sought to enter that area.

- [11] Mncube also confirmed having viewed the video footage. Other than corroborating Rawat's testimony, he had added that Harrimohum would have known at the time of the commencement of his employment that authorisation was needed prior to entering substation 5.
- [12] Another witness, Robinson, of RAP Security which was contracted to the applicant, also viewed the video footage and had observed Harrimohun removing the items from the lockers. He had further testified that although Harrimohun was searched when he left the premises on 3 and 4 November 2012, his bags were however not searched.
- [13] Harrimohun's contentions at the arbitration proceedings were that the charges against him were trumped up as he was a union (UASA) shop steward and had always vociferously objected to the manner with which management treated employees at the workplace. He had admitted to having removed the items from the cupboard in the substation, but for the purposes of using them in the course of his duties. He contended that he had left them at the substation when he was done with them and when he knocked off.
- [14] He testified that he could not have stolen the items as they were subsequently recovered during his suspension and after his dismissal. In regards to the second charge, his contention was that there was no rule prohibiting him from entering the substation; that no permission was required by anyone prior to entry into the substation; and that its doors were permanently left opened. He had thus entered the substation on numerous occasions, with the full knowledge and authority of his supervisor.
- [15] Harrimohun's further testimony was that it was common practice for any other employee to enter the substation. On 3 and 4 November 2012, and as per the instructions of his supervisor, Mr Chinsamy, he was performing routine maintenance, replacing and installing pressure airline valves, and putting additional airlines for housekeeping purposes.
- [16] In regards to the items allegedly stolen, he conceded that he had placed some of them in his jacket pocket, but only to prevent them from falling. He contended that the multi meters belonged to his friend; that he only took the

IR gun out of the substation to play with or test it; and that he took the Emerson to test it, learn how to use it, and thereafter left it at the substation as he had no use for it outside of the workplace; that he removed piping, clamps and second hand valves as they were old, and to fix and return them thereafter.

[17] Harrimohun's witness, Raveen Latchman testified that the substation was easily accessible to all employees, and it was only after the incident that a memo was circulated indicating that entrance thereto was restricted.

[18] Another witness, Rishie Ramruthan, testified that on a Sunday on 2 November 2014, and long after the dismissal of Harrimohun, he had reported for standby duty at the premises and recovered/found one of the items (tong tester) that was reported missing. The discovery was made a week prior to the arbitration proceedings taking place. Rumruthan also testified that the entrance to the substation was always accessible to anyone as it was not locked. This was despite his concession that a 'no entry' sign was placed at the entrance of the substation.

[19] The Commissioner's conclusions are summarised as follows;

19.1 Harrimohun was employed as a machine operator and was trained and had obtained a certificate in line maintenance. He had accessed the substation on 3 and 4 November 2012 as it was near his workstation and removed the items in question. Having taken the items, he left them at the back of the substation. He also took the multi tester as it belonged to his friend, and it was not known what happened to the items thereafter.

19.2 Harrimohun had conceded that he did not ordinarily use the items in the course of his duties. There was however no evidence to prove that he removed the items from the premises, or removed them at all from the substation other than the two he had conceded to.

19.3 His home and vehicle were searched and none of the items were found. The applicant's evidence was however to present two lists of

items collated on 9 and 12 November 2012, which were not the same, and to this end, although allegations of theft were made, the applicant could not state what was stolen.

- 19.4 Evidence suggested that although Harrimohun had removed the items from the cupboards before he knocked off, he had left them behind as he planned to use them on the following shift, but had not found them where he had left them the following day. Since the substation was never locked and was readily accessible to other employees, the items could have been removed by any of the other employees.
- 19.5 Some of the items were subsequently found at the premises at the time Harrimohun was on suspension, and there was no evidence to suggest that he could have arranged for them to be returned to the premises. Evidence therefore suggested that since all of the items were recovered, they must have not left the premises in the first place, and the employer had not led any evidence to show what measures were taken to establish from other employees whether they had knowledge of the missing items or taken them.
- 19.6 In regards to the second charge of entering the substation without authorisation, the Commissioner accepted that entry into the area was unrestricted even though there was a sign outside prohibiting entry, and further accepted nonetheless that authorisation was needed to gain entry. In this case, Harrimohun accessed the area without obtaining the necessary authority.
- 19.7 Since the applicant had failed to discharge the onus placed on it to prove that Harrimohun stole the items, and also in the light of the finding that Harrimohun had indeed entered the substation without authority, the Commissioner concluded that the sanction of dismissal was too harsh in the light of his clean disciplinary record and years of service, hence the award of reinstatement and backpay.

Grounds of review and evaluation:

- [20] The applicant contends that the Commissioner's award is reviewable on a number of grounds including that her conduct was grossly irregular; that she had committed misconduct on various fronts, and that she made an unreasonable finding since no reasonable decision-maker would have concluded on the facts and the evidence available, that Harrimohun was not guilty of the allegations of misconduct levelled against him. In that regard, it was further submitted that the Commissioner failed to consider relevant evidence and the applicable principles; failed to apply her mind to the different versions presented by the parties regarding the reasons or purpose of Harrimohun at the substation and handling the items in question when they were unrelated to his duties; or failed to properly consider the competing and disputed versions and evidence of the various parties.
- [21] Flowing from the established review test, it follows that the issue to be determined is whether the award issued by the Commissioner is one that a reasonable decision maker could reach¹.
- [22] On the material presented, the Commissioner found that Harrimohun had entered the substation without authority. In the light of that finding, it was further not placed in dispute that the items in question were removed from the cupboards in the substation. Some of these were later found over a period of time in odd places where they were not supposed to be. This was despite a search immediately after they were discovered to be missing.
- [23] Since Harrimohun was seen on the video footage entering the area and handling/removing the items when he had no authority to do so, it follows that the Commissioner's findings and conclusions that the applicant had not discharged the onus placed on it to prove the misconduct in question cannot be deemed reasonable for the following reasons;

23.1 The enquiry into whether Harrimohun was guilty of the misconduct related to the removal or theft of the items in question in the light of the disputed versions placed before the Commissioner required an

¹ *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*[2007] 12 BLLR 1097 (CC) at para 110.

examination of the probabilities of the contending versions, and a weighing up of those versions to determine which was the more probable; the reliability of witnesses and their versions; and their credibility².

23.2 It having been found by the Commissioner that Harrimohun had no authority to enter the area, central to the determination of the charge of removal or theft was whether the applicant had established a *prima facie* case of misconduct. Thus once the applicant had proved a *prima facie* case of misconduct on the part of Harrimohun, the dismissal stood *prima facie* justified. The evidentiary burden would then shift to Harrimohun to present such evidence as would exonerate him from blame in that regard³.

23.3 The Commissioner clearly failed to weigh the probabilities of Harrimohun's version of events as opposed to the evidence presented on behalf of the applicant. On the facts placed before her, the invariable conclusion to be reached would have been that such a version was lacking in honesty and credibility, and clearly the probabilities favoured a finding that a *prima facie* case of misconduct had been made. The submission made on behalf of Harrimohun that there was no direct evidence of misconduct on his part is clearly misplaced, as that is not the standard of proof applicable in this Court.

² See *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd* (2014) 35 ILJ 1656 (LC), where it was held that;

"11. The proper approach of a court (or arbitrator) which is called upon to determine which of two mutually destructive versions should be accepted was related in the judgment of *Stellenbosch Farmers Winery Group Limited and other v Martell et Cie* ...

12. That judgment emphasises the interrelationship of credibility of the witnesses, their reliability and the probabilities. However, it is be borne in mind that the ultimate decision which a court, or an arbitrator (as the case may be) must determine is whether on the issue in question the party which bears the onus has discharged it. In cases concerning the fairness of dismissals under the LRA, the party which bears the onus of justifying the dismissal is the employer. The question which the arbitrator must ask in discharging its duties as such is where the probabilities lie. If the probabilities favour the employer, it may well discharge the onus of proving the dismissal was fair. If they do not, the employer may fail."

³ *Woolwoths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2011] 10 BLLR 963 (LAC); (2011) 32 ILJ 2455 (LAC) at para 34

- 23.4 Harrimohun's version that he had merely removed the items to 'play with', or 'learn how to use them' was so ridiculous, far-fetched and improbable that it ought to have been rejected out rightly.
- 23.5 To the extent that Harrimohun had alleged that he had removed some of the items as they belonged to his friend (Naidoo), the issue is what had prevented the latter from fetching the items himself; what was so urgent that required of him to remove the items just before the end of his shift at 00h00; and if indeed that was the case, why leave the items on a bench in the substation, when they were safely kept in the cupboard. If indeed the item belonged to Naidoo, the fact that he was not called to the arbitration proceedings to corroborate that version creates doubt as to the credibility or probability of that version.
- 23.6 The Commissioner clearly failed to take into account that once Harrimohun had gained access to the area without authority, axiomatically, he could not have had any authority to remove anything in that area. The argument that Harrimohun had entered the area due to lax security or that he was seen on the video footage fiddling or 'playing' with the items is lame in the extreme.
- 23.7 The mere fact that Harrimohun had conceded to having entered the area and removed the items was sufficient, and whether those items were subsequently recovered is by all accounts irrelevant. He had no reason in the first place to remove the items from where they were. Any suggestion that Harrimohun may have entered the substation area with noble intentions is belied by evidence from the video footage which demonstrated that upon entering the area, he had acted suspiciously, looked up at the video surveillance cameras, locked the door behind him, put the items and the keys that were placed on top of the cupboards in his pocket, and exited the area.
- 23.8 Evidence further placed before the Commissioner was that it was realised that the keys that were placed on the cupboards were missing, and before Harrimohun was informed of the video footage, he

had denied having taken the items from the substation, and it was only after he has informed of the video footage that he had conceded that he had entered the area.

23.9 The Commissioner appears to have placed more emphasis on the charge of 'theft', when that charge was aligned to a 'removal' of the items. Once the evidence established that Harrimohun had removed the items, that was the end of the enquiry.

23.10 The fact that Harrimohun sought to give a concocted explanation as to the reason he had entered the substation and removed the items from where they were, and had continued to give that version throughout the arbitration without acknowledging any wrong doing in my view is an aggravating factor, which was material for the assessment of the appropriateness of the sanction of dismissal.

23.11 The fact that he had long service and a clean disciplinary record became secondary to the net effect of his conduct, which was by all accounts, dishonest and serious, thus further breaking any trust relationship between him and the applicant.

23.12 His contention that he was 'targeted' as he was a UASA member and had stood for employees' rights is clearly a smokescreen and a lame attempt at diverting attention from his misdemeanours. In the end, the gross nature of the misconduct in question called for the sanction of dismissal. It cannot be expected of this court to countenance arbitration awards requiring reinstatement in circumstances where the evidence presented point to serious acts of dishonesty which were aggravated by concocted and implausible explanations, coupled with a lack of show of contrition.

[24] Based on the evidence and the material placed before her, it can safely be concluded that the decision arrived at by the Commissioner clearly falls outside the band of reasonableness, and accordingly ought to be set aside.

[25] I have had regard to the full record of the proceedings and the material placed before the Commissioner, and I am satisfied that in the light of the conclusions reached in this judgment, no purpose would be served by remitting the matter back to the MEIBC, and the Court is placed in a position to substitute the Commissioner's finding. I have further had regard to the question of costs, and upon a consideration of the requirements of law and fairness, I am of the view that a costs order in this case is not warranted.

[26] Accordingly, the order of the Court is as follows;

Order:

1. The arbitration award issued by the third respondent under case number MEKN7430 dated 5 March 2015 is reviewed, set aside and substituted with an order that;

‘The dismissal of Mr Kirath Harrimohun by Hulamin Limited was fair’

2. There is no order as to costs

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Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: I. Lawrence of Edward Nathan
Sonnenbergs

For the Respondent: S. Moodley

Instructed by: Narain Naidoo & Associates

LABOUR COURT