IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C477/2014

In the matter between

TOLO SEAGELA MMOLA **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

MR ANTON A CRAFFORD (COMMISSIONER) **Second Respondent**

OLD MUTUAL (PTY) LTD GROUP SCHEMES **Third Respondent**

Heard: 7 December 2017

Delivered: 29 March 2018

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review the amount of compensation awarded by the second respondent (the Commissioner) for the substantively unfair dismissal of the applicant. The applicant also seeks to review the award on the basis that the Commissioner should have found his dismissal to have been procedurally unfair. The Award under WECT 4887-14 reads as follows in so far as the remedy it provides is concerned:

"REMEDY FOR THE UNFAIR DISMISSAL

31. The applicant sought compensation of twelve months for the unfair dismissal. Ordinarily the Labour Relations Act of 1995 as amended requires that if the Applicant's dismissal is found to be substantively unfair, reinstatement should be considered as the primary relief. This has also been supported by Labour Court judgments. However, we have to consider that the applicant has been found guilty of charges of misconduct, but that the employment relationship had not broken down irretrievably at the time of his dismissal. One has also to consider that Tolo has aggravated the relationship between himself and the respondent by posting defamatory information towards management and Old Mutual. This makes, in my view the option of reinstatement untenable, as argued by the respondent, and that compensation in these circumstances is justified. Taking into account the evidence presented, the findings of guilt, the nature of misconduct and the procedural fairness, Tolo's continued unemployment, I believe it would be just and equitable to award Tolo 3 month's compensation. This amounts to R5130.00 x 3 months= R15,390.00"

[2] It is evident from the transcribed record of the arbitration that the Applicant did not ask for reinstatement. The record reads as follows:

"COMMISSIONER: Ja What do you want me to consider? Do you want me to consider the reinstatement, reemployment, are leaving it over to my description (sic) for compensation? If you can just help me?

APPLICANT: Yes, or the compensation because the reinstatement, as I as being a victim to the company it's going to be worse if, let's say, reinstatement should be granted, which I doubt it, so reinstatement, no.

COMMISSIONER: Okay.

APPLICANT: Yes, my focus is on compensation.

COMMISSIONER: Okay, and what does that mean, what does compensation mean?

APPLICANT'S INTERPRETER: One year compensation."

[3] It appears *ex facie* the Award that the Commissioner, despite the clear indication from the applicant that he did not seek reinstatement, was of the view that he needed to consider whether reinstatement was a tenable remedy. In other words his understanding of the law was to the effect that even where an employee believes the employment relationship has broken down and therefore only seeks the solatium of monetary compensation for his unfair dismissal, it is still necessary to evaluate whether the 'primary remedy' should be granted. That this is a mistake of law is evident from the clear working of section 193(2) of the LRA which reads:

"(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure."

[4] In **Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others**[1] the Court, per Zondo DCJ, stated:

"[135] Once the Labour Court or an arbitrator has found a dismissal unfair, it or he is obliged to consider which one of the remedies listed in s 193(1) is appropriate, having regard to the meaning of s 193(2). Considering both the provisions of s 193(1) and s 193(2) is important because one cannot adopt the attitude that dismissal is unfair, therefore, reinstatement must be ordered. The Labour Court or an arbitrator should carefully consider the options of remedies in s 193(1) as well as the effect of the provisions of s 193(2) before deciding on an appropriate remedy…."

[5] The Commissioner further considers aggravating conduct by the Applicant which occurred after he was dismissed (i.e. the postings he put on facebook about staff members). Such consideration occurs as part of his irrelevant enquiry as to whether the employment relationship had broken down. It is unclear if this issue affected his discretion in deciding the amount of compensation he awarded.

[6] The charges for which the applicant had been found guilty and dismissed, as set out in the Award, were that: *"in that on or around about the 24th of February 2014 (Tolo) you failed to report to work without the necessary permission granted; and (Tolo) you failed to follow a reasonable and lawful instruction by the manger to inform them that you won't be at work".* Both the Charges were described as "Gross Misconduct". The applicant had been 'called' to search for the bones of his cousin who had disappeared some years earlier in Limpopo.

[7] In his review application to this Court, the applicant targets the finding of the Commissioner that his dismissal was procedurally fair. The main focus of this

[1] (2016) 37 ILJ 313 (CC)

ground was the failure of the employer to provide a Sepedi interpreter for him at the disciplinary hearing, although he averred he had requested one. The Commissioner reasoned as follows:

"15. This brings one to the reasonableness of Tolo's request and whether the lack of an interpreter prejudiced Tolo in his inquiry to make it procedurally unfair. Old Mutual argued that not only is its business conducted in English, Tolo was competent in English, have passed English as a second language in his senior certificate and obtained 70-79% in English creative writing at INTEC. It is quite apparent that the position Tolo holds as a Sales Agent would require him to be able to speak English and it would be reasonably expected that he could understand and speak English. Particularly with his scholastic achievements. Even during these proceedings, even though Tolo argued that he was not competent in English he only utilized the CCMA Interpreter minimally and conducted himself in more than acceptable English. *I am persuaded and as reflected above in terms of Schedule 8 (4), Tolo was reasonably able to understand the charges against him and able to defend himself. I do not believe that Tolo suffered any prejudice in this regard."*

[8] In fact it was only in the Labour Court that the Applicant was provided with a Sepedi interpreter. At the CCMA he was provided with an interpreter who could interpret in Sesotho and Tswana but not in Sepedi. This distinction between our different languages does not appear seem to have struck the Commissioner. In addition he referred to Schedule 8(4) of the LRA in his analysis quoted above, which reads as follows:

"(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After

the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision."

[9] The Commissioner's reliance on the Schedule to conclude that the applicant was 'able to defend himself' is bad in law. Clause 8(4) deals with notification of the charges in a language that an employee can reasonably understand. It does not deal with whether an employee is able to defend himself in a language other than his mother tongue.

[10] In the minutes of the first disciplinary hearing dated 10 October 2014, contained in the record before the Commissioner, the following is recorded:

"Anthea ask Tolo if he has sufficient time to prepared for his case, he said No he is not prepared and he only had 3 days to prepare, according to Tolo is supposed to be 5 days.

Tolo feels it was just handed over

The reason he presented was that his language (sipedi) (sic) was comfortable for him and he can express himself better in his own language.

Chantell said that the business language is English….."

[11] The disciplinary hearing was held a day later despite the concerns raised by the applicant in the minutes referred to above. Those minutes also record one 'Anthea' the Senior Manager and Chairperson of the hearing as follows: "Anthea suggested that Tolo can bring his interpreter to the next hearing." It was the evidence of Mr Jacques Singleton, the Chairperson of the disciplinary hearing on the 11th October 2014, that he read from the Code at the hearing including the following:

"If you require to have proceedings translated into your home language, you must notify me in advance…"

[12] The transcript of the arbitration proceedings reflects the following exchange during Singleton's examination in chief:

"RESPONDENT'S REPRESENTATIVE: That's fine thank you. Now, these rights were they given to applicant?

WITNESS 3: Yes it was given to the applicant. He had no problem at the time, given his (interruption)….

RESPONDENT'S REPRESENTATIVE: When you say 'given' what do you mean?

WITNESS 3: Given that he – the language barrier, because (interruption)

RESPONDENT'S REPRESENTATIVE: Was it read to him, or….?

WITNESS 3: It was read to him and he had no objection to that, because I asked him does he feel comfortable, I could postpone it to another date. He said he had no problems with doing that, and I formed my own opinion because he was speaking his – even better than myself, okay, and I gave him an opportunity for an interpreter as I said. I gave him the whole code."

[13] The transcript also reflects the position taken by the third respondent when it representative interrupted Mr Singleton's cross-examination stating the following:

"RESPONDENT'S REPRESENTATIVE: Commissioner, we're getting into sheer – this is irrelevance. The question-the issue is – the issue has been put on the table that there was a language problem. The reply [that] has come back from two witnesses is that on both occasions yes, no dispute, he asked for a Sepedi interpreter, that's not in dispute. However, we – both witnesses have come back and already testified that on both occasions he was happy with English."

[14] In the Courts view, given all the above, the finding by the Commissioner that the applicant's dismissal was procedurally fair was not one that a reasonable decision maker could reach. In this Court, the third respondent insisted in its written submissions that the applicant was not denied a Sepedi translator, as he never requested one. In fact Mr Sass for the third respondent submitted before me that the applicant was being frivolous in arguing that he should have been able to have a Sepedi translator, as he was proficient in English. He further

argued that the applicant could not rely on procedural defects in the disciplinary hearing since an arbitration is a hearing de novo. This is incorrect. It is precisely the alleged defects in a disciplinary process that a Commissioner must consider in coming to a finding on whether the dismissal was procedurally fair or not.

[15] In **Tonga v ICA Group Ltd t/a Renown Meat Products** [2] the Deputy President of the Industrial Court stated, in dealing with procedural fairness that:

"[14] Mr Meyer who appeared for the applicant voiced his dissatisfaction with certain other features of the enquiry, but of these I regard the fact that the applicant was not accorded the services of an interpreter as being the more serious one. The right to have an interpreter at the hearing or at a trial is a cardinal right which cannot easily be waived and in South Africa it is generally a right exercised by black workers whose mother-tongue is a language other than English or Afrikaans. It is manifestly unfair to expect a witness or an accused person to testify in a language in which he or she is less than proficient. (See J and R Piron Managing Discipline and Dismissal (1992) at 15, 16 and Andrew Levy Rights at Work (1992) at 73.) The respondent was aware of this particular employee's right as it is itemized in the disciplinary checklist referred to above."

[16] In **Mabitsela v Department of Local Government & Housing & others**[3], the Court per Molahleli J stated as follows:

"[16] …. The right to interpretation is a key element of both the right of access to courts and the independent impartial dispute-resolution bodies as provided for in terms of s 34 of the Constitution…"

[17] It would appear that this concept was recognised in principle by the third respondent, as it appears in its own Code. However, it was not respected in practice and the attitude taken by the third respondent, (a major employer), to the issue in this Court, was surprising.

[2] (1994) 15 ILJ 669 (IC)
[3] (2012) 33 ILJ 1869 (LC)

[18] I have considered that irrelevant considerations were taken into account by the Commissioner in the way he dealt with the remedy to be awarded to the applicant in as far as substantive unfairness was concerned, as well as his finding on procedural fairness. I am of the view that the award should be reviewed, set aside and substituted in order that the applicant is compensated for both the procedural and substantive unfairness of his dismissal. In my view it is just and equitable in all the circumstances of this case, that he is compensated in an amount equivalent to seven months of the salary he earned at the time of his dismissal. I order as follows:

Order

1. The Award under WECT4889-14 is reviewed and set aside and substituted as follows:

"1.1 The dismissal of Tolo Seagela Mmola was procedurally and substantively unfair.

1.2 Old Mutual (Pty) Ltd Group Schemes is to pay compensation to the Applicant in an amount equivalent to seven months compensation, being an amount of Thirty Five Thousand Nine Hundred and Ten Rand (R35 910.00).

1.3 The compensation is to be paid within 10 court days of this order."

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances

For the Applicant: In person

For the Third Respondent: Bowman Gilfillan Inc