



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 550/2012

In the matter between

KEYPAK (PTY) LTD

Applicant

and

POTGIETER, T N.O (cited in his capacity as

**Commissioner of the Commission for Conciliation,
Mediation and Arbitration)**

First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

HEYNSEN, JEROME

Third Respondent

Heard: 9 October 2014

Delivered: 18 September 2015

Summary: Having made the finding that the third respondent had failed to meet the performance standard set by the applicant the commissioner rendered his award reviewable by finding the third respondent's dismissal for poor work performance substantively unfair.

JUDGMENT

LALLIE J

- [1] This is an application to review and set aside an arbitration award of the first respondent. It is opposed by the third respondent. This application was filed outside the six weeks' period prescribed in section 145 (1) of the Labour Relations Act 66 of 1995 ("the LRA") and the applicant applied for condonation of the lateness. The condonation application is unopposed. I have considered it and decided to grant it because the extent of its lateness is not excessive and the explanation proffered by the applicant is reasonable.
- [2] The third respondent was employed by the applicant as a qualified fitter and turner from 7 November 2011 subject to a three months' probation. He did not meet the applicant's performance standard and the parties agreed to extend his probation to 30 March 2012. However, on 7 March 2012, after the third respondent had yet again failed to identify a fault from a machine, the applicant gave him a week's notice that his services would be terminated. His last working day was 14 March 2012. Aggrieved by his dismissal, the third respondent referred an unfair dismissal dispute to the second respondent who I will refer to in this judgement is the CCMA. It was arbitrated by the first respondent who I will refer to in this judgement as the commissioner. The commissioner issued an award in which he found the third respondent's dismissal procedurally and substantively unfair and ordered the applicant to pay him compensation in the amount of R72 000.00 which is equivalent to remuneration he would have earned over a period of six months. In this application, the applicant seeks an order reviewing and setting aside the arbitration award.
- [3] Giving reasons for his decision, the commissioner noted that the third respondent did not give evidence. He took into account that in the agreement extending the third respondent's probation the parties agreed as follows:

'1. The employee shall receive any further training, guidance, support, and instruction as may be necessary to allow him the opportunity to meet the required standards. 2. The employee will be evaluated on a weekly basis, on every Monday. 3 .Should the employee not perform according to the standard set, the company reserves the right to terminate the employee's service at the end of the extended probation period'.

- [4] The commissioner found the third respondent's dismissal procedurally unfair based on the applicant's concession that the applicant extended no formal invitation for the third respondent to make representations before the decision to dismiss him was taken. He expressed the view that the applicant could set standards which it could expect the third respondent to comply with. The commissioner had doubts about the third respondent's ability and willingness to comply with the standard set by the applicant. He found no basis to conclude that there was no substance in deciding that the third respondent performed poorly.
- [5] The commissioner expressed the view that the third respondent could expect the applicant to give him training which it undertook to provide in the contract extending his probation. He found it common cause that the training was not provided. The commissioner observed that notwithstanding the third respondent's poor performance, he had to decide whether the applicant acted fairly by dismissing him. He rejected the applicant's argument that the third respondent did not need training on the machines he was required to service as it was inconsistent with the agreement to extend his probation which provided that the third respondent "shall receive" further training to allow him meet the performance standard. The commissioner found the applicant's failure to comply with the terms of the agreement to extend the third respondent's probation inconsistent with his poor performance and the sanction of dismissal inappropriate. He concluded that the third respondent's dismissal was both substantively and procedurally unfair and ordered the applicant to pay him compensation equivalent to remuneration he would have earned over a period of six months.

- [6] The applicant submitted that the award stands to be reviewed and set aside on the grounds that it is unreasonable because having found that the third respondent had failed to meet the performance standard, the commissioner had no basis to find his dismissal substantively unfair. The commissioner unreasonably found the third respondent's dismissal substantively unfair because the applicant failed to give him training as on the uncontested evidence tendered at arbitration, the third respondent did not need training. He was employed as a qualified and experienced fitter and turner. The commissioner misconstrued the agreement extending the third respondent's probation in finding that it provided that the applicant "shall receive" training. His finding that failure to provide the promised training rendered the dismissal substantively unfair has no basis. A further ground the applicant sought to rely on was the commissioner's failure to apply the guidelines in item 9 of schedule 8 to the Labour Relations Act 66 of 1995 (the LRA) in determining the fairness of the dismissal. The applicant submitted that the commissioner failed to apply his mind properly and to have proper consideration of the facts and the law and exceeded his powers when determining the issue of relief.
- [7] Opposing the application, the third respondent denied that the award is unreasonable. He further denied that the commissioner misconstrued the agreement extending his probation. He submitted that had the applicant followed the guidelines in schedule 8 to the LRA, he would have completed his probation successfully. The third respondent denied having failed to meet the performance standard set by the applicant. The better part of his affidavit consists of his effort to disprove evidence tendered at the arbitration to the effect that he failed to meet the set performance standard.
- [8] For this Court to review and set aside an arbitration award, it must constitute a decision which a reasonable decision maker could not reach. In this regard see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. In *Herholdt v Nedbank Ltd and Others*² it was held that when an arbitrator conducts the enquiry into the fairness of a dismissal in the wrong manner, his or her arbitration award becomes reviewable. Guidelines for the determination of the

¹ [2007] 12 BLLR 1097 (CC)

² [2013] 11 BLLR 1074 (SCA)

fairness of the dismissal of employees while serving probation are contained in item 8 of schedule 8 to the LRA. They provide that the purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming his or her appointment. They further provide that an employee may be dismissed for poor work performance during or at the end of the probation after a fair procedure has been followed. The importance of distinguishing between the substantive and procedural fairness of the dismissal of an employee on probation is implicit in item 8 which provides a procedure to be followed when dismissing an employee on probation for poor work performance. Item 8(1) (j) of schedule 8 to the LRA provides for the substantive fairness of those employees as follows:

‘Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for the dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.’

[9] For an arbitrator to reach the conclusion that dismissal for poor work performance before the completion of the probationary period is substantively fair, the arbitrator needs to be satisfied that employee failed to meet the performance standard set by the employer. The only evidence before the commissioner which he correctly accepted was to the effect that the third respondent failed to meet the set performance standard. He made a finding that the respondent's work performance was poor. The finding is inconsistent with his conclusion that the third respondent's dismissal was substantively unfair. A decision that is disconnected with evidence before an arbitrator renders an award unreasonable. See *Herholdt (supra)*.

[10] The applicant conceded having failed to follow a fair procedure when dismissing the third respondent by not affording him an opportunity to make representations before taking the decision to dismiss him. The applicant and the third respondent entered into an agreement to extend the probation period. Clause 2 of the agreement provides as follows:

'Therefore, it is recorded and agreed that the probation period of the Employee will be extended for a further until 30 March 2012 for the purpose of evaluating the Employee's ability to fulfil the necessary functions of his work. This extended period will be subject to the following conditions:

1. The Employee shall receive any further training, guidance, support, and instruction as may be necessary to allow him the opportunity to meet the required standards.
2. The Employee will be evaluated on a weekly basis, on every Monday.
3. Should the employee not perform according to the standards set, the company reserves the right to terminate the employee's services at the end of the extended probation period'.

[11] The commissioner rejected the applicant's argument that the third respondent did not need training as it was inconsistent with the agreement to extend his probation. He expressed the view that they would not have agreed that he "shall receive" further training to allow him improve and meet the required standards if the third respondent did not need training on the machines he was to service. Although the commissioner did not cite the provisions of the contract extending the probation *verbatim*, his conclusion that it promised the third respondent training which he needed judging by the quality of his performance, cannot be faulted. However, the question that needs to be answered is whether the applicant's failure to provide training affected the substantive or procedural fairness of the dismissal. Failure to provide training in the context of the agreement extending the probation period affected the procedural fairness of the third respondent's dismissal. The evidence before the commissioner was that the third respondent's poor work performance was unabated. The commissioner even expressed his doubts about the third respondent's ability and willingness to comply with the set standard. He overlooked provisions of item 8 (1) (j) of schedule 8 to the LRA in taking the decision on the fairness of the third respondent's dismissal for poor work performance that he ought to have accepted reasons less compelling than would have been the case had the dismissal been effected after the completion of the probationary period. The

commissioner's decision that the sanction of dismissal was inappropriate and the third respondent's dismissal substantively unfair is unreasonable as it is not based on the evidence before him.

[12] As the third respondent's dismissal was only procedurally unfair the amount of compensation granted by the commissioner is discordant with the unfairness of the dismissal. The third respondent worked for the applicant for about four months. His poor work performance manifested itself almost immediately after his appointment. Compensation equivalent to remuneration the third respondent would have earned over a period of two months is just and equitable in all the circumstances of this matter.

[13] In the premises, the following order is made:

13.1 Condonation of the late filing of the review application is granted.

13.2 The arbitration award issued by the first respondent under case number ECPE 1210 – 12 and dated 26 September 2012 is reviewed and set aside and substituted with the following:

13.3 The third respondent's dismissal was substantively fair but procedurally unfair.

13.4 The applicant is ordered to pay the third respondent compensation in the amount of R26 000.00 which is equivalent to remuneration he would have earned over a period of two months.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Snyman of Snyman Attorneys

For the Third Respondent: Advocate Thys

Instructed by Rushmere Noach Inc

LABOUR COURT