Employment law update

Talita Laubscher *BIur LLB (UFS) LLM* (*Emory University USA*) is an attorney at Bowman Gilfillan in Johannesburg.

Monique Jefferson *BA (Wits) LLB (Rhodes)* is an attorney at Bowman Gilfillan in Johannesburg.

The interplay between constructive dismissal and reinstatement

In *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others* [2013] 8 BLLR 834 (LC) Steenkamp J was required to consider whether an order for reinstatement is competent in a situation where the basis of the employee's claim is that the employer made continued employment intolerable. It also raised the question as to whether seeking reinstatement would defeat a claim for constructive dismissal, since it would not appear to make sense for an employee to allege that he had no other option but to resign but, at the same time, to seek to be reinstated to such an unbearable environment.

The employee in this case, Gordon, had worked for the department for 23 years and suffered a heart attack followed by post-traumatic stress disorder and clinical depression. He was placed on sick leave and applied for ill-health retirement. Gordon submitted medical certificates between June 2007 and September 2008. On 3 December 2008 the department sent a letter to Gordon informing him that his medical certificates did not cover his absence after September 2008 and that the period from October 2008 to December 2008 would be regarded as unauthorised absence and he was ordered to report for duty immediately. He did not report for duty but submitted medical certificates to cover the period from October 2008 to December 2008.

Gordon had also applied for temporary incapacity leave in 2007 and submitted the requisite documents to the department's human resources director. The documents were required to be signed by witnesses and the human resources director undertook to have the documents signed by two witnesses. In May 2009 Gordon was informed that his application for temporary incapacity leave had not been considered as there was a technical error because it had not been signed by two witnesses. He was required to re-submit the form and did so in August 2009.

The department informed Gordon that, because he had not re-submitted the form timeously, it would institute 'leave without pay' for the period from 31 July 2006 to 6 February 2009 when he was absent and the department would recover R 12 000 per month from his salary in order to recover an amount of R 753 352,02 that had been paid to him in his absence. This would leave him with an income of approximately R 2 159 per month.

Gordon then requested that the department place a moratorium on the deductions pending his application for temporary incapacity leave. He did not receive a response and consequently tendered his resignation and filed a grievance. During the grievance hearing he was given the option of proceeding with his resignation or retracting his resignation to be assisted by the department in an application for ill-health retirement. The department also undertook to reconsider the issue of his absence being regarded as unpaid leave and, in that regard, to revert the amount of the deductions, if any, to be made from his salary.

Gordon chose to withdraw his resignation but the department was not proactive in taking a decision regarding the repayment of the R 12 000 that had been deducted from his salary. There was another grievance meeting on 1 September 2009 but by the end of September there was still no decision regarding the deductions. Gordon submitted his resignation at the end of September 2009 and referred a constructive dismissal dispute to the bargaining council. The arbitrator found that Gordon had been constructively dismissed, that the dismissal was unfair and that he should be reinstated.

The department took the decision on review. The Labour Court held that the appropriate test on review in constructive dismissal cases is whether the commissioner correctly found that the employee was dismissed. Only if this is answered in the affirmative should the court apply the test set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) to determine whether the remedy granted is one that a reasonable commissioner could make. The arbitrator had found that the employee had been constructively dismissed as the employee was placed in circumstances that were objectively intolerable.

Furthermore, the arbitrator was of the view that the intolerable situation was of the department's own making as the department could have taken steps to resolve the issue of the application for temporary incapacity leave quicker. In addition, the deductions made by the department from Gordon's monthly salary were excessive. It was accordingly found that the department's conduct was likely to damage the trust relationship.

By taking these factors into account, Steenkamp J found that Gordon's resignation did amount to constructive dismissal. This was further supported by the fact that Gordon resigned only as a matter of last resort after he had raised the pertinent issues with the department and had given the department the opportunity to rectify the situation but, instead, Gordon was met with passivity and inaction by the department.

Steenkamp J found that it was unusual to claim reinstatement where the employee alleges that the working relationship was intolerable. Furthermore s 193(2)(*b*) of the Labour Relations Act 66 of 1995 requires an arbitrator to reinstate an employee unless the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. However, after considering the evidence that was placed before the arbitrator Steenkamp J agreed with the arbitrator's decision to reinstate Gordon. This was because it appeared that Gordon would not be subjected to the same circumstances that prevailed before he resigned as he would not be subject to the excessive deductions and he had furthermore recovered psychologically.
Thus, it was held that, while the employment circumstances had been intolerable at the time of his resignation in 2009, they were no longer intolerable at the time that he sought reinstatement in 2012. Steenkamp J agreed with the arbitrator's finding and it was held that seeking reinstatement two and a half years later did not defeat Gordon's claim for constructive dismissal. Thus, the arbitrator's conclusion was not so unreasonable that no reasonable arbitrator could have come to the same conclusion and the review application by the department was accordingly dismissed.

Moksha Naidoo *BA (Wits) LLB (UKZN)* is an advocate at the Johannesburg Bar.

'Grossly irregular' to reduce the Sidumo test

Herholdt v Nedbank Limited (SCA) (unreported case 701/2012, 5-9-2013) (Cachalia and Wallis JJA; Nugent, Shongwe JJA and Swain AJA concurring)

The appellant, Herholdt, a financial advisor, was dismissed for failing to disclose to his employer, Nedbank, that he had been named a benefactor in a client's will.

At arbitration the Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner found Heroldt's conduct did not amount to dishonesty, as argued by Nedbank, and hence his dismissal was substantively unfair. On review the Labour Court set aside the award, at which time Herholdt appeal to the Labour Appeal Court (LAC).

Having lost his appeal at the LAC, Herholdt approached the Supreme Court of Appeal (SCA).

When interpreting the test to be adopted by the Labour Court on review, the LAC in *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC), per Murphy AJA, endorsed the principle set out in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1129 (LC) where the Labour Court said the following: 'If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

On the strength and in support of this approach, the LAC held: 'Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined.'

With regard to the threshold triggering the Labour Court's intervention on review, the LAC said: 'There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him [or her], with such having potential for prejudice and the possibility that the result may have been different. This standard recognises that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'

On appeal to the SCA, the Congress of South African Trade Unions, who was admitted as *amicus curiae*, argued that the courts have unduly relaxed the standard and test on review by introducing 'latent irregularities' and 'dialectical unreasonableness' as alternative and/or further considerations when reviewing awards, as compared to the test held by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

The SCA began by setting out the test to be adopted by the Labour Court on review, as enunciated in the *Sidumo* case. The Constitutional Court, in formulating the 'reasonable decision-maker' test, held that a court on review is tasked with deciding whether or not the decision of the arbitrator is one that a reasonable decision-maker could not have reached, given the evidence before him or her.

This test, according to the SCA focuses on the reasonableness of a decision reached as opposed to how the decision was reached. While the reasons for the arbitrator's findings must be examined when adopting this test, a flaw in the arbitrator's reasoning in arriving at a conclusion, is not in itself sufficient to set aside the award. Apart from an arbitrator's questionable line of reasoning, a reviewing court must still examine whether or not the conclusion reached by the arbitrator is not one a reasonable decision-maker could reach.

In this manner the Constitutional Court, in giving meaning to the purpose of the Labour Relations Act 66 of 1995 (LRA) (which is adopting a speedy and inexpensive dispute resolution system), preserved the distinction between an appeal and review and further maintained the narrow scope in which to set aside awards on review.

Thus, after the *Sidumo* decision, it was clear that applications to review awards could only be considered on the basis of the reasonable decision-maker test, read with the grounds contained in s 145(2)(*a*) and (*b*) of the LRA.

Under the heading 'Review of arbitration awards', s 145(2)(*a*) states that an award can be reviewed if '... the commissioner –
(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner's powers.'

In examining s 145(2)(*a*) the SCA said the following: 'The height of the bar set by the provisions of s 145(2)(*a*) of the LRA is apparent from considering the approach to reviews of arbitral awards under the corresponding provisions of the Arbitration Act 42 of 1965. The general principle is that a "gross irregularity" concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a "gross irregularity" is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry. Where the arbitrator's mandate is conferred by statute then, subject to any limitations imposed by the statute, they exercise exclusive jurisdiction over questions of fact and law.'

The grounds listed in the above section were not to be read in isolation but were to be suffused in the legal principle of 'reasonableness'.

Therefore 'gross irregularity in the conduct of the arbitration proceedings' as expressed in s 145 (2)(*a*)(ii), was limited to situations where, as a result of any gross irregularity, the result reached by the arbitrator was rendered unreasonable.

Turning to the findings of the LAC, the SCA found that the court *a quo*'s views were in support of a *dictum* held by the minority of court in the *Sidumo* case and hence contrary to the binding views upheld by the majority on two grounds.

First, the LAC *in casu* prescribed a lower threshold for which to interfere with an award on review, as compared to the reasonable decision-maker test. Secondly, the legal concept of the 'reasonableness of the decision', expressed in the *Sidumo* case, was no longer a considering factor in that the existence of potential prejudice to a party, brought about by an arbitrator's reasoning was, according to the LAC, sufficient to set aside an award without further asking the question whether the decision under review nevertheless fell within a band of reasonableness.

The SCA held: 'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(*a*) of the LRA. For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated in s 145(2)(*a*)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'
In applying the reasonable decision-maker test, the SCA dismissed the appeal on grounds that the arbitrator arrived at a substantively unreasonable decision given the evidence before her.

Note: Unreported cases at date of publication may have subsequently been reported.