

SOUTH AFRICA / JUDGMENT

Imagex (Pty) Ltd v Krustinsky and Others (JR1303/2014) [2016] ZALCJHB 371 (29 September 2016) [2016] ZALCJHB 371

COURT

Labour Court Johannesburg

BEFORE

E Molahlehi

CASE / FILE NUMBER

JR1303/2014

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 1303/2014

In the matter between:

IMAGEX (PTY) LTD Applicant And GABOR KRUSTINSKY COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION COMMISSIONER DUMISANI NGWENYA 1st Respondent 2nd
Respondent 3rd Respondent

HEARD: 04 May 2016

DELIVERED: 29 September 2016

SUMMARY: Review application. Dismissal of employee on probation. The employee arriving late repeatedly- the employer taking no serious step to indicate disapproval –giving oral counselling. Failure by the employer to apply progressive discipline.

Molahlehi J

Introduction

- [1] This is an application to review and set aside the arbitration award made under case number GAJB 4925/14 dated 11 June 2014, in terms of which the third respondent, (the Commissioner) found the dismissal of the first respondent (the employee) to have been unfair and ordered the applicant to compensate him with an equivalent of two months' salary.

Background

facts

- [2] The first respondent was employed as a technical representative for the applicant, in the medical industry. The business of the applicant entails servicing both public and private customers in the medical industry. The employee was charged with the following offences:
1. "Poor Work Performance in that you have continually failed and/or refused to adhere to your work hours (late coming) during your probation period.
 2. Gross Misconduct in that you embark on many personal errands, without permission, during work hours.
 3. Gross Misconduct in that you failed and/or refused to adhere to instruction to connect/use the GPS system issued to you."

The grounds for review.

- [3] The applicant contended that the Commissioner, in arriving at the decision as he did, reached a conclusion which no reasonable decision maker could have reached. In this regard the applicant contended that the Commissioner overlooked the fact that the employee was still on probation.

The arbitration award

- [4] The Commissioner in his analysis found the employee to have been guilty of the charges he was charged with. He however, found the dismissal to be substantively unfair. He found the dismissal to have been unfair because the applicant did not regard the infraction which occurred over a period of time, to have been serious enough to warrant the dismissal. The other reason related to this was that the applicant failed, in the context of repeat offences, to apply corrective discipline. He also found in this regard that the applicant failed in the circumstances to consider a sanction other than that of dismissal.
- [5] In relation to procedural fairness the commissioner found that to have been fair.

Evaluation/analysis

- [6] The parties in general agreed on the legal authorities to follow when accessing the reasonableness or otherwise of an arbitration award.
- [7] The test to apply in considering a review application is that found in *Sidumo & Another v Rustenburg Platinum Mines Ltd and others*,^[1] where it was held that the question to answer in determining whether the arbitration award is reviewable or not is the following:

“is the decision reached by the commissioner one that a reasonable decision maker could not have reached.”

- [8] In *Goldfields Miners South Africa (PTY) Ltd (Kloof Gold Mine) v Commissioner for Conciliation Mediation and Arbitration & others*,^[2] the Labour Appeal in explaining the *Sidumo* test held that:

“In short: a review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the fact

presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived”

The question to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed given the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate. (iv) Did he or she deal with the substantial merits of the dispute? And (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?

- [9] In my view the Commissioner cannot be faulted for the conclusion he reached when regard is had to both his reasoning and all the material that served before him. It is clear from the reading of the arbitration award that the Commissioner had a full understanding and appreciation of the principal issues he had to deal with in resolving the dispute between the parties.
- [10] The Commissioner firstly determined whether the employee was guilty of the two charges which had been proffered against him. It is common cause that he found him guilty of the charges of failing to keep time for reporting for work and failing to insert the GPS log book into the cigarette light of the car.
- [11] Having found that the employee to have been guilty of the two offences the Commissioner proceeded to perform his duty of having to determine whether in the circumstances of the case it was fair to dismiss the employee. In other words the Commissioner proceeded to determine whether the sanction of dismissal was in the circumstances fair. He found it not to be.

[12] The sanction of dismissal was unfair because the conduct of the employee persisted for a considerable time reporting late for work, with the applicant not doing anything about it. On its own version the applicant kept giving the applicant verbal counselling regarding the issues of time keeping. If indeed late coming was regarded as a serious offence the applicant ought to have warned the employee about the alleged misconduct and the possible consequences that was likely to follow. If indeed the situation had become unreasonable from the side of the applicant it ought at least to have placed him on terms by issuing a written warning. This is in essence what the Commissioner means when he says the applicant never applied progressive discipline.

[13] The above analysis applies also to the issue of GPS log book.

[14] In my view, the fact that the employee was still on probation at the time does not on the facts and the material before the Commissioner makes his decision unreasonable. In terms of item 8(1) (8):

“If the employer determines that the employee’s performance is below standard, the employer should advise the employee of any

aspects in which the employer considers the employee to be failing to meet the required performance standards. If the employer believes that the employee is incompetent, the employer should advise the employee of the respect on which the employee is not competent. The employer may either extend the probationary period or dismiss the employee after complying with sub items (g) or

(h) as the case may be.”

[15] In *Plane Engineering (PTY) Ltd v Ncobo & others*, [3] the Labour Appeal Court in dealing with the issue of probationary service employees held that:

“even though less onerous reasons can be accepted for dismissing a probationary employee, the fairness of such reasons still needs to be tested against stipulations of items 8(1) (a)-(h) of the code of Good Practice”.

[16] In light of the above I found that the applicant has failed to make out a case to review the Commissioner’s arbitration award. I see no reason in fairness and law why the costs should not follow the results.

Order

[17] In the premises the application to review the arbitration award made under case number GAIB 4925/14 dated 11 June 2014, is dismissed with costs.

E Molahlehi

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv. L Holender

For the Respondent: Clifford Levin Attorneys

[1]

(2007) 28 ICJ2405 (CC).

[2]

(2014) 35 ILJ 943 (LAC).

[3]

(2014) 35 ILJ 1971 (LAC).

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