

SOUTH AFRICA / JUDGMENT

Jacobs v CCMA and Others (C811/19)

[2024] ZALCCT 15; [2024] 5 BLLR 517 (LC); (2024) 45 ILJ 1009 (LC) (6 March 2024)

[2024] ZALCCT 15

COURT

Labour Court Cape Town

BEFORE

Whitcher

CASE / FILE NUMBER

C811/19

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IN

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable/Not

Reportable

Case

No: C811/19

In

the matter between:

KEVIN
JACOBS
Applicant
and
CCMA
First Respondent
SARAH CHRISTIE
N.O.
Second
Respondent
GOLDEN ARROW BUS
SERVICES (PTY) LTD
Third Respondent

Heard:

31 August 2023

Delivered:

This judgment was delivered electronically to the parties by email.
The date and time for hand-down is deemed to be 6
March 2024.

Summary: Commissioner found dismissal substantively unfair. Review against decision not to order reinstatement. Aggravating factors in determining sanction after an employee is found guilty of misconduct may not function as surrounding circumstances denying reinstatement to an employee found not guilty as charged by the Commissioner. Slippage between section 193(2)(b) and 193(2)(c) of the LRA not permitted where commissioner pins reasoning to intolerability alone.

JUDGMENT

WHITCHER J

Introduction

- [1] This is a review application in terms of Section 145 of the Labour Relations Act, 1995 against the award of the second respondent (‘the commissioner’).
- [2] The applicant also seeks an order condoning the late service and filing of the review application which is granted. It was 30-days late, the explanation for lateness was satisfactory and the balance or prejudice is tipped in the applicant’s favour.
- [3] The facts and legal issue may both be crisply described. Having found that the applicant’s dismissal by the third respondent on 13 March 2019 was substantively unfair, the commissioner declined to reinstate the applicant. Since reinstatement is the “primary”^[1] relief the CCMA must order when a dismissal is found to be substantively unfair under section 193 of the LRA, did the commissioner’s decision to decline reinstatement meet the review test?

The evidence and award

- [4] The evidence, as set out in the award, is that the applicant went on leave for six days just before the employer on 18 October 2018 was to roll out an automatic payment system by which customers could pay for rides on busses by smart cards. The applicant had overall responsibility for the success of this business process and he had assured management that adequate systems were in place to handle the roll-out. On the day, however, the smart-card system had problems. These were a PR disaster for the employer. On his return to work, the applicant was called in and accused of gross negligence. This was on the basis that no proper roll-out system was in place and that 18,000 smart cards had gone missing. (The cards were later found). The applicant did not offer any explanation for what went wrong at this meeting^[2].
- [5] In March 2019, the employee was taken to a disciplinary hearing accused of gross negligence and providing misleading information to the employer about the adequacy of the systems in place. He was dismissed. He unsuccessfully appealed and referred the matter to the CCMA.

- [6] Restating the details of the evidence led at the CCMA is unnecessary. This is because, having heard the evidence and argument and recounted it at length in her award, the commissioner found as follows:

“Jacobs did not abandon his work; he remained in contact even when he was approved leave in order to assist with contingencies. I conclude that while there was negligence, it was not gross in all the circumstances and dismissal, especially summary dismissal was substantively not fair.”

Analysis

- [7] It is by now trite that, in terms of section 193 of the LRA, reinstatement would ordinarily beckon when a dismissal is found to be substantively unfair unless certain exceptions are met. The specific exception the commissioner noted here was that “circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable” under section 193 (2) (b) of the LRA.
- [8] What reasons did the commissioner give to justify the finding that a continued employment relationship would be intolerable? These may be stated as follows:

8.1 The applicant was a senior employee;

8.2 The relationship between the applicant, operations manager and the IT department had broken down. This flows from the applicant’s original failure to co-operate in the investigation into what went wrong on his return from leave;

8.3 The matter had taken over a year to be heard; and

8.4 That reinstatement would be unlikely to ‘succeed’.

- [9] Before analysing these reasons, it should be noted that the third respondent launched a valiant effort in its heads of argument to persuade the court that the applicant was in fact guilty of serious misconduct in the first place. Valiant but misguided. For the commissioner found the applicant’s dismissal to have been substantively unfair. No cross-review was launched against this finding. To characterise these proceedings as a “sanction review” is thus not entirely accurate. The present review is limited to examining whether, upon such a finding of substantive unfairness, reinstatement was justifiably denied the applicant. The importance of the new smart card system, the severity of the original offence, the applicant’s taking leave at a critical time, reputational implications of the mess and the question of trust in the employee’s assurances and his refusal to co-operate in an investigation were all matters the commissioner thoroughly considered. And yet she still found that the sanction of dismissal was “substantively not fair.”

- [10] In my view, the commissioner’s award on relief (not sanction) is inadequately defended by addressing this court on why her substantive unfairness finding was not warranted in the first place. Yet this is what the third respondent drifts into by telling this court how deserving of dismissal the applicant originally was. The court should rather be told what

makes the reinstatement of an employee who should never have been dismissed in the first place intolerable. This would appear to me to be a different order of facts and argument than a rehashing of the aggravating factors aired in the CCMA which the commissioner obviously dismissed.

- [11] I turn now to look at the reasons the commissioner supplied in her award to justify a finding that reinstating the applicant would be intolerable. The first two of the four reasons stated above typically function as aggravating factors in determining sanction after an employee is found guilty of misconduct. They do not strike me as extraneous “circumstances surrounding the dismissal”. Let us assume however, despite my doubts, that these considerations may function both as aggravating factors to justify the dismissal of a guilty employee and function as surrounding circumstances denying reinstatement to an employee found not guilty. Even so, the employee’s seniority and his attitude to the investigation were factors already known to the employer at the time of the internal disciplinary hearing in March 2019. These factors had already left their mark on the employment relationship at the time the original sanction was determined at the disciplinary hearing. But this was a disciplinary hearing whose outcome the commissioner, in no uncertain terms, found was substantively unfair, in the face of the applicant’s seniority and lack of cooperation. It thus appears illogical that these same two factors – seniority and attitude to the investigation – should later explode in significance so as to deprive the Applicant of the reinstatement he should, in substantive fairness, not even be forced to seek. He should not have been dismissed according to the commissioner.
- [12] In my view the commissioner’s later reliance on these factors as evidence of “circumstances surrounding the dismissal ... such that a continued employment relationship would be intolerable” is a category mistake and illogical. A logical misstep of this nature cannot be the basis of a finding a reasonable decision-maker would make.
- [13] The third ground stated by the commissioner was the length of time the matter took to resolve at the CCMA. This is not a ground of intolerability. It makes no sense to raise it as one. Perhaps the court is invited to assess the commissioner’s decision to deny reinstatement against the ground that reinstatement may not reasonably be practicable. I am reluctant to permit this slippage between section 193 (2) (b) and 193 (2) (c). The Commissioner pinned her reasoning to intolerability alone. An assessment of a decision-maker’s reasoning is not always enhanced by looking for reasons other than the one’s stated by the decision-maker themselves to justify the decision.
- [14] Having said that, assuming reasonable practicability was at stake, a year’s delay in resolving dismissals is, unfortunately, commonplace. In any event, the practicability of reinstatement was not canvassed in sufficient evidence before the commissioner. I could not find testimony on why the employee could not be slotted back into work, nor was argument addressed to this court on this matter. If she had practicability in mind, the commissioner’s decision does not flow from the evidence; which is a reviewable irregularity.

- [15] The fourth ground to deny reinstatement appears to be an example of circular reasoning. Effectively the commissioner found that reinstatement is unlikely to succeed because it is unlikely to succeed.
- [16] I thus find that the decision to deny the applicant the primary remedy of reinstatement when his dismissal was substantively unfair falls to be reviewed and set aside because none of the reasons given for this decision are ones that a reasonable decision-maker would have based such a decision on. Applying any of the formulations of the review test gives us the same result.
- [17] The job of commissioners is a difficult one. The award in this matter was detailed and erudite. The commissioner faltered at the last step on an issue that comes to the Labour Court surprisingly often. Surprisingly, because the law really now is perfectly clear. The LAC and Constitutional Court have roundly endorsed the principle that absent clear and compelling reasons rooted in solid evidence, employees whose dismissals are substantively unfair should not be denied reinstatement. Commissioners wishing to invoke an exception to this statutory rule in terms of section 193 (2) (b) and (c) cannot do so in broad brush strokes, re-animating arguments proper to aggravation of sanction, or lighting circular concerns about the employer's convenience. In circumstances such as the present one, commissioners should reinstate or devote clearly reasoned paragraphs to the circumstances in evidence surrounding the dismissal that truly make the prospect of reinstatement intolerable.
- [18] The question that remains for consideration is whether the order to reinstate the applicant should be retrospective to the date of the dismissal. It is only fair that the extent of the retrospective order take into account any delays in the prosecution of the review.

[19] In the circumstances, the following order is made:

Order

1. The award of the CCMA denying the applicant reinstatement is set aside and substituted with the following order:
 - 1.1 The third respondent is ordered to reinstate the applicant retrospectively with effect from the date of his dismissal on the same terms and conditions that pertained at the time of his dismissal.
 - 1.2 In calculating the value of the backpay, two months' remuneration may be excluded.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv M Garces, instructed by Parker Attorneys

For the Third Respondent:

Macgregor Stanford Kruger Inc

[1] Booi v Amathole District Municipality and Others

(2022) 43 ILJ 91 (CC) paras 39-40 and 42.

[2] Paras 14 – 16 and 48 – 49 of the award.

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