REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

CASE NO: C253/2016

Not reportable

In the matter between:

TRANSPORT AND OMNIBUS WORKERS'	
UNION obo BRANDT	Applicant
and	
SA ROAD PASSENGER BARGAINING	
COUNCIL	First Respondent
COMMISSIONER BRÜMMER N.O	Second Respondent
TABLE BAY RAPID TRANSPORT	Third Respondent

Application heard: 16 August 2017

Judgment delivered: 9 October 2017

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 17 March 2016. In her award, the arbitrator held that the applicant's dismissal by the third respondent was substantively and procedurally fair.

[2] The applicant was dismissed on 12 January 2016, on charges of sexual harassment.

[3] The award summarises the evidence, and it is not necessary for me to repeat the material facts here, save to note that the applicant was dismissed for sexual harassment. At the arbitration hearing, the complainant testifiedthat the applicant had made remarks of a sexual nature to her, none of which were disputed by the applicant in cross-examination. Four other witnesses gave evidence against the applicant, the last of whom investigated the incidents concerned and conducted the disciplinary hearing and dismissed the applicant. At the close of the third respondent's case, the arbitrator sought clarity from the applicant's representative, who did not dispute that he had been advised of the consequences of failing to dispute the complainants' version. Closing arguments were then presented, most of which focused on issues of procedure.

[4] Given the grants for review referred to below, the following extracts from the award are relevant:

58. It was at this point in the proceedings that clarification was sought by the arbitrator as to how the union was to proceed with the case, as Ms Kastoor's evidence had not been challenged.

59. It was contended with him that there was a miscommunication between the applicant and his union representative. The applicant could, however, not have conceded that he had been advised of the commencement of the hearing to make notes with what he disagreed with and to instruct his representative accordingly. It was stressed that uncontested evidence would stand as undisputed and reflecting the correct version of the events

60. The arbitrator declined giving advice to the union as to how to present the case who in turn responded that they still have the right to review. It was conceded that it would serve no further purpose to call any other witnesses as the testimony of Ms Kastoor stands undisputed.

[5] In relation to procedural fairness, the arbitrator found the following:

79. The Labour Court *in Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] (BLLR 833 (LC) specifically endorsed item 4 is reflected*supra* and held that the strict rules as they would apply to criminal or other matters should not have application in the workplace environment. It was held that item 4 sets out what is expected from an employer.

80. The next point of relevance is then that item for the code as per the LRA has indeed been complied with.

81. It further stands undisputed that the informal approach testified to by Mr Abrahams has been in place for 2 ½ years and at no stage had any objection been raised in following this approach. There was also no objection at the commencement of the disciplinary hearing to him acting as the chairperson despite the knowledge that he had also investigated the matter.

82. It is also common cause that the disciplinary code procedure referred to by the union is not part of the conditions of employment of the applicant.

> 83. The only reasonable conclusion, the light of the above, is that the process followed was an accepted one complied with item 4 of the Code…..

[6] The applicant has raised two primary grounds for review. The first has a procedural basis, and is directed against the finding that the dismissal was procedurally unfair in circumstances where the applicant contends, in effect, that the chair of the internal hearing was biased. The second relates to the arbitrator's refusal to allow the applicant to recall the complainant after she had given evidence at the arbitration hearing.

[7] The applicable legal principles are well-established. This court is entitled to interfere with an award made by a commissioner if and only if the commissioner misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)). In other words, the test is two-staged. First, the applicant must establish a misconception of the nature of the enquiry or some misconduct or misdirection on the part of the arbitrator. If that is established, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.

[8] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)), The Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one on more

factors amounted to a process related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgement). Specifically, the questions for a review court to ask or whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he was she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with a substantial merits of the dispute and whether the decision is one that another decision maker could reasonably have arrived at based on the evidence (see paragraph 20). So, when arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

[9] The first ground of review, it will be recalled, concerns the arbitrator's finding that the applicant's dismissal was procedurally fair, and in particular, her finding that the procedure adopted by the third respondent complied with the Code of Good Practice. The second ground for review has its roots in the arbitrator's refusal to allow the complainant to be recalled as a witness. The first ground for review must be viewed in a context in which the applicant was an experienced shop steward, he was represented during the disciplinary hearing by a fellow shop steward, neither he nor his representatives objected to Abrahams conducting the hearing, the first time that the concern was raised regarding Abrahams role was during the applicant's appeal, a similar disciplinary process had been followed for approximately two years without objections from union and finally, the disciplinary code was no more than a guideline. In my view, the arbitrator's ruling that the applicant's dismissal was procedurally fair is reasonable having regard to the evidence before them.

[10] The second ground for review must necessarily be evaluated in a context where the LRA promotes the expeditious resolution of disputes. The arbitrator's decision to disallow the recall of the complainant was made in circumstances where she had explained the arbitration process to both parties of the commencement of the proceedings, she hademphasized the importance of putting contrary versions to witnesses, she had encouraged the applicant to make notes in response to versions with which he disagreed, the arbitrator explained to the applicant that he must instruct his representative on any challenges to the evidence adduced by the third respondent's witnesses,. The arbitrator specifically explained to the applicant that if he failed to challenge evidence it would stand as undisputed. The applicant clearly understood the arbitrator's explanations guidelines. Further, each witness was informed by the arbitrator that he or she would be late, cross examined and re-examined. This must have had the effect of reinforcing the applicant's representative of their own duties. The complainant testified it was cross-examined by the applicant's representative. During cross-examination, the applicant passed notes to his representative. At the end of the complainant's testimony, the arbitrator specifically asked the employee whether he had any more questions. He confirmed that he had none. Obviously alive to the issue of onus of the unchallenged version complainant, the arbitrator writer enquired of the employee and didn't decrement forward. It was only after the arbitrator reiterated that crucial parts of the complainant's testimony stood unchallenged that the employee requested that the complainant be recalled.

[11] The arbitrator's refusal to allow the company to be recalled was not unreasonable given that the employee, on his own admission, is an experienced union official acquainted with the arbitration process, but he was represented by a similar experience officials similarly acquainted with the arbitration process, that the complainant was cross-examined and that after re-examination, she left the venue. The applicant's response to the arbitrator's resident with him his failure to challenge specific incidents of sexual harassment are limited to averments that he was confused and that there had been some

miscommunication. The arbitrator specifically invited the applicant to explain where any confusion crippling. His response is recorded as follows '*Ek gaan lieg as ek se ek het 'n antwoord'*.

[12] In my view, the arbitrator did not misdirect herself by ruling that the applicant had failed to make a case to recall the complainant. In the absence of any reviewable irregularity, there is no potential distorting effect on the award. In relation to the finding on procedural fairness, the arbitrator's decision falls into a band of decisions to which a reasonable decision-maker could come on the available evidence. The application accordingly stands to be dismissed.

[13] Finally, relation to costs, there is no reason why costs ought not to follow the result.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Adv. AM Sarantos, instructed by Justine Del Monte

For the third respondent: Mr CS Hendricks, Marais Muller Hendricks Inc.