REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 887/2011

In the matter between:

LITHOTECH AFRICA MAIL CAPE, A DIVISION OF BIDVEST PAPER PLUS (PTY) LTD	**Applicant**
and	
STATUTORY COUNCIL FOR THE PRINTING, NEWSPAPER AND PACKAGING INDUSTRIES	**First Respondent**
C M BENNETT N.O.	**Second Respondent**
MBUYISELO MASITO	**Third Respondent**

Heard: **30 January 2013**

Delivered: **22 February 2013**

Summary: Review – process related – arbitrator reinstating employee despite claim for compensation only – reviewed and remitted.

JUDGMENT

STEENKAMP J

Introduction

[1] The third respondent, Mr Mbuyiselo Masito ("the employee") was dismissed for incapacity arising from ill health. He is a diabetic. He referred an unfair dismissal dispute to the statutory council (the first respondent). The arbitrator (the second respondent) found that his dismissal was unfair because the applicant, Lithotech, "did not make every reasonable effort" to accommodate the employee's incapacity. He ordered the applicant to reinstate the employee retrospectively on a permanent day shift (as opposed to the shift system on which he was working at the time of his dismissal).

[2] The applicant prays for that award to be reviewed and set aside in terms of s 145 of the LRA.[1] The applicant also seeks condonation for the late filing of its review application.

Background facts

[3] The employee was employed as a laser operator in the laser printing department of T-Systems, a company that provided printing services to Woolworths (Pty) Ltd. In July 2010 his contract of employment was transferred to the applicant (Lithotech) when it took over Woolworths' printing account. Lithotech dismissed him for incapacity due to ill health on 9 June 2011.

[4] The employee is 50 years old and suffers from diabetes. He has to give himself daily insulin injections but the disease has, until recently, not impacted his work performance.

[5] In terms of his contract of employment, the employee is required to work a "continental shift system". This is a three week shift system comprising shifts of 11.5 hours with the following rotation:

5.1 Week 1: Friday, Saturday and Sunday 07:00 – 18:30.

5.2 Week 2: Monday – Thursday day shift (07:00 – 18:30).

5.3 Week 3: Monday – Thursday night shift (19:00 – 06:30).

[1] Labour Relations Act 66 of 1995.

5.4 Week 4 (Friday – Thursday): seven days off duty.

[6] The rotation starts afresh after the seven days off.

[7] Due to his diabetes, the employee started encountering problems with the night shift. His physician, Dr Michael West, stated that it would pose a long term risk to his health. An earlier "referral letter" by Dr J Rhoda on 3 May 2011 stated that the employee had "poor diabetic control largely due to lack of exercise and suboptimal diabetic diet".

[8] The employee took an excessive amount of sick leave. In his first ten months of employment with Lithotech he took 220 hours of sick leave out of his total sick leave entitlement of 240 hours for a 36 month period.

[9] Lithotech's industrial relations manager, Belinda Meuldijk, held eight meetings relating to incapacity (ill health) with the employee in the period from March to June 2011. After exploring alternatives to the employee working night shift, Lithotech came to the conclusion that they could not accommodate him and dismissed him for incapacity on 9 June 2011.

[10] The employee referred an unfair dismissal dispute to the first respondent (the Council). Conciliation failed. The second respondent (the arbitrator) fond that Lithotech could and should have offered the employee reasonable accommodation in the form of working dayshift only; and that it could have done so by rotating other employees into his night shift duties.

<u>The arbitration award</u>

[11] The arbitrator noted that the Code of Good Practice: Dismissal contained in Schedule 8 to the LRA[2] sets out the following guidelines:

> "Any person determining whether a dismissal arising from ill health or injury is unfair should consider –
>
> (a) If the employee is not capable –
>
> (i) the extent to which the employee is able to perform the work;
>
> (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not

[2] Labour Relations Act 66 of 1995.

possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work."

[12] The arbitrator also emphasised that the duty on the employer to accommodate an employee is more onerous where the employee is injured at work or is incapacitated by a work-related illness. Why the arbitrator emphasised this irrelevant consideration, is not clear; there is no suggestion that the employee's diabetes was caused by his circumstances at work. The only relevant consideration could be Dr West's testimony that his blood glucose levels improved when he worked day shift only. His own poor control of his condition, poor diet and lack of exercise, on the other hand, exacerbated his condition.

[13] The arbitrator did not accept Lithotech's evidence and argument that it would be impracticable to try and accommodate the employee by allowing him to work dayshift only. He appears to have accepted that only one volunteer had come forward to offer to take over some of the employee's night shifts; but the administrative complexities were such that this one volunteer would not be sufficient. The arbitrator reasoned that the employee had to work 13 weeks of night shift per year; Lithotech had 39 operators plus supervisors; and if all the remaining operators were to be rostered in turn to cover one week of the employee's night shifts, this would mean that each operator would only be required to two weeks of night shift in a four-week period, approximately once every three years. This, he found, was reasonable accommodation.

[14] The arbitrator found that Lithotech had failed to prove that the employee's dismissal was fair as it had not made every reasonable effort to accommodate his incapacity.

[15] The arbitrator noted that the employee "did not wish to return to work but rather that he would want to either be medically boarded or compensated on a monthly basis until his retirement". He noted, though, that the employee did not qualify to be medically boarded as his physician had assessed him as being fully capable of carrying out his operational duties – just not on nights. And with regard to compensation, the arbitrator

correctly noted that he could only grant compensation up to a maximum of 12 months' remuneration. That led him to the conclusion that the employee's "second preferred remedy is ... not within my authority to grant". He therefore did not consider compensation as an alternative to reinstatement, and ordered Lithotech to reinstate him to his position as operator – but ordered that he "be accommodated on permanent day shift".

[16] It is this award that the applicant wishes to have reviewed. I must first consider whether condonation should be granted for the late filing of the review application.

Condonation

[17] In considering the application for condonation, I take into account the well-known principles in *Melane v Santam Insurance Co Ltd.*[3] When considering the prospects of success, I will do so in the context of the merits of the review application. It is also on this basis that messrs *Ellis* and *Aggenbach* addressed their oral argument.

Extent of the delay

[18] The application was delivered 22 days outside of the six-week time limit imposed by the LRA. This is not in itself a significant delay, especially when considered together with the other aspects below.

Reasons for the delay

[19] Lithotech received the arbitration award from the Council on 29 August 2011. It mistakenly applied for rescission rather than review. It did so on 1 September 2011, a mere three days after it had received the award. To exacerbate the error, it addressed the rescission application to the CCMA instead of the Council. I should note that it had not yet obtained legal advice at that stage.

[20] On 8 September 2011, the Council advised Lithotech –through one Ken Leid, apparently a representative of an employers' organisation – that the

[3] 1962 (4) SA 531 (A) 532 C-F.

award was not rescindable. (It is not clear why the Council would have responded to an application that was apparently addressed to the CCMA). Leid took the matter up with the Council's General Secretary, Mr Leon Pillay. Pillay told Leid that the applicant would have to deliver an amplified rescission application to the Council. The applicant did so on 9 September 2011. It had difficulties delivering the application to the employee. It eventually delivered the application to him by registered mail. It made numerous enquiries to the Council as to the status of the rescission application, to no avail. On 18 October it received a rescission ruling dated 12 October 2011 from the Council. It stated – correctly – that the Council did not have jurisdiction to rescind the award and that the applicant would instead have to launch a review application in this Court.

[21] Settlement discussions ensued, to no avail. On 7 November 2011 the applicant engaged its current attorneys of record. They delivered the application for review within two days, on 9 November 2011.

[22] Our courts have often stated that there is a degree beyond which a litigant cannot hide behind the negligence of its legal advisors. But in this case, once instructed, the applicant's attorneys acted with due haste. Before that, the applicant attempted to pursue its options to have the award set aside; without legal advice, though, it did so at the wrong forum and via the wrong route. Surprising as that may be, given that the matter was being dealt with by the applicant's IR manager, Meuldijk, it is not an entirely unacceptable or fanciful explanation. It is clear that the applicant wished to take timeous steps to have the award set aside, and indeed attempted to do so. One would assume that it and its IR manager will not make a similar mistake again. In this instance, I find the explanation an acceptable one.

Importance of the case

[23] As the applicant conceded, this is a neutral factor in this matter. It is of no significant societal importance, other than to say that it does deal with the question of reasonable accommodation.

Prospects of success

[24] The prospects of success can only be properly considered in the light of the merits of the review application. I now turn to that.

Review grounds

[25] The applicant raises the following grounds of review:

25.1 The arbitrator made a number of mistakes of fact relating to the shift system. Those mistakes led the arbitrator to come to a conclusion that may have been different., but for the mistakes.

25.2 The arbitrator contacted the applicant telephonically after the conclusion of the arbitration proceedings to gather further information. That constituted a gross irregularity.

25.3 The arbitrator ordered Lithotech to reinstate the employee, despite the fact that he did not seek reinstatement. The arbitrator therefore misapplied the provisions of s 193 of the LRA.

Evaluation / Analysis

[26] I shall deal with each of the review grounds in turn. In doing so, I shall with the third ground, as did both parties' legal representatives in oral argument.

The order of reinstatement

[27] Section 193 of the LRA reads:

"**193 Remedies for unfair dismissal and unfair labour practice**

(1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator may-

(a) order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal*;

(b) order the employer to re-employ the *employee*, either in the work in which the *employee* was employed before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal*; or

> *(c)* order the employer to pay compensation to the *employee*.
>
> (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the *employee* unless-
>
> *(a)* the *employee* does not wish to be reinstated or re-employed;
>
> *(b)* the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;
>
> *(c)* it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or
>
> *(d)* the *dismissal* is unfair only because the employer did not follow a fair procedure."

[28] In the case before the arbitrator, the employee clearly indicated that he did not wish to be reinstated; instead, he wanted either to be medically boarded (something the arbitrator could not order); or to be compensated, albeit phrased in the unrealistic terms of remuneration until retirement. The latter claim is clearly in excess of what an arbitrator could award in terms of s 194. Nevertheless, the fact remains that the employee asked for compensation instead of reinstatement. That placed his claim squarely with s 193(2)(a); in other words, the employee did not wish to be reinstated.

[29] Despite this, the arbitrator ordered Lithotech to reinstate the employee retrospectively. In doing so, he prevented a fair trial of the issues and acted beyond his powers. He did not give Lithotech the opportunity to lead evidence, if it so wished, why reinstatement in another position – as ordered by him -- would not have been reasonably practicable, as envisaged by s 193(2)(c). He also disregarded the evidence that Lithotech led in the context of the need for dismissal, i.e. that it would not have been reasonably practicable to employee Masito on dayshift only.

[30] This portion of the award is reviewable. As Landman J said in *Volkswagen SA Ltd v Brand NO & Others*[4], an award that orders reinstatement where the employee did not require it is "perverse and defective".

[4] [2001] 5 BLLR 558 (LC) para [111].

Telephone call

[31] The arbitrator telephoned Lithotech after the arbitration proceedings and without the employee's knowledge in order to glean more information about the shift system.

[32] It may seem strange that the applicant – rather than the employee – raises this as a ground of review. However, whoever raises it, this clearly inappropriate conduct of the arbitrator amounts to a gross rregularity in the arbitration proceedings.

[33] For example, in *MEC, Public Works, Northern Province v CCMA & others*[5] Freund AJ held that, even if it were to be accepted that an arbitrator acted in good faith with the intention of doing justice between the parties when he requested them to provide him with further documentary evidence after the hearing, it amounted to a gross irregularity for him to do so without giving them the opportunity to deal with the documents and their implications in a further hearing.

[34] This ground of review also succeeds.

Mistakes of fact

[35] The arbitrator misunderstood the factual situation with regard to the shift system. That may explain why he attempted to gather further information on it after the conclusion of the arbitration proceedings. Be that as it may, it appears from the award that he did not apply his mind to the evidence that was led on the way the shift system functioned.

[36] The arbitrator's finding that Lithotech could have accommodated the employee by enabling him to work dayshift only, is based on his understanding that this could be achieved by placing another employee on an extra week of night shift approximately once every three years.

[37] This is not borne out by the evidence. Firstly, the arbitrator bases his assumption on the understanding that 39 operators plus shift supervisors could have swopped shifts with Masito. That was not the evidence. The evidence was that, of the 39 employees on the shift system, six are

[5] [2003] 10 BLLR 1027 (LC) para [20].

supervisors who are only able to stand in and do the job of an operator (such as Masito) in an emergency. There were 33 operators spread across the three shifts (day, night and weekend) every week. Those 33 operators included the 11 operators on shift with Masito – they could obviously not swop with him if they work the same shift. That leaves 22 operators, of whom 11 would be working day shift; they could not work a night shift as well, amounting to a 23 hour shift, in the same week. Only 11 operators were therefore in the "pool" of workers who could potentially swop with Masito.

[38] In any event, adherence to the shift system is included as part of the operators' terms and conditions of employment in their contracts of employment. Lithotech could not unilaterally alter the terms of the other employees' contracts in order to accommodate Masito; and when it attempted to do so by agreement, only one volunteer came forward. The arbitrator did not apply his mind to that aspect of the evidence. That amounts to an irregularity in the process of decision-making that also renders the resultant award reviewable.[6]

Conclusion

[39] The award must be reviewed and set aside on one or all three of the grounds discussed above. It follows that the applicant had good prospects of success in the review application. Coupled with the relative short delay in delivering the review application and the reasons therefor, condonation should be granted.

[40] This is not a case where the Court is in a position to substitute its award for that of the arbitrator; neither did the applicant ask it to do so. The grounds on which the award is set aside are related to the arbitration process more than its outcome. It should be remitted to the Council for a fresh arbitration on the merits.

[41] In these circumstances, the employee should not be held liable for the applicant's costs.

[6] *Herholdt v Nedbank* [2012] 9 BLLR 857 (LAC).

Order

[42] I therefore make the following order:

42.1 The late filing of the review application is condoned.

42.2 The arbitration award handed down by the second respondent (the arbitrator) under the auspices of the first respondent (the Council) under case number PNPI 1715 is reviewed and set aside.

42.3 The dispute is remitted to the first respondent for a fresh arbitration before an arbitrator other than the second respondent.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Edwin Ellis of Edward Nathan Sonnenbergs.
THIRD RESPONDENT:	Morné Aggenbach Instructed by D Butlion & associates.