THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1163 / 16

In the matter between:

FIONA KOCK **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

JABULANI JELMOND MASHABA N.O. (AS ARBITRATOR) **Second Respondent**

ABSA BANK LTD **Third Respondent**

Heard: **29 August 2018**

Delivered: **05 March 2019**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA – application of review test set out – determinations of arbitrator compared with evidence on record – commissioner's decision regular and sustainable – award upheld**

Misconduct – insubordination – principles considered – employee clearly insubordinate – employee guilty of misconduct – award upheld

Misconduct – final written warning for insubordination – final written warning never challenged – warning must stand and cannot be challenged in later unfair dismissal proceedings

Misconduct – final written warning for directly related offence – consequences considered – dismissal based on final written warning fair

Review application – no case for review made out – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award given by the second respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration ('CCMA'). This application has been brought in terms of section 145 of the Labour Relations Act[1] ('the LRA').

[2] This matter arose from the dismissal of the applicant by the third respondent, for misconduct relating to insubordination. The applicant challenged her dismissal as an unfair dismissal to the CCMA. This dispute came before the second respondent for arbitration, which arbitration proceedings took place on 16 and 17 May 2016. Following conclusion of the arbitration proceedings, and in an arbitration award dated 27 May 2016, the second respondent found in favour of the third respondent, and determined that the applicant's dismissal by the third respondent was both substantively and procedurally fair. The second respondent then dismissed the applicant's claim. It is this determination that gave rise to the current review application.

[3] The applicant's review application was filed on 15 July 2016. Considering that the arbitration award of the second respondent was served on the applicant on 6 June 2016, the review application was thus brought within the 6 (six) weeks'

[1] Act 66 of 1995 (as amended).

time limit under section 145[2] of the LRA. The review application is accordingly properly before this Court for determination. I will therefore now proceed to decide this review application, by first setting out the relevant background facts.

The relevant background

[4] The applicant commenced employment with the third respondent on 6 December 2006, and was employed as a quality assurance specialist. She was dismissed on 25 September 2015 on a charge of continuing insubordination. In the end, the relevant facts in this matter are straight forward.

[5] The applicant, at the time when this matter arose, reported directly to the quality assurance manager, Edward Africa ('Africa'). In November 2013, when Africa joined the team the applicant was working in, the employees in the team worked three different staggered working hours, being from 07h00 to 15h30, or from 07h30 to 16h00, or from 08h00 to 16h30. The applicant's working hours was from 07h30 to 16h00.

[6] It must be added that the actual prescribed 'official' working hours in the third respondent was from 08h00 to 16h30, and the other two sets of working hours was a privilege that was extended to employees by way of individual arrangements. Of importance in the current matter, and after Africa joined the team, he discovered that the applicant was not sticking to the alternative working hours she had been permitted to do, and was regularly arriving at work late. As a result, and in 2014 already, this special dispensation was taken away from her, and she was required to work the normal and prescribed working hours from 08h00 to 16h30.

[7] The applicant then in fact worked from 08h00 to 16h30, from October 2014 until early January 2015. She then unilaterally decided, for personal reasons, to revert back to working from 07h30 to 16h00. She never informed Africa of this decision, or that she had done so.

[2] Section 145(1)(a) reads: 'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award - (a) within six weeks of the date that the award was served on the applicant …'

[8] Africa himself noticed in February 2015 that there was an issue with some employees sticking to the proper official working hours. In order to finally regularize the situation where it came to working hours, vis-à-vis the whole team, Africa sent an e-mail notification to all the team members on 25 February 2015. This included the applicant. The e-mail could not have been clearer. It recorded:

> 'I have noticed that some of the people in the team is coming in early and leaving early.
> There is no such arrangement and this will stop immediately.
> The attached are the agreed working hours and needs to be adhered to going forward.'

A list with individual employees' names with accompanying working hours was then indeed attached to the e-mail. The applicant's working hours were listed as 08h00 to 16h30. Africa testified that this had all been earlier agreed with SASBO, of which the applicant was a member.

[9] The applicant did not adhere to this clear instruction. She continued to work her own chosen working hours, from 07h30 to 16h00. All the other employees in the team however complied with the instruction, save for one other employee that had transferred out of the team, and thus this issue no longer applied to her.

[10] On 5 May 2015, Africa sent another e-mail to the applicant. He indicated to her that the working environment was not a shift or flexi time working environment. He reiterated that her working hours were from 08h00 to 16h30, and that there is no exception to this. He instructed her to stop immediately coming to work when she chose to, and indicated that if she did not adhere to the instruction to work the prescribed working hours, the matter would proceed to what he called 'HR process'.

[11] What followed was a flurry of e-mails between the applicant and Africa on 5 May 2015. The applicant answered Africa that she had told him at the beginning of the year that she would be working from 07h30 to 16h00 and he said she could continue with it. Africa stated that the previous arrangement

regarding her working hours lapsed 'last year'. In order to make matters clear, however, he stated that 'as of today' she was not working from 07h30 to 16h00 but from 08h00 to 16h30 as instructed. The applicant replied that she was not comfortable with this, and would speak to her representative. Africa responded that he was happy that she do this, but nonetheless her working hours were from 08h00 to 16h30 which she had to comply with.

[12] The applicant persisted with her refusal to comply. As a result, Africa had a meeting with her on 13 May 2015, and made it clear to her that her working hours were form 08h00 to 16h30, once again. He specifically told her that if she did not comply, proceedings would be instituted against her. The applicant responded by e-mail to Africa, concerning this meeting, suggesting that he was rude and disrespectful towards her. Africa answered that this was not his intention, and then proceeded confirm the actual content of the discussion, which included that he told her if she did not adhere to the working hours, action would be taken against her, and that she answered 'do what you want'.

[13] The applicant remained unswayed in her refusal to work from 08h00 to 16h30. She tried to immunize herself from the instruction by raising a long complaint to Africa by e-mail on 17 August 2015, seeking to justify her refusal. Africa answered on 27 August 2015, stating that he considered the applicant's contentions, but remained adamant that she will not be permitted to work from 07h30 to 16h00, and that her working hours were form 08h00 to 16h30. On 2 September 2015, the applicant then demanded reason for this instruction, which issue had long before been disposed of.

[14] What was apparent is that this was all going around in circles. The applicant had made it clear that no matter how many instructions she received concerning her working hours, she was not going to comply, and would continue to work the hours she decided.

[15] On 16 September 2015, the applicant was then notified to attend a disciplinary hearing to be held on 22 September 2015, on the following charge:

> 'It is alleged that you refuse to obey a reasonable and lawful instructions.
>
> A. You were instructed on various occasions since February to adhere to the official working hours as per the standard hours of 08:00 to 16:30.

B. You have persisted to arrive and leave your working environment contrary to the instruction given.'

[16] The disciplinary hearing then indeed took place on 22 September 2015. The applicant pleaded not guilty to the charge, insisting that she was entitled to work the working hours she had decided to work. She however did not dispute any of the background facts as set out above. The chairperson found the applicant guilty of the charge against her, and proceeded to consider the issue of an appropriate sanction.

[17] As part of the sanction consideration, it became apparent that the applicant had received a final written warning on 9 July 2015, also for insubordination. In this instance, and in sum, the applicant has refused to participate in a PAP process, despite being instructed to do so. She also behaved disruptively in the course of such proceedings. This warning was never challenged, either internally, or as an unfair labour practice to the CCMA.

[18] In a written finding handed down on 23 September 2015, the chairperson recommended the dismissal of the applicant. She was ultimately dismissed in terms of this recommendation on 25 September 2015.

[19] The applicant then challenged her dismissal as an unfair dismissal dispute to the first respondent in a referral filed on 15 October 2015, and this dispute came before the second respondent for arbitration. She challenged her dismissal as being both substantively and procedurally unfair.

[20] The second respondent first dealt with the issue of procedural fairness. He accepted that the applicant was represented throughout the disciplinary proceedings by an official from SASBO, and had a proper opportunity to state her case. He concluded that the applicant's dismissal was procedurally fair.

[21] Turning then to substantive fairness, the second respondent decided from the outset that he was not going to enquire into the validity or fairness of the final written warning of 9 July 2015, or the grievance outcome in respect of a grievance brought by the applicant against Africa. The second respondent held that if the applicant was dissatisfied with any of this, she should have pursued an unfair labour practice dispute to the CCMA.

[22] The second respondent accepted the third respondent's evidence that the official and ordinary working hours in the third respondent was from 08h00 to 16h30, and any alternative working hours was an indulgence to individual employees. He also accepted that whilst the applicant has initially been the recipient of such an indulgence, that was taken away from her in 2014 because of her continuous late coming, and that she had as a result indeed worked from 08h00 to 16h30 from October 2014 to January 2015.

[23] The second respondent determined that the applicant was fully aware of the fact that she had to work from 08h00 to 16h30, and had consistently refused to obey Africa's instruction to do so. The second respondent also accepted that this rule regarding working hours was consistently applied to all employees.

[24] The second respondent then proceeded to deal with the issue of an appropriate sanction. In this regard, the second respondent considered the applicant's final written warning of 9 July 2015, which he accepted was for a directly related offence. The second respondent also found that the misconduct was serious, and that the applicant's own conduct was deliberate and repeated. According to the second respondent, the applicant had 'defied' her manager.

[25] Finally, the second respondent also accepted that the applicant had been warned beforehand of the consequences of her persistent refusal to obey the instruction, but had decided to continue with her defiance nonetheless. He accepted that her behaviour continued until her dismissal. Finally, the second respondent also had regard to the third respondent's disciplinary code and procedure, which provided for dismissal as an appropriate sanction in this instance.

[26] Pursuant to the above reasoning, and in the arbitration award referred to above, the second respondent upheld the dismissal of the applicant as being fair. Hence the review application now before me.

The test for review

[27] I will only shortly touch on the appropriate test for review. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[4]. In *Herholdt v Nedbank Ltd and Another*[5] the Court applied this reasonableness consideration as follows:

> '… 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'[6]

[28] What this means is a two stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[29] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable

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[3] (2007) 28 ILJ 2405 (CC).
[4] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[5] (2013) 34 *ILJ* 2795 (SCA) at para 25.
[6] See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16

outcome, even if it may be for different reasons or on different grounds.[7] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.[8]

[30] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

Grounds of review

[31] The applicant's case for review must be made out in the founding affidavit, and supplementary affidavit.[9] As was said in *Northam Platinum Ltd v Fganyago NO and Others*[10]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[32] The applicant, in addition to the founding affidavit, indeed filed a supplementary affidavit.[11] I will now summarize the actual grounds of review raised by the applicant, as extracted from this set of pleadings.

[33] The first ground of review relates to the second respondent's refusal to consider the validity of the final written warning. According to the applicant, the

[7] *Fidelity Cash Management* (*supra*) at para 102.
[8] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.
[9] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27
[10] (2010) 31 ILJ 713 (LC) at para 27.
[11] This is filed in terms of Rule 7A(8)(a).

second respondent was obliged to enquire into the same, and she was entitled to raise it for consideration even in the unfair dismissal proceedings. The applicant added that the final written warning in fact was evidence of a 'pattern of victimization' of the applicant by 'people' in the employ of the third respondent. In short, the applicant suggests that the second respondent should have found that the final written warning constituted an unfair labour practice which would prove this 'pattern'.

[34] The second ground of review related to the second respondent refusing to allow evidence and documents to be presented by the applicant, about the validity / fairness of the final written warning. According to the applicant, this deprived her of a full opportunity to state her case.

[35] The third ground of review then relates to the second respondent's decision on sanction. The complaint by the applicant is that several of the second respondent's findings on sanction was either not supported by the evidence before him, or he relied on inadmissible hearsay evidence. This includes his findings about the nature of the misconduct, that the applicant's actions were deliberate and repeated, and that the rule was consistently applied. The applicant also contended that progressive discipline should have been applied, meaning she should not have been dismissed.

[36] I will consider the applicant's review application based only on these grounds of review. This of course means that the second respondent's findings on procedural fairness, and where it comes to the facts relating to the actual misconduct committed by the applicant, stand as uncontested. In particular, the conclusion that the applicant did commit the misconduct with which she had been charged stand as uncontested. In the end, it is only the sanction of dismissal that remains in issue.

[37] I also need to address a further difficulty with the manner in which the applicant chose to present her case. In the applicant's heads of argument, the case advanced goes far beyond the grounds of review as set out above. It is simply not permissible to raise new grounds of review in heads of argument, which were not pertinently raised in the founding affidavit and/or

supplementary affidavit.[12] In her heads of argument, the applicant has a full go at the entire award. She challenges that there was a rule that she breached, contends that there was an actual agreement that she work the alternative working hours, and raises a number of issues she submits was not considered by the second respondent when deciding an appropriate sanction. This needed to have been specifically raised and set out in the founding affidavit and supplementary affidavit. For this reason, these new grounds of review should not be considered, and I will have no regard to the same in deciding this matter.

Analysis: The Final Written Warning / Grievance

[38] I will commence with what appears to be the main thrust of the applicant's review case, being the issue of the challenge of the final written warning. In this regard, a number of pertinent facts were undisputed. The applicant was indeed issued with a final written warning on 9 July 2015 of which she was fully aware. The final written warning was issued after disciplinary proceedings and on a charge of insubordination relating to a refusal to obey an instruction from a manager. The final written warning was current and binding at the time of the disciplinary proceedings that led to the applicant's dismissal. And finally, the final written warning was never challenged, either by way of an internal process, or by way of an unfair labour practice referral to the CCMA.

[39] The LRA draws a clear distinction between dismissal disputes, and unfair labour practice disputes. In fact, and opposed to what is considered to be a dismissal as defined in section 186(1) of the LRA, section 186(2)(b) provides that an unfair labour practice is any disciplinary action short of dismissal.[13] This would obviously include a final written warning. What this means is that the basic nature of the dispute in the case of a dismissal dispute, on the one hand, and an unfair labour practice dispute, on the other, is simply not the same. By way of comparison to illustrate the point, a similar circumstance can be found in the difference between an automatic unfair dismissal dispute

[12] *Communication Workers Union and Others v SA Post Office Ltd and Others* (2013) 34 ILJ 626 (LC) at paras 35 and 39; Brodie (supra) at para 34. See also the analyses in *Madondo v Safety and Security Sectoral Bargaining Council and Others* (2015) 36 ILJ 2314 (LC) at paras 73 – 88.

[13] The section reads: Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving- … (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee …'.

under section 187(1)(f) of the LRA,[14] and a discrimination dispute under section 10 of the Employment Equity Act,[15] which can even both arise out of the same factual matrix. In these instances, separate disputes must be pursued by way of referrals to conciliation, and it does not follow that when the Court considers an automatic unfair dismissal dispute, it can simply also consider a discrimination dispute in the absence of such specific referral of such dispute to conciliation.[16]

[40] Therefore, the clear difference in the nature of the dispute, where it comes to an unfair dismissal dispute and an unfair labour practice dispute, has a consequence. This consequence is that each has its own distinct dispute resolution process.[17] It follows that an unfair dismissal dispute must be pursued as such, and an unfair labour practice dispute must also be pursued as such. It cannot be legitimately contended that when an unfair dismissal dispute is pursued by way of a referral to the CCMA, it would also by implication include a challenge of an earlier final written warning, even if that final written warning may have a bearing on the dismissal. The final written warning must be specifically challenged as an unfair labour practice. This must be done by a proper referral to conciliation served on the employer, followed an unsuccessful conciliation at the CCMA. In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[18] the Court said:

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[14] The section reads: '(1) A dismissal is automatically unfair if … the reason for the dismissal is- … (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

[15] Act 55 of 1998. In this regard, section 6(1) reads: 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

[16] See *SA Airways (Pty) Ltd v Jansen van Vuuren and Another* (2014) 35 ILJ 2774 (LAC); *Evans v Japanese School of Johannesburg* (2006) 27 ILJ 2607 (LC); *Bedderson v Sparrow Schools Education Trust* (2010) 31 ILJ 1325 (LC); *Wallace v Du Toit* (2006) 27 ILJ 1754 (LC); *Hibbert v ARB Electrical Wholesalers (Pty) Ltd* (2013) 34 ILJ 1190 (LC).

[17] Section 191(1)(a) of the LRA reads provides that if there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to the CCMA or applicable bargaining council. In the case of an unfair dismissal dispute, the time limit to do so is 30 days (section 191(1)(b)(i)), and in the case of an unfair labour practice 90 days (section 191(1)(b)(ii)). In addition, section 191(5)(a)(i) provides for the referral of an unfair dismissal dispute to arbitration, which section 191(5)9a)(iv) provides for the referral of an unfair labour practice dispute to arbitration. Two distinctive processes are clearly envisaged.

[18] (2015) 36 ILJ 363 (CC) at para 47. See also *Mphahlele v Ephraim Mogale Municipality* (2018) 39 ILJ 879 (LC) at para 8.

> 'In determining the objectives of s 191, none of its provisions can be ignored. They must all be taken into account. That includes the requirement in s 191(3) that the employee must satisfy the council that a copy of the referral has been served 'on the employer'. The general purpose of s 191 provides the background against which the specific purpose of s 191(3) must be understood. The subsection ensures that the employer party to a dismissal or unfair labour practice dispute is informed of the referral. The obvious objective is to enable the employer to participate in the conciliation proceedings, and, if they fail, to gird itself for the conflict that may follow.'

[41] In the absence of a final written warning being challenged as an unfair labour practice, it simply cannot be challenged in the course of subsequent unfair dismissal proceedings. Even under the former LRA,[19] the erstwhile Industrial Court recognized the necessity to distinguish between the challenge of a final written warning and a dismissal, and accepted that a final written warning cannot be challenged in subsequent litigation if it had not been specifically challenged earlier. In *Paper Printing Wood & Allied Workers Union and Another v Sappi Fine Papers (Pty) Ltd*[20] it was held:

> '… previous disciplinary actions are not necessarily in dispute at subsequent hearings, even when taken into account for the purpose of deciding what further action should be taken against the employee. It is also possible that long periods could have elapsed between disciplinary actions and the separate disciplinary enquiries held in respect thereof. Furthermore, it is of real importance that disputes should be resolved as soon as possible. In view of this, there is every reason to consider previous disciplinary action as separate disputes and to require that such disputes must specifically be referred to conciliation boards - if such actions are still in dispute.'

[42] The former Labour Appeal Court followed a similar approach in *Agbro (Pty) Ltd v Tempi*[21], where it was held that the Court was not entitled to enquire into the question as to whether an earlier final warning had been justified, as it was not permitted to:

[19] Act 28 of 1956.
[20] (1993) 2 LCD 318 (IC) at paras 6 – 7.
[21] (1993) 2 LCD 24 (LAC) at para 5.

'… qualify or derogate from the finality of the warning. If one did so it would loose its force as a "final warning".'

[43] Under the current LRA, and in the reported award of *Subroyen v Telkom (SA) Ltd*[22], a CCMA arbitrator referred with approval to the judgment in *Agbro* supra, and held as follows:

> **'**The law in respect of the right of an employee to challenge prior warnings on the basis that these warnings are used in assessing a proper and fitting sanction is clear. An employee may raise the question of the fairness of these previous warnings at a subsequent tribunal hearing only if he or she challenged the fairness of these warnings at the time …'

I agree with this reasoning. It is in line with the prescribed dispute resolution structure under the LRA and the clear distinction drawn between dismissals and unfair labour practices.

[44] I find further support for my view in the judgment of *Mining Power Transfer t/a Driveline Technologies v Marcus NO and Others*[23], where the Court was specifically called on to decide an argument by an employee party that despite the employee never referring a separate dispute of an unfair labour practice where it came to a final written warning, the fact that the employer itself elected to use such warning as an aggravating factor in order to secure the employee's dismissal, the employee was entitled to attack the merit of such warning in the unfair dismissal arbitration. The Court held as follows in this regard:[24]

> 'I am not persuaded by the submission of Mr *Botha*. The issue which fell to be determined by the arbitrator was whether the dismissal of the third respondent on 11 February 2005 was procedurally and substantively fair regard being had to the final written warning given to the third respondent on 1 September 2003. In *Agbro* (*Pty*) *Ltd v Tempi* (1993) 2 LCD 24 (LAC) the court held that it was not entitled to enquire into the question as to whether the final warning (which had never been challenged and reversed) had been justified as this would

[22] (2001) 22 ILJ 2509 (CCMA) at 2521C-D.
[23] [2008] JOL 21764 (LC) at para 37.
[24] Id at para 38.

qualify or derogate from the finality of the warning. I am in respectful agreement …'

[45] It is not unusual that an employee receives a final written warning, which is then challenged to the CCMA, and that employee is subsequently dismissed, which dismissal is also pursued to the CCMA. As a matter of practice, these two separate disputes may well be consolidated at arbitration stage, especially where the final written warning has a direct impact on the later dismissal. But the fact remains that there is a distinct and separate referral of the final written warning as an unfair labour practice, which is always required.

[46] *In casu*, the applicant has conceded that she never referred an unfair labour practice dispute to the CCMA to challenge the final written warning. This was specifically explored in the course of the arbitration, and confirmed to be the case. This is further borne out by her conciliation and arbitration referrals in the unfair dismissal dispute which was before the second respondent, which clearly only provide for the referral of the unfair dismissal dispute, and make no reference at all to the final written warning. There is no evidence of any dispute being conciliated at the CCMA concerning the final written warning.[25] As such, the validity or fairness of the final written warning was not open for consideration in the dismissal arbitration before the second respondent, and it stands.

[47] There is an important policy consideration underlying this principle that a final written warning must be specifically challenged beforehand as an unfair labour practice. The purpose of the final written warning is in essence to place the employee on final terms. As a matter of general principle, a final written warning is exactly what it says, being that a repeat of the transgression in a specified period will result in dismissal. It is a last chance.[26] If the employee is unhappy with being given a last chance if the first place, then the employee must challenge it, so it can be determined if this is a legitimate last chance. If the employee does not challenge it, then the employer should be entitled to

[25] Compare *September and Others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC) at para 56.
[26] I do not say that that a final written warning always and without exception must lead to dismissal in the case of a repeat transgression. There may be unique circumstances where even the existence of a final written warning may not lead to dismissal, which the employee would of course has to show exists. But that is an issue for the arbitrator considering the fairness of the sanction of dismissal to decide, based on the particular facts of the matter and in conducting the holistic enquiry as discussed below.

accept that the employee is well aware that it is his or her last chance and would adjust his or her behaviour accordingly. It is then surely a matter of common sense that if the employee transgresses again, and is dismissed because of having spurned his or her last chance, it cannot be permissible to then attack the validity of the last chance. In effect, such a challenge undermines the very purpose of the final written warning, and what it is intended to do. I thus agree with the reasoning in *Agbro*, *Mining Power Transfer* and *Subroyen* in this regard.

[48] In the circumstances, the second respondent simply cannot be faulted for his reasoning that it was not open for him to consider the validity or fairness of the final written warning in the absence of an earlier challenge of the same by way of an unfair labour practice dispute. The second respondent was entitled to accept, and then apply, the final written warning as it stood, in deciding the issue of a fair sanction. Similarly, the second respondent was well within his rights to have declined the applicant the opportunity to lead evidence seeking to contradict the validity or fairness of the final written warning. There is simply no reviewable irregularity committed by the second respondent on any of these issues, and this ground of review of the applicant must fail.

[49] The only enquiry an arbitrator when dealing with an unfair dismissal dispute is competent to make, where it comes to a pre-existing unchallenged final written warning, is limited to determining whether the final written warning was indeed issued to the employee, the employee was aware of it, whether it concerns related misconduct to that which the employee was dismissed for, and finally if it is still binding. For example, if the evidence shows that the employee was never issued with the final written warning, then it can hardly be said that the final written warning can be taken into account as the last chance being afforded to the employee to remedy his or her behaviour.[27] Another example where the final written warning may not lead to dismissal is where the warning had expired by the time the further misconduct had taken place.[28] Evidence in this respect thus does not serve to contradict the validity or fairness of the final

[27] See *Sandvik Mining and Construction RSA (Pty) Ltd v Molebaloa NO and Others* (2013) 34 ILJ 426 (LC) at para 30.
[28] Compare *National Union of Metalworkers of SA and Others v Atlantis Forge (Pty) Ltd* (2005) 26 ILJ 1984 (LC) at para 148.

written warning. It serves, in short, to decide if the employee is actually on a last chance because of it.

[50] One final issue that must be dealt with where it comes to the final written warning. The applicant in essence tries to sneak in a challenge to the final written warning through the back door, by contending the evidence relating to its merits and whether it was fair or not could serve to establish a pattern of victimization of the applicant. In my view, this approach is contrived. It is the same kind of argument already rejected in *Mining Power Transfer.* The problem with the applicant's refusal to work from 08h00 to 16h30 as she was instructed to do, arose long before the events giving rise to the final written warning taking place at the end of June 2015. By May 2015, Africa was clearly threatening the applicant with disciplinary action if she did not comply with the instruction to work the official working hours. There was no change in circumstance from that time. It is hard to comprehend how unrelated events of insubordination in June 2015 can serve to prove victimization of the applicant relating to the working hours issue to the extent that it would exonerate her of the misconduct for which she was dismissed. But in any event, what must put paid to this contention is that if the applicant so strongly believed the final written warning was victimization, she should have challenged it, which she never did.

[51] Therefore, the second respondent's findings concerning the final written warning are unassailable on review, and all the review grounds raised by the applicant relating to the same must fail

Analysis: The Sanction

[52] As dealt with above, it was undisputed that Africa had on several occasions in the period between February and August 2015 instructed the applicant to work from 08h00 to 16h30, and she deliberately and persistently refused to do so. There can be no doubt that the applicant committed the misconduct with which she had been charged. In any event, the conclusion that the applicant committed the misconduct is not challenged as part of the review grounds properly raised. All that remains is to decide whether dismissal was a fair sanction.

[53] In deciding whether an employer acted fairly in deciding to dismiss an employee, a variety of factors must be considered, as a whole. These are, in sum, the following: (1) the importance of the rule that had been breached (seriousness of the misconduct); (2) the reason the employer imposed the sanction of dismissal; (3) The explanation presented by the employee for the misconduct; (3) the harm caused by the employee's conduct; (4) whether additional training and instruction may result in the employee not repeating the misconduct; (5) the service record of the employee; (6) the breakdown of the trust / employment relationship between the employer and employee; (7) the existence or not of dishonesty; (8) the possibility of progressive discipline; (9) the existence or not of remorse; (10) the job function of the employee; and (11) the employer's disciplinary code and procedure.[29] In general terms, what requires consideration by an arbitrator was articulated in *Vodacom (Pty) Ltd v Byrne NO and Others*[30] as follows:

> '… the determination of the fairness of a dismissal required a commissioner to form a value judgment, one constrained by the fact that fairness requires the commissioner to have regard to the interests of both the employer and the worker and to achieve a balanced and equitable assessment of the fairness of the sanction …'

[54] The above being the applicable principles, what must next be done is to apply the facts to these principles, and to consider the actual case of the applicant as to why the sanction of dismissal could be seen to be unfair, in order to decide whether the second respondent's ultimate determination that dismissal was a fair sanction in this case, passes muster on review. As said in *Wasteman Group v SA Municipal Workers Union and Others*[31]:

[29] *Sidumo* (*supra*) at para 78; *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82; *Bridgestone SA (Pty) Ltd v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2277 (LAC) at paras 17 – 18; *Woolworths (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* (2016) 37 ILJ 2831 (LAC) at para 14; *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at para 30; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38; *Fidelity Cash Management (supra)* at para 94.

[30] (2012) 33 ILJ 2705 (LC) at para 9.

[31] (2012) 33 ILJ 2054 (LAC) at 2057G-I.

> '… The commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner. …'

[55] I will first deal with the nature of the misconduct. The second respondent considered it to be serious, and being misconduct of the kind that could competently lead to dismissal. This reasoning of the second respondent cannot be faulted. In *Humphries and Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and Others*[32] the Court held as follows:

> '… In our view a disregard by an employee of his employer's authority, especially in the presence of other employees, amounts to insubordination and it cannot be expected that an employer should tolerate such conduct. The relationship of trust, mutual confidence and respect which is the very essence of a master-servant relationship cannot, under these circumstances, continue. In the absence of facts showing that this relationship was not detrimentally affected by the conduct of the employee it is unreasonable to compel either of the parties to continue with the relationship...'

[56] The misconduct *in casu* is exacerbated by the fact that it was deliberate and repeated, in the face of several efforts by Africa to simply secure compliance.[33] In *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others*[34], the Court summarized the position in such circumstances as thus:

> 'It is trite that an employee is guilty of insubordination if the employee concerned wilfully refuses to comply with a lawful and reasonable instruction issued by the employer. It is also well settled that where the insubordination was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be justified. … '

[57] The kind of insubordination committed by the applicant in this instance, for the want of a better description, is such that it would *per se* be destructive of the employment relationship, considering a number of factors. First, she in fact

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[32] (1991) 12 ILJ 1032 (LAC) at 1037F-H. See also *Commercial Catering and Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC).
[33] See *A Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of SA and Others* (1995) 16 ILJ 349 (LAC) at 359E-F.
[34] (2013) 34 ILJ 1440 (LAC) at para 31. See also *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others* (2012) 33 ILJ 2117 (LC) at paras 116 and 121.

knew her prescribed working hours were from 08h00 to 16h30. She conceded she had been so informed in 2014 already, and for a period of some four months in fact worked those hours. She then unilaterally decided to revert to working from 07h30 to 16h00, for personal reasons and without any attempt to notify Africa. Her conduct was of her own deliberate design. Secondly, the instructions given to her were in writing, and could not have been more clear. The language used in the various e-mails from Africa could not have left her in any doubt about what she had to do, and what the consequences would be if she did not. Thirdly, and instead of complying the applicant did her utmost not to comply. She tried to rely on an agreement allegedly concluded with Africa that she could work these alternative hours which was false contention, she threatened to involve her union representative (SASBO in any event did nothing about the issue), and lastly she tried to discredit Africa by raising a grievance. The applicant, in short, made her intentions clear – she was not going to comply with her direct manager's instructions to work the proper working hours as prescribed in the third respondent. She consequently earned her dismissal. An appropriate comparison can be found in the following dictum in *Silverton Spraypainters*[35]:

> 'In the present instance, Mr Van Jaarsveld wilfully, persistently and publicly defied a lawful and reasonable instruction given to him by his employer, Mr Cronje, who was the sole director of the company. On one of the occasions when Mr Van Jaarsveld defied the instruction it was in the presence of Ms Spaans, one of the company employees. It is trite that mutual trust and respect constitute a fundamental pillar in every sustainable employer-employee relationship. In my view, Mr Van Jaarsveld's unbecoming conduct completely ruined his employment relationship with the company, which rendered his dismissal justified. The misconduct was so serious that the sanction of dismissal would, in my view, have been justified.'

[58] In my view therefore, and based on the seriousness of the misconduct alone, the applicant earned her dismissal. The conclusion the second respondent arrived at in this regard must therefore be upheld, as it would simply not be an irregular finding and in any event would be a finding that resorts well within the bands of a reasonable outcome.

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[35] Id at para 47. See also *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 33126 (LC) at para 69.

[59] But there is even more to it *in casu*. In this regard, there is also the actual existence of the final written warning. This warning was also for insubordination, and was valid and binding on the applicant. It was issued whilst the exchanges between Africa and the applicant about her working hours was still ongoing, and shortly before the final exchange in August 2015. The issuance of the warning must have made it clear to her that she would face dismissal for continued insubordination.

[60] The Court in *Transnet Freight Rail v Transnet Bargaining Council and Others*[36] specifically dealt with the very issue of the consequences of a final written warning, and said:

> 'Usually, the presence of a valid final written warning at the time of the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature. The principles of progressive discipline require such a re-offending employee usually to be considered irredeemable. …. I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal.'

And in *Gcwensha v Commission for Conciliation, Mediation and Arbitration and Others*[37] the Court held:

> 'I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal.'

[61] The above puts paid to the applicant's argument that further progressive discipline was warranted in this case. The misconduct for which the applicant had been dismissed took place right off the back of a final written warning for the same kind of misconduct. Ordinarily, and from there, there is no room for further progressive discipline. There was no evidence of any compelling reason why this general principle that a dismissal should follow, should be departed from, other than a mere appeal for clemency, which was simply far

[36] (2011) 32 ILJ 1766 (LC) at para 42 – 43. See also *Builders Trade Depot v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 1154 (LC) at paras 45 – 46.
[37] (2006) 27 ILJ 927 (LAC) at para 32.

too little, too late. The situation was aptly described by Salty Thompson, the chairperson of the disciplinary hearing of the applicant, who testified thus:

> '… because of I had a final written wanring on my file, I would pull my finger to keep my job. But even after that she just did what she wanted, worked the hours she wanted …'

[62] The applicant tried to distinguish the final written warning from the current misconduct by contending that the events giving rise to her dismissal related to working hours / late coming, whilst the events relating to the final written warning for refusal to participate in a PAP process. The purported distinction is artificial. The different underlying events have little relevance in justifying the drawing of the distinction the applicant seeks. At the heart of it, and in both instances, the applicant refused to obey instructions from her manager. In the case of the final written warning, she refused to comply with a company policy. In the case of the dismissal events, she refused to comply with an instruction relating to working hours. It is birds of a feather. Appreciating this, the second respondent considered the final written warning as directly applicable. His conclusions in this regard are sound, and certainly reasonable.

[63] Therefore, and based on the final written warning, the applicant's dismissal was equally justified and fair. The final written warning was for the same behavioural offence she had been dismissed for. Following the final written warning, she had a last chance to comply with the instruction from Africa to work from 08h00 to 16h30. She spurned this last chance. There was no reason, on the evidence, why her dismissal should not have followed as a result.

[64] The applicant never showed any remorse for her conduct. She remained steadfast in her view that she did nothing wrong, and was in effect entitled to work the hours she chose to work. The second respondent correctly recognized this in his award. Genuine remorse contemplates an unconditional acknowledgement of the wrongdoing, a plea for forgiveness, and an undertaking that the misconduct will not be repeated if the employee is

permitted to remain in the fold of the employment relationship.[38] The applicant did none of this. She remained defiant to the end.

[65] The applicant argued that there was no evidence led by the third respondent about the destruction of the trust / employment relationship. I must immediately mention that this was not pertinently raised as ground of review, but even if considered, it is my view that the serious nature of the misconduct, as coupled with the final written warning and complete lack of remorse would carry the day to justify dismissal. The point is that certain cases of misconduct speak for themselves, and it is not always an imperative to lead evidence about the destruction of the trust relationship. As pertinently said in *Impala Platinum Ltd v Jansen and Others*[39]:

> **'**Since *Edcon*, this court has repeatedly stated that where an employee is found guilty of gross misconduct it is not necessary to lead evidence pertaining to a breakdown in the trust relationship as it cannot be expected of an employer to retain a delinquent employee in its employ.'

And in *Woolworths (Pty) Ltd v Mabija and Others*[40], the Court held:

> 'The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonesty, cannot be visited with a dismissal without any evidence as to the impact of the misconduct. In some cases, the more outstandingly bad conduct of an employee would warrant an inference that the trust relationship has been destroyed. …'

[66] The second respondent considered, and in my view properly so, that the disciplinary code of the third respondent prescribed dismissal as a competent sanction for the misconduct in this instance. It is true that the second respondent did not consider the harm caused by the employee's conduct; the job function of the applicant, and the service record of the applicant. But none

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[38] *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1051 (LAC) at para 25; *City of Cape Town v SA Local Government Bargaining Council and Others (2)* (2011) 32 ILJ 1333 (LC) at para 2.

[39] (2017) 38 ILJ 896 (LAC) at para 13. See also *Schwartz v Sasol Polymers and Others* (2017) 38 *ILJ* 915 (LAC) at para 30; *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others* (2017) 38 *ILJ* 881 (LAC) at para 30; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (*supra*) at para 19; *Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen and Others* (2018) 39 ILJ 1330 (LC) at para 59.

[40] (2016) 37 *ILJ* 1380 (LAC) at para 21. See also *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2017) 38 ILJ 860 (LAC) at paras 34 – 35.

of these factors render the outcome ultimately arrived at by the second respondent that dismissal was fair and justified in this instance, to be unreasonable. Considering all the other issues already referred to and discussed above, it remains my view that the decision of the second respondent that dismissal was a fair sanction in this case resorts well within the bands of a reasonable outcome.

[67] I am therefore satisfied that the conclusion of the second respondent arrived at to the effect that the applicant's dismissal constituted a fair sanction in this instance, was not irregular, would in any event constitute a reasonable outcome, and as such, must be upheld. It follows that the applicant's dismissal was fair, and the second respondent's finding that this was indeed the case must equally be upheld.

Conclusion

[68] In *Gold Fields Mining*[41] the Court said:

> '…. The questions to ask are these: … (ii) Did the arbitrator identify the dispute he was required to arbitrate….? (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 reasonable have arrived at based on the evidence?'

In casu, all these questions must clearly be answered in the affirmative, having the consequence that the second respondent's award must be upheld.

[69] Therefore, and based on all the reasons set out above, I conclude that the second respondent's arbitration award is simply not reviewable. I am satisfied that the second respondent properly conducted the arbitration proceedings, and there is nothing untoward or irregular in his evaluation and determination of the evidence. Insofar as the issue of the outcome arrived at by the second respondent may be considered on the basis of it being reasonable or unreasonable, there is in my view no doubt that it would comfortably resort within the bands of reasonableness as required, in order to be sustainable on review. The applicant's review application falls to be dismissed.

[41] (*supra*) at paras 20 – 21.

Costs

[70] This then only leaves the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was unsuccessful, I do not intend to burden her with a costs order. I am also mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[42] where it comes to the issue of costs in employment disputes. The issue of costs was in any event not pressed by either party when the matter was argued before me. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

[71] In the premises, I make the following order:

Order

1. The applicant's review application is dismissed.

2. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court of South Africa

[42] (2018) 39 ILJ 523 (CC).

Appearances:

For the Applicant:	Ms M Naydenova of Marina Naydenova Attorneys
For the Third Respondent:	Ms T Rapuleng of Cliffe Dekker Hofmeyr Attorneys