THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable / not reportable

Case no: JR929/15

In the matter between:

AZWINDINI DOLLY NETSHISAULU	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
MOHALE CALVIN LEBEA *N.O.*	**Second Respondent**
ESKOM HOLDINGS SOC LIMITED	**Third Respondent**

Heard: 23 August 2017

Delivered: 28 September 2017

Summary: Review of arbitration award – commissioner misconstruing misconduct as gross negligence and upholding sanction of dismissal when employee guilty of ordinary negligence – award reviewed and set aside and substituted with an order that dismissal unfair and employee reinstated on a written warning

JUDGMENT

MYBURGH, AJ

Introduction

[1] The applicant employee seeks to set aside on review the commissioner's award in which he found her dismissal by Eskom for misconduct to be substantively fair. The review application is opposed by Eskom.

[2] The review involves a three-pronged attack on the award: firstly, that the commissioner's decision to disallow the applicant legal representation was allegedly reviewable in that he failed to properly apply the relevant test; secondly, that the commissioner was allegedly disqualified from arbitrating the matter because he had conciliated a related dismissal dispute involving Mr Masokwameng; and thirdly, that the sanction of dismissal imposed by the commissioner was allegedly unreasonable.

Overview of the facts

[3] The applicant was employed by Eskom as an HR officer in its Limpopo operating unit, and reported to Ms Motimele, the HR manager. The applicant commenced employment with Eskom in 2010, and had a clean disciplinary record.

[4] Eskom's Limpopo operating unit is split into five zones, one of which is the Thohoyandou zone. That zone is split into two sectors – the Thohoyandou sector and the Louis Trichardt / Musina sector. At all material times, it appears that the applicant was in the process of transitioning from the Thohoyandou sector (where she had originally been appointed) to the Louis Trichardt / Musina sector, with her replacement in the Thohoyandou sector being Mr Masokwameng. Although he had worked for Eskom for some three years as a trainee, Mr Masokwameng appears to have taken up the position of HR officer

towards the end of June 2014, and was being informally mentored by the applicant. As at 1 July 2014 (see below), he had apparently only been in the position of HR officer for four days.

[5] On 1 July 2014 at 09:58, Ms Motimele sent an email to her team of HR officers (including the applicant and Mr Masokwameng) dealing with the appointment / recruitment of learners who had completed their learnerships. A spreadsheet was attached to the email reflecting, *inter alia*, the names of the learners who were to be recruited. Given its importance, the full text of the email warrants quotation:

> "Good morning team
>
> See the attached doc for your urgent action.
>
> The following needs to be adhered to:
>
> We are in the process of negotiating for the appointment of these learners, however we are urgently requested to start with the process of recruitment, in case approval is given, we appoint with effect from the 1st of July 2014.
>
> The following needs to take place with effect from today:
>
> Start the recruitment process for them in your respective areas (medicals, GA2, assessment, whatever process that goes with their appointment).
>
> Please give this priority, as July payroll is closing on the 10/11, and these process [sic] should be completed by July payroll closure.
>
> Treat this as private and confidential. No information to be shared with anyone outside you.
>
> Feel free to ask for clarity in case you do not understand the instruction."

[6] In terms of the attached spreadsheet, 18 learners were to be recruited, four of whom fell within the Thohoyandou zone – two each in the Thohoyandou and Louis Trichardt / Musina sectors.

[7] At the time of receiving this email on 1 July 2014, the applicant was together with Mr Masokwameng in the Thohoyandou office. Upon reading the email, the applicant formed the view that there was no attachment to it, and confirmed

with Mr Masokwameng that he had also not seen the attachment. The applicant was fortified in her view by the fact that she came across an email from Seun Hlabane, an HR officer who was also a recipient of Ms Motimele's email, to Ms Motimele advising her that there was no attachment. (Mr Hlabane apparently later discovered the attachment with the assistance of his colleagues.) The applicant then twice made an attempt to contact Ms Motimele telephonically, but was unsuccessful.[1] She also appears to have formed the view that there was no point in sending Ms Motimele a follow up email, because Mr Hlabane had already done so, and had not received a response.

[8] It was in these circumstances – and particularly in the light of the fact that the recruitment process had to be undertaken urgently – that the applicant sent an email to the training department at 12:43, requesting to be provided with details of the learners who had qualified. The training department sent a response at 13:05, attached to which was a spreadsheet reflecting the names of ten qualified learners in the Thohoyandou zone. But unbeknown to the applicant (and Mr Masokwameng), there were only four names on Ms Motimele's spreadsheet (which were amongst the training department's list of ten). This unfortunately set in train a process which culminated in six more learners being appointed in the Thohoyandou zone than ought to have been the case.

[9] It warrants mention that the difference in the selection method used by Ms Motimele and the training department, which accounted for the difference in the numbers, is that Ms Motimele used 31 April 2014 as the cut-off date for the learners having passed their trade test, whereas the training department's spreadsheet appears to have listed the learners who had qualified as at the date that it was sent (i.e. 1 July 2014). The learners who qualified after 31 April

[1] Although Ms Motimele denied this, she did so on the basis that the applicant had failed to raise the issue with her when seeing her at a training session on 4 July 2014, which makes little sense. The applicant's evidence that she had attempted to contact Ms Motimele telephonically on 1 July 2014 was not challenged under cross examination. That she did so is also borne out by her email of 10 July 2014 addressed below.

2014 stood to be considered for employment during a second recruitment phase.

[10] Reverting to the chronology of events, following the receipt of the training department's spreadsheet, Mr Masokwameng then attended to processing the recruitment of the ten learners listed on the spreadsheet – this under the oversight of the applicant. This culminated in the preparation of written offers of employment for them, which were signed by Mr Bala (senior manager maintenance and operations of the Limpopo operating unit) on behalf of Eskom on 8 July 2014. The positions on offer were for senior technical officials commencing on 1 July 2014, at a remuneration level of some R225 000 per annum.

[11] On 9 July 2014, Ms Motimele sent these written offers of employment to the applicant and Mr Masokwameng under cover of an email. The key part of this email read:

> "Signed letters for your distribution.
>
> Check them before you distribute, especially on the acceptance site [sic], just to ensure that you did not mix names."

[12] The applicant understood this instruction to mean that she should check that the name on the notice of acceptance attached to the offers of employment correlated with the offer itself, which she did. The applicant did not check the names against Ms Motimele's spreadsheet because she had still not seen it, and in any event, she considered everything in order because the offers of employment had been signed and approved by Mr Bala and sent to her by Ms Motimele.

[13] It also warrants mention that it was common cause that, during the period 1-9 July 2014, the applicant had a congested schedule which kept her mostly out of her office, and that she was unwell at a point.

[14] On either 9 or 10 July 2014, the offers of employment were accepted by the learners. It thereupon transpired that offers had been made to and accepted by six leaners who had not been on Ms Motimele's spreadsheet – three each in the Thohoyandou sector (for which Mr Masokwameng was responsible) and the Louis Trichardt / Musina sector (for which the applicant was responsible). Ms Motimele herself had failed to pick this up when sending the written offers of employment to the applicant and Mr Masokwameng on 9 July 2014 – there having been six too many offers of employment for the Thohoyandou zone (as a whole).

[15] During the afternoon of 10 July 2014, Ms Motimele sent an email to the applicant and Mr Masokwameng calling them to a meeting the following day "to discuss the appointments of learners in Thohoyandou, and why the deviations from the spreadsheet that was sent". The applicant's contemporaneous response – sent within half an hour – was this:

> "First I would like to say I am sorry for the mess.
>
> I called all the learners wrongly given the offers and explained that I made the mistake and are withdrawing the offers.
>
> I take full responsibility for this, though [sic] I should have followed for the list as there was no attachment on your mail.
>
> I called on several times without getting hold of you and Seun did write a mail that there is no attachment and there was no response from your side.
>
> Thinking I was doing the right thing I asked Training for qualified appies which is what we used.
>
> I spoke to all of them and will take responsibility for it all.
>
> I cannot apologise enough for this. I will not even mind if disciplinary steps are taken against me, I should have followed up for the correct list which I never did and tried to get it from Training.
>
> The attached spreadsheet we are seeing it for the first time today when you sent it at 2.
>
> We will not appoint them on the system. We have retrieved all the documents.

I have attached this mail to show you that there was no attachment. I am still taking accountability and will be there tomorrow."

[16] The applicant's evidence at the arbitration was consistent with this.

[17] On 7 August 2014, arising from the above, the applicant was charged with three counts of misconduct with reference to clauses in Eskom's disciplinary code:

"2.28 'Is negligent in the performance of his/her duties': in that on the 9th July 2014 you failed to check the correctness of the offer of employment letters that were given to individual learners, in accordance with the spreadsheet that was given to you by your manager (Rachel Motimele).

2.29 'Commits an act or omission that is detrimental to Eskom': in that during the month of July 2014 you gave offer of employment letters to unintended recipients, acting out of instruction from your manager (Rachel Motimele), which has both financial and legal implications for Eskom.

2.2 'Disregards or wilfully fails to carry out lawful order given to him/her by person authorised to do so': in that on the 1st of July 2014 you disregarded the instruction given to you by your manager (Rachel Motimele) to prepare and submit the appointment documents for 2 learners as stipulated in the list which was attached to the email and was sent to you on 1 July 2014. Instead, you added 3 more learners that were not included in the approved list of recommended learners."

[18] With effect from 31 August 2014, and following a disciplinary enquiry at which she pleaded guilty as charged, the applicant was dismissed.

[19] Mr Masokwameng was also dismissed on account of the same misconduct. However, at the CCMA conciliation of his dismissal dispute on 26 March 2015, the parties entered into a settlement agreement, in terms of which he was re-employed as an HR officer with effect from 1 May 2015. The commissioner was the conciliator in this matter.

[20] Also of relevance is that, on 15 March 2015, and further to a CCMA arbitration between Eskom and the learners whose offers of employment were withdrawn, the CCMA ruled that such withdrawal "may constitute a dismissal", and that "the employees may refer an alleged unfair dismissal dispute to the [CCMA]". What became of this is unknown.

[21] The arbitration of the applicant's dismissal dispute conducted by the commissioner took place on 13 and 14 April 2015. At the outset of the arbitration, the commissioner refused an application for legal representation brought by the applicant – this in circumstances where Eskom was represented by a senior IR advisor. The applicant then represented herself for the first day of the arbitration (when Ms Motimele gave evidence) and was represented by a NUM shop steward on the second day of the arbitration (when Mr Lithole, the chairperson of the applicant's disciplinary enquiry, gave evidence for Eskom, whereupon the applicant testified in her defence).

[22] It was common cause at the arbitration that Ms Motimele's spreadsheet had come to the attention of all five of her HR officers, save for the applicant and Mr Masokwameng, and that appointments had been correctly made in all zones, save for the Thohoyandou zone. In circumstances where the applicant admitted at least the factual basis of the charges of misconduct brought against her – albeit maintaining that she had not received Ms Motimele's spreadsheet – the only substantive issue in dispute between the parties was the fairness of the sanction of dismissal. In this regard, the applicant, *inter alia*, raised an inconsistency challenge *vis-à-vis* Mr Masokwameng, and asserted that Ms Motimele had failed to pick up the error she had made (and thus compounded it).

<u>The commissioner's award</u>

[23] To begin with, the commissioner found that "[i]t is highly improbable that while the same email was sent to all human resources officers including the applicant, her email would be the only one without the attachment which was the spreadsheet".

[24] The commissioner then proceeded to make these findings about the nature of the applicant's misconduct:

> "5.3 It is not in dispute that the email contained a clear instruction that its contents are private and confidential and should not be discussed with persons outside human resources. One would have expected applicant in view of the clear instructions to have at least sent an email to her manager or other colleagues in human resources if she could not find the spreadsheet. Her explanation that she did not do so as Seun had already sent an email cannot be accepted as Seun was not sending on her behalf and there had been no discussion between her and Seun on this issue. Furthermore Seun was merely mistaken and his mistake was corrected by his colleagues. Applicant's conduct in obtaining information outside of human resources despite clear instructions has been not only negligent but also deliberate.
>
> 5.4 Applicant did not dispute that all other human resources officers who received the same email with her complied with the instruction and used the spreadsheet. They prepared appointment documents for the correct number of learners and correct recipients as instructed. In my view a reasonable human resources officer in the position of the applicant would have complied with the instruction and ensured that the correct number of learners as well as the correct recipients receive the appointments letters in the circumstances. *Applicant has failed to act in the above manner and thus her conduct amounts to gross negligence*. As stated the applicant did not dispute the other aspects of the allegations against her." (Own emphasis.)

[25] Dealing pertinently with the issue of sanction, the commissioner went on to find:

> "5.5 Applicant did not dispute that the charges against her are serious and have financial implications on the employer. Moreover it is not in dispute that the learners who were wrongly appointed instituted proceedings against the employer to compel the employer not to revoke their appointments. Applicant's misconduct is therefore very serious due to the above financial and legal implications. Moreover applicant acted contrary to clear instructions and thus she could easily have avoided

> the misconduct if she had wanted to. This aggravates her misconduct. Although applicant pleaded guilty in the disciplinary hearing she changed during arbitration and insisted that she was innocent. Applicant is therefore not remorseful. The sanction of dismissal is furthermore in line with the employer's disciplinary code. The employer's evidence that the trust relationship has been destroyed by the applicant's conduct has also not been challenged. I find that the sanction of dismissal is fair in the circumstances."

[26] I have emphasised the commissioner's finding in para 5.4 of his award (see para 24 above) that the applicant was guilty of gross negligence, because this must have been fundamental to the commissioner's determination of sanction.

Analysis and evaluation

[27] Although Ms Gantley (who appeared *pro bono* for the applicant) did not abandon the applicant's first two grounds of review (see para 2 above), she did not press them with any vigour or enthusiasm – and correctly so, in my view. While the commissioner may well have been wrong in refusing the applicant legal representation, I am unable to find that his decision was unreasonable. I am similarly unpersuaded that the commissioner was disqualified from arbitrating the matter simply because he had conciliated Mr Masokwameng's dismissal dispute in the month before the arbitration (which produced a settlement that the applicant relied on to mount an inconsistency challenge).

[28] This brings one to what lies at the heart of this matter: an attack on the reasonableness of the sanction of dismissal imposed by the commissioner. As a point of departure, it warrants mention that the determination of sanction involves three interrelated enquiries: an enquiry into the gravity of the misconduct; an enquiry into consistency; and an enquiry into factors that may have justified a different sanction (i.e. mitigating and aggravating factors).[2]

[2] CCMA Guidelines: Misconduct Arbitrations, para 94.

[29] Inherent in an enquiry into the gravity of misconduct is an assessment of the actual nature of the misconduct. Quite often, it is a commissioner's failure to properly assess the gravity of the misconduct, including the nature thereof, which causes awards on sanction to be found unreasonable on review. A classic example of this is *Wasteman.*[3] A shop steward was dismissed for insubordination after he refused to report to his supervisor's office. A CCMA commissioner upheld the dismissal, but the award was set aside on review by this court. On appeal, the LAC found that the award was reviewable because the commissioner had erred in failing to find that the employee's misconduct constituted insubordination *per se* and not gross insubordination, with only the latter form of misconduct warranting dismissal. As Davis JA put it:

> "In summary, if the test of *Sidumo*[4] … is properly applied to this case, neither of the justifications set out in the award of fourth respondent, stand up to reasonable scrutiny. A reasonable decision maker in the position of fourth respondent would have been alive to the distinction between insubordination *per se* and insubordination which must give rise to the ultimate sanction of dismissal. In order to come to the latter conclusion, she would have been required to have analysed the facts and found a plausible and reasonable justification for this sanction. As I have analysed both the evidence and her award, these are absent."[5]

[30] Closely allied to this is *Palluci Home Depot*.[6] The employee, a manager of a furniture retailer, was dismissed for, *inter alia*, gross insubordination, in that she had allegedly screamed and shouted at her managing director. A CCMA commissioner upheld the dismissal, but the award was set aside on review by this court. In dismissing the ensuing appeal, the LAC also found that the commissioner had gone wrong in failing to appreciate the distinction between

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[3] *Wasteman Group v South African Municipal Workers' Union* [2012] 8 BLLR 778 (LAC).

[4] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

[5] At 783F-G. See similarly, *Zono v Gruss NO & others* [2011] 9 BLLR 873 (LAC) at para 35.

[6] *Palluci Home Depot (Pty) Ltd v Herschkowitz and others* [2015] 5 BLLR 484 (LAC).

types of misconduct that warrant dismissal and those that do not. As Kathree-Setiloane AJA put it:

> "The commissioner … made material errors in fact and law by failing to apply his mind to the distinction on the facts and the law between insubordination, and insolence in determining whether the first respondent had committed the offence of gross insubordination upon which the appellant based its decision to dismiss her. Then in determining the fairness of the dismissal he failed to appreciate the distinction between gross insubordination and insolence, and that an employee can only be dismissed for gross insolence and not mere insolence. Furthermore, in assessing the fairness and appropriateness of the dismissal, he failed to assess the gravity of the misconduct with reference to the fact that it was neither wilful nor serious, and that the first respondent was provoked into conducting herself in an insolent manner by the employer … ."[7]

[31] Returning to the present matter, read in context, the charges against the applicant involve a complaint that she failed to act in accordance with Ms Motimele's spreadsheet mailed to her on 1 July 2014, and that she failed to discover her error despite being requested in Ms Motimele's email of 9 July 2014 to check things.[8] Essentially, the case against the applicant was one of negligence, which is how the matter was dealt with in argument before me. (Insofar as the third charge against the applicant is not meant to convey some form of conscious risk-taking on her part (a form of negligence) but instead insubordination, the analysis undertaken below applies *mutatis mutandis*. Quite clearly, any insubordination (which is, in any event, not apparent because the applicant simply made a mistake in not noticing Ms Motimele's spreadsheet) was by no means gross, such as to warrant dismissal. Insofar as the sanction of dismissal was upheld for insubordination *per se*, it was thus unreasonable.)

[32] On an analysis of the evidence, the applicant may well have acted with a measure of negligence in three respects, namely in: (i) failing to notice that the spreadsheet was attached to Ms Motimele's email of 1 July 2014 (which it must

[7] At para 42.

[8] There is little difference between the second and third charges.

have been as it was received by other recipients); (ii) failing to take further steps to obtain the spreadsheet from Ms Motimele on 1 July 2014; and (iii) failing to uncover the error in response to Ms Motimele's email of 9 July 2014.

[33] But in order for this to warrant dismissal, it would have to be determined that the applicant was *grossly* negligent, because negligence *per se* does not warrant dismissal[9] (just like insubordination *per se* and insolence does not[10]). In argument, Mr Ramdaw (who appeared for Eskom) submitted that ordinary negligence warrants dismissal, and undertook to provide me with authorities in support of this proposition. Having studied the list of authorities subsequently submitted by him, I am fortified in my view that only gross (or grave) negligence warrants dismissal.

[34] When will negligence constitute gross negligence? Albeit in the civil law context, the SCA said this about the distinction in *Transnet*:[11]

> "It follows, I think, that to qualify as gross negligence the conduct in question … must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity."

[35] Grogan says this about gross negligence:[12]

> "To warrant dismissal at first instance, negligence by an employee must be 'gross'. Gross negligence may be said to have occurred if the employee is persistently negligent, or if the act of omission under consideration is particularly serious in itself. While in civil law the term 'gross negligence' has a

[9] Grogan *Dismissal* (2nd ed) at 246.

[10] See *Wasteman* (*supra*) and *Palluci Home Depot* (*supra*).

[11] *Transnet Ltd t/a Portnet v Owners of The MV Stella Tingas and Another: MV Stella Tingas* 2003 (2) SA 473 (SCA) at para 7.

[12] Grogan (*supra*) at 246-247.

technical meaning, in employment law it can be taken to mean negligence that is particularly inexcusable."

[36] Seen in the light of these authorities, did the applicant's conduct in the three respects identified above involve a departure from the standard of a reasonable person (in this case an employee in the position of the applicant) to such an extent that it can properly be categorised as extreme or particularly inexcusable? To my mind, the answer is clearly "no". This for the following reasons.

a) While it is so that the applicant ought to have noticed that the spreadsheet was attached to Ms Motimele email of 1 July 2014, her failure to do so was clearly not extreme or particularly inexcusable. Indeed, both Messrs Masokwameng and Hlabane made the same mistake. And the failure to notice an email attachment is, as Mr Ramdaw fairly acknowledged, something that often occurs in the ordinary course of email usage.

b) While it is so that the applicant can be criticised for not having taken further steps on 1 July 2014 to obtain the spreadsheet from Ms Motimele, the extent of her negligence must be assessed in the light of the steps that she did take to secure the information in question. As stated above, it was the applicant's case that she: (i) tried to contact Ms Motimele telephonically, but was unsuccessful; (ii) considered an email to her to be inefficient because Mr Hlabane had already sent one and had not received a response; and (iii) in effect, believed that the information that would have been contained in the attachment could be obtained from the training department, which resulted in her using her initiative and contacting them. Significantly, it was not established in evidence that the applicant would have had reason to believe that the information received from the training department would not correlate with that contained in Ms Motimele's spreadsheet. Also significant is that the applicant was required to act urgently on 1 July 2014, and did so. To my mind, seen in the context of what the applicant actually did, her failure to take further

steps to secure the spreadsheet from Ms Motimele that day was clearly not extreme or particularly inexcusable. Put differently, the applicant's conduct can by no means be described as "a total failure to take care",[13] such as to constitute gross negligence; to the contrary, she acted with a significant degree of care.

c) While it is so that the applicant can also be criticised for not having uncovered the error in response to Ms Motimele's email on 9 July 2014, again, her failure to do so was clearly not extreme or particularly inexcusable. This is so because in circumstances where she had still not seen Ms Motimele's spreadsheet, she clearly remained of the view that the information received from the training department was reliable (which was not unreasonable), and had no reason to believe that the offers of employment did not correlate with such information.

[37] This then leaves the issue of the loss or potential loss caused by the applicant's negligence. On the evidence presented at the arbitration, it is unknown whether Eskom would have been able to escape liability in the event of the learners whose appointments were revoked having pursued an unfair dismissal claim against Eskom. But to my mind, the fact that the applicant's conduct caused or could have caused loss to Eskom, did not, in itself, serve to convert it from negligence into gross negligence.

[38] In sum, I am of the view that the applicant was not guilty of gross negligence, such as to warrant dismissal. I am further of the view that the evidence established this overwhelmingly – this to such an extent that a finding to the contrary is not sustainable on the facts of the case, and does not fall within a band of reasonable decisions.[14] I am fortified in this view by the fact that the applicant also had four years' service, with a clean disciplinary record.

[13] See the quotation from *Transnet* (*supra*).

[14] See *Fort v Coega Development Corporation (Pty) Ltd and Others* (PA8/16) [2017] ZALAC 50 (17 August 2017) at paras 93 and 95.

[39] Turning to the commissioner's award, the following errors and misdirections are apparent.

a) In para 5.3, the commissioner misconstrues the relevance of Mr Hlabane's email. The fact that he did not send the email on the applicant's behalf and that they had not spoken, did not detract from the fact that the applicant considered that sending a similar email to Ms Motimele would take the matter no further – thus her decision to contact the training department.

b) Also in para 5.3, the commissioner finds that the applicant misconducted herself in breaching confidentiality by contacting the training department. But this falls outside of the scope of the charges. In any event, her email to the training department records that the recruitment process was confidential.

c) In para 5.4, the commissioner finds that the applicant's conduct amounted to gross negligence. Notwithstanding the fact that the applicant was not charged with gross negligence, the commissioner's finding of gross negligence was unreasonable on the analysis undertaken above – the commissioner having ignored material facts and failed to undertake a balanced assessment of the evidence.

d) The finding by the commissioner in para 5.5 that the "applicant acted contrary to clear instructions and thus she could easily have avoided the misconduct if she had wanted to", ignores the applicant's defence, namely that Ms Motimele's spreadsheet had not come to her attention.

e) The applicant did not recant on her plea of guilty at the arbitration and insist that she was innocent, as found in para 5.5. She accepted the factual basis of the charges against her, but maintained (as she had done at her disciplinary enquiry) that she had not received Ms Motimele's spreadsheet. The commissioner's finding of a lack of remorse was thus unreasonable.

f) Eskom's disciplinary code was not introduced into evidence, so there exists no basis for the finding that dismissal was in line with the code, as found in para 5.5. And insofar as the code provides for dismissal in the case of negligence *per se*, this is at odds with the law.

g) Eskom's evidence that the trust relationship had been destroyed was, in effect, based on the assumption that the applicant was guilty of serious misconduct, when she was not.

[40] To my mind, the distorting effect of these errors and misdirections – particularly the commissioner's failure to consider material facts and undertake a balanced assessment of the evidence, resulting in a finding of gross negligence – was the production of an unreasonable result,[15] i.e. that the sanction of dismissal was fair in the circumstances. Put differently, had the commissioner properly acquitted himself, he could not reasonably have found that the sanction of dismissal was fair in the peculiar circumstances of this matter.

[41] Turning to the issue of relief, I intend to finally determine the dismissal dispute myself. In circumstances where I have found that the commissioner's decision to uphold the sanction of dismissal was unreasonable, it follows that the applicant's dismissal was substantively unfair, with there being no reason why she ought not to have been afforded the primary remedy of reinstatement. In circumstances where the applicant was guilty of a measure of negligence (which Mr Gantley accepted), this should, in my view, be coupled with a written warning valid for six months.

[15] See *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 25; *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at para 33.

Order

[42] In the result, the following order is made:

a) The second respondent's award dated 23 April 2015 is reviewed and set aside;

b) The second respondent's award is substituted with an order that the applicant's dismissal by the third respondent was substantively unfair, and that the applicant is retrospectively reinstated to the date of her dismissal on 31 August 2014 with full back-pay, on a written warning (for negligence) valid for six months;

c) There is no order as to costs.

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Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Ms K Gantley of Cowan – Harper Attorneys

For the third respondent: Mr A Ramdaw of Roy Ramdaw & Associates